



International Conference
**The United Nations Security Council:
Contemporary Threats to its Legitimacy and Performance**

May 22nd to 25th, 2016

Ascona, Monte Verità

Congressi Stefano Franscini

Organized by

Professor Bardo Fassbender

With the assistance of

Sué González Hauck

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Conference Programme

Sunday, 22 May 2016

16.00-17.30 Arrival and Registration

18.00 Welcome Reception

19.00 Dinner

Monday, 23 May 2016

10.30-12.00 **Opening Remarks**

Bardo Fassbender, University of St. Gallen
Lorenzo Sonognini, Fondazione Monte Verità
Chiara Cometta, Congressi Stefano Franscini

Keynote Speech

Daniel Thürer, University of Zurich

12.30 Lunch

14.00-15.30 **Panel 1: Global Constitutionalism and Critical Approaches to International Law**

Oliver Diggelmann, University of Zurich
Jan Klabbers, University of Helsinki
Chair: Lars Vellechner, University of Bremen

15.30 Coffee Break

16.00-17.30 **Panel 2: Democracy, Rule of Law, and Legitimacy**

Francis Cheneval, University of Zurich
Mattias Kumm, New York University and Berlin Social Science Center (WZB)
Chair: Neil Walker, University of Edinburgh

19.00 Dinner

Tuesday, 24 May 2016

- 10.30-12.00 **Panel 3: Law and Politics in the Debate on UN Security Council Reform**
David Kennedy, Harvard University
Bardo Fassbender, University of St. Gallen
Chair: Dirk Lehmkuhl, University of St. Gallen
- 12.30 Lunch
- 14.00-15.30 **Panel 4: Increasing the Inclusiveness of the UN Security Council**
Joanna Weschler, Security Council Report, New York
Bastian Loges, Technical University Braunschweig
Chair: Thomas Burri, University of St. Gallen
- 15.30 Coffee Break
- 16.00-17.30 **Panel 5: Re-imagining the UN Security Council**
Rossana Deplano, University of Leicester
Christopher Michaelson, University of New South Wales
Vincent-Joël Proulx, National University of Singapore
Chair: Sué González Hauck, University of St. Gallen
- 19.00 Conference Dinner

Wednesday, 25 May 2016

- 10.15 Presentation of the Congressi Stefano Franscini Award for young scientists for the best presentation during the conference
- 10.30-12.00 **Panel 6: North-South Relationships in the Work of the Security Council**
Antony Anghie, University of Utah
Chair: Bardo Fassbender, University of St. Gallen
- 12.30 Lunch
- 14.00-15.30 **Panel 7: Human Rights and Gender in the Work of the Security Council**
Christine Chinkin, London School of Economics and Political Science
Pascale Baeriswyl, Directorate of International Law, Swiss Ministry of Foreign Affairs
Chair: Olga Jurasz, Open University Law School

15.30 Coffee Break

16.00-17.30 **Panel 8: Securing the Non-Use of Force**

Anne Orford, University of Melbourne

Robert Kolb, University of Geneva

Chair: Winrich Kühne, Johns Hopkins University, Paul H. Nitze School of
Advanced International Studies, Bologna

17.30-18.00 **Closing remarks**

Bardo Fassbender, University of St. Gallen

Abstracts and Think Pieces

The UN Security Council: Democracy, Rule of Law, and Legitimacy

Francis Cheneval, University of Zurich

Executive Summary

Any reflection on a reform of the UNSC has to start with an assessment of its current status and achievements. The three concepts mentioned in the title of this panel apply to the UN Security Council (UNSC) in reverse order, whereby the well-foundedness of attribution of these concepts to the UNSC decreases with every concept and is practically null in the case of democracy. Secondly, the concepts only apply separately to the UNSC. There is no democratic legitimacy of the UNSC, no democratic rule of law, and no legitimacy based on the rule of law.

1. The Legitimacy Claim

The UNSC institutionalizes a *modus vivendi* between the world's leading nuclear powers in view of avoiding the worst-case scenario of escalating armed conflict among them. The UNSC has a record of achieving this goal. In that sense the UNSC has output-legitimacy. We can evaluate this output-legitimacy very positively, arguing that the avoidance of the maximum evil of armed nuclear conflict cannot possibly be underestimated, and it is not outweighed by the harm of many armed conflicts that have taken place in spite of the existence and actions of the UNSC. However, the claim can be evaluated negatively on the basis of a counterfactual argument. Nuclear conflict would have been avoided even without the UNSC due to the deterrent effect of MAD. In this case the UNSC's record of achievements becomes more questionable. It can be seen as an instrument of power of the permanent members towards third parties. The record of output-legitimacy of the UNSC becomes much harder to prove given the numerous armed conflicts since its foundation.

