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## Controlling the Execution of a Security Council Mandate to Use Force: Does the Council Need a Lawyer?

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**CONTROLLING THE EXECUTION OF A  
SECURITY COUNCIL MANDATE TO USE FORCE:  
DOES THE COUNCIL NEED A LAWYER?**

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*INTRODUCTION*

In the wake of the North American Treaty Organization (“NATO”) military intervention in Libya pursuant to United Nations (“UN”) Security Council Resolution 1973

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commentators celebrated the triumph of the responsibility to protect principle.<sup>1</sup> This principle envisions collective action under Chapter VII of the UN Charter (the “Charter”) “should peaceful means be inadequate and national authorities . . . manifestly fail[] to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>2</sup> A year later, in the face of complete inaction on the part of the Security Council (“SC”), this principle lies under the rubble of Homs, Hama, and Aleppo, with a death toll in Syria that exceeds 60,000 according to UN estimates.<sup>3</sup>

Is the intervention in Libya after all a pyrrhic victory for the proponents of SC-authorized humanitarian interventions, contributing to the paralysis of the SC in the Syrian crisis and increasing the prospects of SC inaction in similar cases to come? Answering this question in the affirmative, many commentators have pointed out the profound crisis of trust among permanent members of the SC arising from the military intervention in Libya, as Russia and China adopted the position of many international lawyers that the operations of NATO powers in Libya grossly exceeded the mandate provided by Resolution 1973.<sup>4</sup> According to this argument, NATO powers have

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1. S.C. Res. 1973, ¶¶ 4, 6, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

2. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); see Press Release, Secretary-General, Secretary-General Says Security Council Action on Libya Affirms International Community’s Determination to Protect Civilians from Own Government’s Violence, U.N. Press Release SC/10201 (Mar. 17, 2011); Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT’L L. 319 (2012) (“In recent months, following on the decision of the U.N. Security Council to impose a no-fly zone in Libya in response to escalating violence against civilians, observers have elevated the status of the responsibility to protect from notable development to triumphant achievement.”); Gareth Evans, *End of the Argument: How We Won the Debate Over Stopping Genocide*, FOREIGN POL’Y (Nov. 28, 2011), [http://www.foreignpolicy.com/articles/2011/11/28/gareth\\_evans\\_end\\_of\\_the\\_argument](http://www.foreignpolicy.com/articles/2011/11/28/gareth_evans_end_of_the_argument).

3. *Data Suggests Syria Death Toll Count Could Be More Than 60,000, Says UN Human Rights Office*, UNITED NATIONS NEWS CENTRE (Jan. 2, 2013), <http://www.un.org/apps/news/story.asp?NewsID=43866>.

4. See Editorial, *A Black Hole in the System of Collective Security*, 16 J. CONFLICT & SECURITY L. 415, 415–16 (2011) [hereinafter *A Black Hole*]; Chris Keeler, *The End of the Responsibility to Protect?*, FOREIGN POL’Y J. (Oct. 12, 2011), <http://www.foreignpolicyjournal.com/2011/10/12/the-end-of-the-responsibility-to-protect> (“The failure to pass a resolution on Syria is directly related to the actions of the [North Atlantic Treaty Organization] NATO-led intervention in Libya, during which the United States and its allies overtly overstepped the UN [United Nations] mandate authorizing action.”). Explaining Russia’s determination to veto any proposed

“hijacked” an SC authorization to use force issued for the exclusive purpose of protecting civilians, and used it as a vehicle to promote the far more ambitious political end of affecting a regime change in Libya.<sup>5</sup> As a result, the NATO intervention in Libya “has created a general cloud of suspicion surrounding western humanitarian efforts that will continue to be an obstacle to the implementation of the [responsibility to protect] doctrine elsewhere.”<sup>6</sup>

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Security Council (“SC”) resolution that hints at the possibility of future sanctions on Syria, the Russian foreign ministry released the following statement: “The situation in Syria cannot be considered in the Security Council in isolation from the Libyan experience