2. The Rule of Law Claim

The rule of law (ROL) is a difficult concept. For the sake of argument, I basically distinguish two notions of rule of law. One is purely formal and positivistic. It holds that all institutional and individual acts must have a basis in the law or be submitted to the law. This especially includes acts of governments and sovereigns. The law is understood as an internally consistent ensemble of generally binding rules of recognition and rules of obligation. Rules of recognition establish rule-making and executive competencies; rules of obligation establish prohibitions, positive duties and permissions. The second notion of ROL is much more demanding and includes the recognition of normative constitutional principles, separation of power, fundamental rights, as well as civil rights such as the right to equal treatment before the law, due process and participation in political acts, etc. This second notion is prompted by the fact that the formal

ROL as mere supremacy of the law begs the question of justification of the reasonableness of the law in the first place. All acts of government and the sovereign could be submitted to an internally consistent, but profoundly unjust set of laws. History is full of examples of ROL as a system of unjust domination. The danger of the second notion is normative overstretch of the concept of ROL to the point where it becomes indistinguishable from a thick conception of liberal democracy. In order to avoid both dangers (i.e. pure formalism and normative overstretch) and, again, for the sake of our analysis of the UNSC, I suggest limiting ROL to supremacy of the law, separation of powers and equal treatment. Supremacy of the law is given in the case of the UNSC insofar as it is a creation of international law, it is based on rules of recognition. However, the structural features of the UNSC do not honor the principle of supremacy of the law, because the latter is not consistently submitted to a legally binding body of international law. Its decisions are not revisable regarding consistency with the law by an independent body. Its decisions can be vetoed by certain powers and therefore become an ad hoc character. In that respect, the UNSC is more an expression of the permanent state of exception of international relations, and of a *modus vivendi* within that state of exception, than it is a guarantee or essential element of international ROL.

3. The Democracy Claim

Democracy, in the sense of participatory and rule-based government of and by the people, is not applicable to the UNSC. Democracy as decision rule based on the condition “one person, one vote” and a rule of aggregation, such as e.g. unanimity, could be applied if one considers the states as persons in the legal sense of the term. But the unanimity rule only applies to some members. Every statesperson has one vote, but not a vote that is submitted to the same rule of aggregation. The UNSC is a consensus democracy of only five statespersons. It is better described as a consensus oligarchy.

4. Preliminary Conclusions

At the end, my talk addresses the question of what follows from this assessment in view of desirable and presumably feasible reforms of the UNSC. According to a broad body of research on democratization and conflict consensus oligarchies in many cases score better than consensus democracies with regard to conflict avoidance. One is thus well advised to gradually expand the ROL requirements of the UNSC, starting with independent legal revision of decisions. More demanding elements of ROL might follow. Full-blown “democratization” is not desirable let alone feasible at this stage.

Law and Politics in the Debate on UN Security Council Reform

David Kennedy, Harvard University

In his presentation, Professor Kennedy will engage with the tension that is expressed in the different vocabularies of “law and politics” in the title of the panel, and “legitimacy and performance” in the title of the conference. He suggests that as hereby the vocabularies of confident ethical assertion (“law and politics”) and strategic pragmatism (“legitimacy and performance”) are merged, a reform agenda for the Security Council can best be evaluated in distributional terms.

Kennedy highlights the merger of international law with a collective security system as an important shift brought about by the United Nations. He situates the new legal roles of the UN organs and the evolution of these roles in the context of a new world order of technical managerialism. As a part of this new world order, he points to the increasing plurality and malleability of international law and to the simultaneously increasing role of international law as a tool, a justification, and a mechanism for distribution in international politics.

In this context, Kennedy considers various functions that might be assigned to the UN Security Council: The Council could be a more effective global political machine for collective security, a more legitimate supreme administrative legal authority, or the legitimate and legitimizing legal voice of the “international community”. He sketches out how each of these functions would change the parameters of Security Council reform. Albeit, he stresses the difficulties that come with such a functional approach.

Thus, Kennedy suggests to look at the Security Council as a site of struggle, like many others, including struggle over what the Council itself ought to become. Rather than asking what the Security Council can or should do for the international community, Kennedy suggests a shift in perspective that would consist in asking whom the Security Council strengthens, whose prior gains it consolidates, whose projects it advances, and whose projects it hinders.

Increasing the Inclusiveness of the UN Security Council

Joanna Weschler, Security Council Report

The period immediately after the end of the Cold War

- With the end of the decades of the Cold War blockage, the Security Council became dramatically more active.
- There was also a dramatic increase in the interest of actors external to the Council in its work, including states not on the Council and NGOs.

The civil society track:

- Initial resistance but from the mid-1990, continues to this day, considerable levels of interaction, will describe in detail (including based on own participation).

The government track:

- The implementation of Security Council decisions (such as establishment of peace operations or imposition of sanctions) became impossible without active involvement of UN members at large, as troop and police contributors and implementers of sanctions measures. This, starting in the early 1990s, led to increased calls for ways for members at large to have an input into the decision-making process. The Security Council (P5 to be exact) resisted these calls (meanwhile members running for the Council included promises to brief non-Council members as part of their Council electoral campaigns).
- Mention that one of the initiatives aimed at enhancing Council's inclusiveness, was in 2003 the beginning of the process of the establishment of the Security Council Report (the impulse came, simultaneously, from the SG Kofi Annan and from two former elected Security Council members, Canada and Norway, SCR was launched in late 2005).

Some, but insufficient improvements, led the world leaders in 2005 to include in the final document of the September Summit several admonitions aimed at the Council, including:

154. We recommend that the Security Council continue to adapt its working methods so as to increase the involvement of States not members of the Council in its work, as appropriate, enhance its accountability to the membership and increase the transparency of its work. (A/RES/60/1)

In the aftermath of the Summit, several processes:

- Some concessions on the part of the Council but generally very strong resistance (include the examples of enhanced transparency, webcast of meetings, considerably improved website but also recurring setbacks with respect to inclusiveness).
- Establishment of the S5 in 2005 and their crushing in 2012 by the P5.
- The establishment of ACT in 2013 and its impact on Council inclusiveness.
- Current state of affairs (including the SG process and the most recent attempts at limiting non-Council member states physical access).
- Examples of outside impact on the Council, despite resistance, as a way to sketch some options for improvements for the period ahead.

The Other Council: The Transformation of United Nations Security Council Practices

Bastian Loges, TU Braunschweig, and Holger Niemann, Leuphana University Lüneburg

The United Nations Security Council (UNSC) is widely considered as reflecting an anachronistic world order. Based on mere power politics, the UNSC is dominated by powerful states and their very own interests, making the UNSC an arena for political bargains rather than the world's custodian for the maintenance of international peace and security. Such a narrow view on the UNSC is not only frequent in the media, but also apparent in recent textbooks in International Relations (IR) and International Law (IL). Although this is a popular understanding of the UNSC and its activities, it largely neglects the tremendous changes in the practice of UNSC meetings in recent years.

As the paper argues, these changing practices have initiated a transformation of the UNSC from solely reflecting power politics to reflecting discursive agenda setting processes with a more diverse and inclusive set of stakeholders. To this end, the paper sheds light on two particular dynamics and how they transform the Council into a site for social interaction: First, the growing number of thematic meetings where the UNSC becomes a forum for debating cross-cutting issues and programmatic developments instead of deciding routinized practical topics, e.g. in the areas of the protection of women or children in conflict or gender and peacekeeping. Second, a significant number of these meetings were held with the attendance of more participants than the usual fifteen members of the UNSC. In practice, the spectrum of actors invited includes every state interested in the new topics but also a wide array of different agencies and bodies from the wider UN system and civil society.

Given these developments, thinking of the UNSC as mainly an instrument of asymmetric power relations in the international system becomes questionable. Instead, there is also an "other Council" to be discovered: The UNSC becomes a more and more diverse and inclusive forum for deliberation. This "other Council" and its implications for both UNSC practices and theoretical approaches for conceptualizing the Council so far have been largely missing in UNSC research. Considering the far-reaching implications for the legitimacy and efficiency of UNSC decision-making a better understanding of this "other council" seems highly relevant for critically taking stock of the UNSC and its performance.

Taming the Leviathan? The Humanitarian Resolutions of the UN Security Council as a Constitutional Restraint

Rossana Deplano, University of Leicester

Overview

This paper proposes an original take on whether the thematic resolutions of the UN Security Council (SC) are expression of an enlarged SC mandate. The question has significant conceptual and practical consequences and cannot be resolved by the text of the resolutions alone. If the resolutions expand the mandate, then they must add some new rights or duties on either member States or the SC. If this is so, then they create a benchmark of international legality against which to assess the legitimacy of SC action with further implications relating to issues of accountability of both States and the SC. If, on the other hand, they do not expand the mandate, then they are simple recommendations which States are free to disregard. By focusing on a selected group of thematic resolutions – namely, those on the protection of civilians in armed conflict – the paper argues that one way to establish whether such resolutions have expanded the SC mandate is to assess whether they contribute to the development of customary rules in the field of international humanitarian law. In doing so, it deals with broader issues, i.e. the systemic character of resolutions and their possible justiciability while discussing the findings in light of recent SC practice.

Outline and scope of the inquiry

The thematic resolutions are the landmark of the twenty-first century SC practice. They address issues as a matter of principle rather than country-specific situations. Given their unlimited potential application over an indefinite period of time, they beg the question: do they represent an expansion of the SC mandate? It is increasingly accepted that they do,¹ although this is not a straightforward conclusion. But assuming they do, the problem is that the thematic resolutions are all non-Chapter VII resolutions – so why even bother asking the question? After all, the UN Charter has endowed the SC with discretionary powers and they extend to its decisions taken under Chapter VI, VII or VIII of the UN Charter. However, an alternative reading of the question suggests that if the thematic resolutions are expression of an enlarged SC mandate, then they must add something new in the form of rights or duties of either member States or the SC. And if they do create new rights and duties, then they articulate some aspects of the otherwise indefinite scope of the idea of international peace and security. In this sense, they delimit rather than expand the SC mandate with potential repercussions for assessing the fairness of certain SC actions.

The answer to the question is problematic due to the unstated assumption relating to the scope of the mandate of the SC, as set forth in the UN Charter, on which it is grounded. Accordingly, Section 2 further elaborates on the conceptual and practical implications of the two possible answers to the question. To test whether SC resolutions may establish new rights and duties, the analysis focuses on whether thematic resolutions

¹ Early signs of non-country specific resolutions allegedly broadening the scope of the SC mandate can be found in M. Reisman, 'The Constitutional Crisis in the United Nations' 87 *American Journal of International Law* 83-100.

contribute to the development of customary international law (CIL), most likely by declaring existent rules. Other venues of inquiry may well be available to reach the same goal, so no claim is advanced about the completeness of the study. The point here is that if the thematic resolutions at least declare CIL, then they reiterate obligations already imposed on States and, at the same time, make them a threshold of international legality, especially when the SC refers to thematic resolutions in the text of Chapter VII resolutions addressing country-specific issues. If they do not, they remain simple recommendations.

Section 3 establishes whether as a matter of legal theory the resolutions of the SC can contribute to the development of CIL and concludes that, whether from the perspective of the theory of sources or the idea of international law as a process, they can contribute to the development of CIL. Bearing in mind that generalizations about international law are always deceptive, for the purposes of this paper the focus of the inquiry is restricted to one specific group of thematic resolutions, namely, those on the protection of civilians in armed conflict (hereinafter referred to as the humanitarian resolutions). Section 4 thus addresses the potential practical implications of the examination into the relationship between the humanitarian resolutions and CIL with a view to establishing how they create a threshold of international legality against which to assess the fairness of SC actions. If the humanitarian resolutions are regarded as a self-contained group of thematic resolutions declaring CIL, as the theory of sources suggests, they do not apply to any specific situation and remain a second order consideration when it comes to qualifying actual or potential breaches of international peace and security. Accordingly, they do not either enlarge or restrict the discretionary powers of the SC. If, on the other hand, they have a systemic character, as the idea of international law as a process suggests, then they become one of the factors the SC has committed itself to take into account when deciding whether or not to take action to address country-specific situations. From this perspective, violations of customary international humanitarian law become a normative value that could be relied upon by States and other international actors to assess the fairness of the use by the SC of its discretionary powers.

Section 5 discusses the broader issue of whether CIL can bind the SC itself. It concludes that in principle nothing prevents the SC to contribute to the development of customary rules or to be bound by them. However, unlike States, the SC can decide to withdraw its commitment to demand respect of specific customary rules unilaterally and at any time. Acknowledging this, this section delimits the specific scope of the customary rules declared in the humanitarian resolutions. Section 6 examines how the humanitarian resolutions can bind the SC, especially when they create legitimate expectations. Finally, Section 7 evaluates several options that States have in addressing issues of accountability of the SC for violations of thematic resolutions, and particularly humanitarian resolutions.

The thesis put forward is that the humanitarian resolutions constitute a restriction rather than an expansion of the SC mandate, with potential practical repercussions in terms of accountability of both member States and the SC. Although they do not limit the freedom of action of the SC, they represent a constitutional restraint impacting directly on the legitimacy of certain SC actions.

Methodology: doctrinal and empirical.²

Tentative outline

1. Introduction
2. Thematic resolutions: expansion or restriction of the Security Council mandate?
3. Two readings of thematic resolutions
4. Practical implications
5. The Security Council and customary international law
6. When do humanitarian resolutions bind the Security Council?
7. Conclusion

² Data for 1998-2014 taken from R. Deplano, *The Strategic Use of International Law by the United Nations Security Council – An Empirical Study* (Springer 2015); data for 2015-2016 collected manually from the Security Council website: <<http://www.un.org/en/sc/documents/resolutions/>> (accessed 11 January 2016).

The Influence of Non-Permanent Members on Security Council Decision-Making: The Case of Sanctions

Christopher Michaelsen, University of New South Wales

A central reason for the failure of the United Nations' predecessor, the League of Nations, was that key states like the United States chose not to join. The UN's founders therefore created a strong incentive to secure the active participation of the five great powers of the time, namely China, France, Russia, the United Kingdom and the United States (P5). The UN Charter extended permanent Council membership to these states, as well as the ability to veto prospective Council action. The creation of the veto, however, has been criticised as setting up a system of 'power over principle' and 'might makes right'. Many scholars identify this power imbalance as a fundamental flaw that prevents the Council from meeting its responsibility to maintain international peace and causes it to act in an ad hoc and unprincipled manner. The Council is pilloried for its 'inconsistency' and for suffering a 'democratic deficit'.

A commonly advocated strategy to combat these shortcomings is to undertake structural reform of the Council. The goal of such reform is to enlarge the Council and make it more responsive to the broader UN membership. Yet the ability of the P5 to veto any proposed reform means that there is little prospect of addressing what is seen to be the main problem, namely the veto itself. Moreover, the unwillingness of the most powerful non-permanent countries (E10) to set aside their own ambitions and agree on a broadly acceptable reform model has further thwarted reform efforts. This paper is not concerned with structural reform efforts *per se*. Rather, it focuses on the role of non-permanent Council members and, using the thematic area of sanctions as an example, aims to provide an empirically-grounded evaluation of when these members influenced Council decision-making in the post-Cold War period. The paper is based on an assumption that in light of the increasing improbability of broad Council reform it is all the more important to ascertain and understand how E10 members can leverage power and influence on Council decision-making within the existing framework.

The prevailing explanation for Council decision-making excludes the possibility for E10 influence: decisions are determined by the P5, because they possess the exclusive power to veto any Council decision on substantive matters. It follows that, since E10 members lack veto power, they are assumed to lack *any* power to influence UNSC decision-making. Yet there appear to be numerous documented cases of UNSC decisions in which E10 members are identified as having played a significant causal role in shaping the outcome. This paper focuses on the thematic area of sanctions and forms part a broader project which is developing a conceptual framework to understand and measure how elected members build, exercise and maintain UNSC influence.¹ In addition to considering the example of sanctions, the broader

¹ The broader project is then developing a nuanced, differentiated typology of E10 power, where power is understood as the means by which an elected member can get the Security Council to decide something it otherwise would not. This understanding borrows from Robert A. Dahl's (1957) 'first face' of power, but tailors it to the Security Council context, drawing from the relevant international law and international relations literature six hypothesised types of power through which E10 members can influence UNSC decision-making: material power; power of legitimacy; power of burden-sharing; power of deliberation; diplomatic competency; and informal institutions.

project examines the thematic areas of use of force, non-proliferation, peacekeeping and working-methods. Observing that a narrow focus on veto power is unable to capture the full spectrum of power available to E10 members, the project seeks to contribute a more accurate account of their significance in UNSC decision-making. It disaggregates UNSC decision-making into the following three stages: (1) agenda-setting and framing; (2) institutional process; and (3) institutional outcome.

This paper considers a selection of key developments across the various sanction regimes adopted by the Council over the past 25 years (e.g. introduction of humanitarian exceptions, establishment of 1267 Ombudsperson etc.). It examines the role that E10 members played in contributing to these developments by using two analytical methods. The first is to investigate *perceptions* of influence among expert UNSC observers, including diplomatic representatives who have served their countries on the Council. In semi-structured interviews with current and former ambassadors, senior diplomatic officials, senior policymaking officials of member states and the UN, as well as experts from the associated epistemic community, it is asked which E10 members they perceive to have been most influential. In a second step these perceptions will then be evaluated and complemented by close document analysis (resolutions, presidential statements, voting records, and meeting records), literature reviews, and media analysis to determine which cases can be supported by other observable evidence. The paper will conclude with some preliminary observations on *why* some E10 members have been able to exercise influence on Council decision-making on sanctions and under which circumstances and how they have done so.

The Security Council and Counterterrorism: Enhancing its Reliance on State Responsibility to Increase Legitimacy

Vincent-Joël Proulx, National University of Singapore

Since 9/11, international organizations have actively devised counterterrorism strategies and frameworks. Of particular interest are the contributions of the Security Council (SC) to counterterrorism policy-making, which increasingly attract scholarly attention. Through Resolutions 1368 and 1373, the SC unequivocally asserted the right of victim-States to invoke self-defence to counteract terrorism, a posture sometimes construed as enabling States to take unilateral action against non-State actors.

While this shift in institutional discourse might be perceived as widening the scope of permissible self-defence, its impact on State-to-State relations is not as clear when contemplating the implementation of international legal norms. It is debatable whether the Council's post-9/11 resolutions operated on the premise that sufficient connections were in place between Al Qaeda and the government of Afghanistan to a) legally attribute the 9/11 attacks to that State under the law of State responsibility (SR); and b) justify the US-led coalition's military intervention in that country. Undoubtedly, the US' initial reaction held both non-State and State actors equally responsible for failing to prevent, aiding or abetting, or even tolerating terrorism. However, whether this stance amounted predominantly to a *political* claim, as opposed to a normative operation purporting to establish a nexus between Afghanistan's repeated failures to prevent and punish terrorism and its international *legal* responsibility, remains unclear.

To date, considerable scholarly emphasis has been placed on the SC's role as *legislator*, i.e. as creator of primary legal obligations. For instance, Resolution 1373 promulgated general and far-reaching counterterrorism duties of prevention and punishment incumbent upon all States, a revolutionary exercise of its powers given that such obligations were not limited to any geographical area or specific timeframe. However, insufficient scholarly emphasis is placed on the SC's role as *implementer* of those legal norms, namely at the second stage of the inquiry when it is time to actually enforce international legal obligations. The absence of discourse on this front leaves us with the vital query whether the SC can apply SR law, the mechanism invoked to engage States' legal responsibility for failing to comply with their counterterrorism obligations, and implement legal consequences flowing from its findings of illegality.

Drawing from my current book project under contract with Oxford University Press, I will examine the largely unexplored role of SR, if any, in catalyzing or informing the SC's exercise of its powers when handling global security matters. My objective will be to shed light on whether the institutionalization of this normative scheme – SR being central in international law – can yield interesting policy payoffs in responding to global security threats. As a corollary, I will attempt to demonstrate that the SC's reliance on international legal principles might have a legitimating effect on its political decisions in global security settings. In my presentation, I will first offer some remarks on the role and recent development of SR in responding to terrorism. I will then turn to the potential institutionalization of the implementation of SR through UN organs, with critical emphasis on potential SC contributions in counterterrorism contexts.

Indeed, starting from the premise that SR can play a role in the suppression and prevention of terrorism, the question of enforcement remains elusive. Typically, responsibility flowing from an internationally wrongful act is actuated, and ultimately implemented, through inter-State (read: unilateral) mechanisms. Moving away from self-help remedies and unilateral countermeasures, however, I will argue that SR for failing to prevent terrorism could be implemented by the SC. In substantiating my claims, I will draw heavily from relevant State and institutional practice, both under UN Charter Chapters VI and VII.

While the role of other relevant UN organs will be acknowledged, the crux of the analysis will focus on elucidating the interplay between the SC and SR rules. In particular, I will argue that SC action can implicate SR norms in at least three principal ways. First, the Council sometimes formulates primary international legal obligations, the violation of which can have important implications for SR law. The SC has arrogated this 'legislative' role particularly actively in the fields of counterterrorism and nuclear non-proliferation. Secondly, in some instances the SC attributes wrongful conduct to States and determines the consequences of such determinations in a manner compatible with SR's corpus of norms. Thirdly, in other circumstances the Council makes political statements at the intersection of global security and SR repertoire, which straddle both that organ's principal mission under the UN Charter and SR terrain.

Ultimately, I will attempt to show that advancing SR through the SC could prove to be an interesting counterterrorism policy option, despite anxieties commonly voiced regarding that organ's process, be they grounded in political misgivings, structural reservations, or broader concerns over legitimacy. The picture that will emerge is one where the SC can play a role, sometimes determinant, in applying SR norms, a prospect that may be a welcome alternative to unchecked unilateralism.

Security Council, Gender and Human Rights

Christine Chinkin, London School of Economics and Political Science

The SC has not developed a coherent and consistent agenda with respect to human rights. From the outset there has been ambivalence, even opposition to its consideration of human rights, from some members, who deem the subject to be a matter of domestic jurisdiction and outside its primary responsibility for the maintenance of international peace and security. Nevertheless, the Council acknowledges that 'peace and security, development and human rights are the pillars of the United Nations system' and has developed a range of institutional mechanisms and processes through which it informs itself about the human rights situation in various states. The Council now regularly includes a human rights component in peace operations and seeks greater and more effective integration of human rights throughout the life cycle of missions. But it has never held a thematic debate on human rights; its approach to human rights is piecemeal and ad hoc rather than coordinated and consistent. Human rights abuses in some situations have received little or no attention and there has been no systematic follow-up with respect to those places where it has directed its attention towards such abuses. It has also undermined human rights through its own decisions.

In contrast, since 2000 the Security Council has adopted a thematic agenda on women, peace and security (WPS) that supplements and complements other thematic agendas, such as those on the protection of civilians in armed conflict, children and armed conflict, small arms and threats to international peace and security caused by terrorist acts. Through seven follow-up resolutions the WPS has been institutionally expanded and explained constituting an extraordinary advance since 2000; before then women – or gender – were mentioned by the Security Council only in specific and rare cases. But there are concerns, for instance around the equating of women and gender, the focus on sexual violence in conflict thereby obscuring and marginalizing other gender-based harms, and the securitization of women's experiences in conflict through the assumption of military means as the most appropriate for the protection of women. This is aggravated by the commitment made to integration of the WPS and counter-extremism agendas. In the case of both human rights and gender it must be asked whether inclusion by the Security Council advances, or subverts and undermines their core concerns.

Gender in the Work of the UN Security Council

Pascale Baeriswyl, Federal Department of Foreign Affairs of the Swiss Confederation

From the perspective of policy and international law, the history of the UN Security Council's regulatory framework on gender issues is a unique example of innovative pioneer work but at the same time exposes the Security Council's overall shortcomings when it comes to implementation. The aim of this presentation is firstly to describe specific developments within the Council and secondly to establish cross-references to the international context and the legal framework (international humanitarian law, international criminal justice, human rights).

The regulatory framework on women, peace and security consists of nine thematic resolutions (1325 [2000], 1820 [2008], 1888 [2009], 1889 [2009], 1960 [2010], 2106 [2013], 2122 [2013], 2242 [2015] and 2272 [2016]¹), numerous presidential statements and many references within country resolutions or in the context of sanctions regimes.

UN Security Council Resolution (UNSCR) 1325 on Women, Peace and Security (WPS) was adopted in the year 2000 against the background of the first review process of the Beijing Platform of Action, adopted at the Fourth World Conference on Women in Beijing in 1995, as well as the UN Security Council's missions' failings in Rwanda, Srebrenica and Somalia, which led to the set-up of the UN Security Council's protection architecture: (UNSCR) 1325 was adopted following UNSCR 1265 (1999) and 1296 (2000) on Protection of Civilians (POC) and UNSCR 1261 and 1314 (both in 2000) on Children and Armed Conflict (CAAC), thus completing the protection architecture, which has since been upheld by these three – interconnected – pillars.

UNSCR 1325 is remarkable inasmuch as it was the first and still is one of the only UN Security Council resolutions that came about in the context of a strong movement of civil society in combination with leadership from elected Council members from the South (Bangladesh, Namibia, Jamaica and Mali). It is substantially broader than its sister resolutions, and – in addition to prevention and protection - it includes the strengthening of the role of women in peace processes and other processes relevant to conflict management and resolution (prevention, protection and participation [PPP]). The invitation to all member states to draw up a national action plan (NAP) is another ground-breaking aspect of the resolution as it recognised early on the need for an interplay between the international and national levels (and between international and domestic legislation). This inspired the implementation mechanism of UNSCR 1540 (non-proliferation) as well as the sanction regimes, and today is being discussed in particular in counterterrorism. The inclusion of civil society in the elaboration of the resolution and the involvement of the national level have contributed to the fact that today, UNSCR 1325 is one of the UN Security Council's best-known resolutions worldwide. However, there is little correlation between this prominence and how effectively the resolution has been implemented. The very combination of participation and protection as well as lacking or inconsistent political will resulted in the implementation of UNSCR 1325

¹ Although adopted under the peacekeeping agenda, Resolution 2272 is considered as part of the WPS agenda due to its link to the legal handling of sexual violence in conflict.

quickly falling behind that of its sister resolutions. The WPS agenda also lacked institutional integration into the UN system, unlike PoC (with OCHA) or CAAC (with UNICEF). It was not until the creation of UN Women in 2011 that the WPS agenda gained an institutional backup within the system.

With the creation of the special tribunals on former Yugoslavia (UNSCR 808 [1993]) and Rwanda (UNSCR 955 [1994]), the Security Council laid the foundation for criminal jurisdiction on sexual violence in conflicts and for the subsequent inclusion of a definition of the crime in the Rome Statute. With the verdict in the case of Jean-Paul Akayesu², for the first time an international court found that sexual violence had been used as a weapon of war and constituted a key element in qualifying the crime as genocide. The work of the special tribunals and the serious offences committed in the context of the conflict in the DRC resulted in the Security Council recognising sexual violence as a threat to peace and security in 2008. The USA in particular put through a decoupling of the protection aspects of the WPS agenda in its own series of Security Council resolutions (UNSCR 1820 [2008]; UNSCR 1888 [2009]; UNSCR 1960 [2010]; UNSCR 2106 [2013]). This separation was disputed both in women's rights circles and by permanent Security Council members Russia and China as well as the G77 countries. Some feared that the central connection between leadership and protection found in UNSCR 1325 would be lost; others that this decoupling would provide the different areas of protection with stronger legal instruments. To a certain extent, both misgivings were justified.

With UNSCR 1888, for the first time the Security Council created a special representative of the UN Secretary-General reporting directly to the Security Council (the special representative for CAAC's mandate was created by the UN General Assembly) and, with UNSCR 1960 – using the same model as the protection mechanism for CAAC – established *Monitoring, Analysis and Reporting Arrangements (MARA)*. UNSCR 1960 also strengthened the relation to Chapter VII of the UN Charter by associating the MARA framework and the special representative with the Council's sanctions system and by recommending that women protection advisors, who could report to the MARA framework, be included in field missions. An annex was incorporated into the Secretary-General's report listing parties to conflicts responsible for patterns of rape or other forms of sexual violence in situations of armed conflict on the Security Council agenda.

In 2009, another ground-breaking development occurred with the adoption of UNSCR 1889, which followed the broader tradition of UNSCR 1325. It provided for the development of a system of indicators for the work of the Security Council in general in order to measure its effectiveness in implementing a Security Council resolution (political benchmarking).

In 2015, 15 years after the adoption of UNSCR 1325, the UN Secretary-General commissioned a comprehensive 'Global Study' on the implementation of the resolutions in the field of women, peace and security, the conclusions of which had an influence on UNSCR 2242. Interesting developments include the linking of the WPS agenda with the discussion on the prevention of violent extremism, as well as the creation of an informal group within the Security Council (as has already been in place for the PoC agenda for many years), mandated to promote the coherency of the WPS agenda within the general work of the Security Council from now on.

² *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgment (Sept. 2, 1998).

And finally, in March 2016 the Security Council rounded out the body of rules relating to gender – after a number of scandals relating to sexual abuse by UN peacekeepers, especially in Chad – with UNSCR 2272. The aim of this resolution is to add authority to the UN Secretary-General's zero tolerance policy and to provide the threat of consequences for violations of this policy despite the immunities enjoyed by UN mission personnel, for example through recalling entire national contingents.

Consequently, the UN Security Council now has a well-established rulebook with numerous tools, including reference to the enforcement measures under Chapter VII.

This presentation aims to provide answers to the following questions:

- What tools has the UN Security Council given itself to implement UNSCR 1325 et seq., how are these to be evaluated, and in what political and legal context did they come about/do they now stand?
- What impact do these have on the UN Secretary-General's reporting and on the Security Council's actual work on national situations?
- How are they being implemented in specific conflict contexts by local leadership and/or the UN peacekeeping operations, or as part of peacebuilding?
- What connections are there between the tools of the WPS agenda and the enforcement measures, in particular the Security Council's sanctions system?
- What synergies are there between the WPS agenda and other aspects of the Security Council's thematic agenda, in particular its protection architecture?
- How does the WPS agenda correlate with other themes and actors as well as with the institutional set-up of the UN system?
- What connections are there to other international legal instruments or international organisations, especially international humanitarian law (Geneva Convention, Convention on Refugees, work relating to IDPs), human rights (esp. CEDAW / GR 30), but also to the international case law of the ICTR, ICTY and ICC?
- Where does the potential for the implementation of the WPS agenda by the Security Council lie?
- What vision is there for the future of WPS within the Security Council, and what vision for the future for peace and security thanks to the WPS agenda?

Securing the Non-Use of Force in an Age of Intervention

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At the heart of the collective security system established under the UN Charter in 1945 was a commitment to universalism and the idea that it was possible to constitute a community of states who would act forcefully only in the name of that community to counter aggressive actions. In joining the UN, states gave up their right unilaterally to resort to force other than in self-defence, and pledged to use force only in the name of the international community. The principle of collective security meant not that force would be abolished, but that it would be 'collectivized' or 'denationalized'.¹ More specifically, the UN system sought to collectivize the judgment that there had been an illegal breach of the peace or act of aggression, and the decision to resort to force in response.

Any argument that the effect of the UN Charter has been to render unilateral or regional resort to force in international relations a thing of the past is difficult to sustain in the face of the widespread resort to military action in international affairs today. While the use of force in international relations was formally prohibited except in self-defence or where authorised by the Security Council, those exceptions have steadily expanded to swallow the rule. In addition, it had already become clear by as early as the 1950s that while the Charter constraints on the unilateral use of force in international affairs meant that acquiring territory through warfare or occupation was no longer a viable policy option, the UN would have a more difficult task restraining powerful states or regional alliances from engaging in new forms of intervention through support for proxy wars or to protect civilians. Today, while the language of 'war' has (almost) disappeared from contemporary foreign policy, it has been replaced by justifications for supporting or engaging in the use of state violence ranging from the relatively benign (military training, security sector reform, civilian protection, securing humanitarian aid) through to the more menacing (counterinsurgency, stabilisation, pacification, de-radicalisation, targeted killing).

This paper argues that international law does not currently have available concepts that are able to make sense of the contemporary landscape of intervention and its accompanying modes of humanitarian governance. The problem is not that there are so many practical examples of contemporary situations in which states resort to the threat or use of force in their international relations, but that the gap between the legal framework governing resort to force and the contemporary practice of states appears so wide. The aim of this paper is to explore whether it is possible to avoid a cynical reaction to the recognition of that gap between law and practice, and instead to take seriously that the current practice of states and non-state actors significantly challenges the adequacy of international law as an analytical framework for comprehending, interpreting, and evaluating global politics.

¹ Arnold D McNair, 'Collective Security' (1936) 17 *British Year Book of International Law* 150, 161.

The Speakers and Panel Chairs

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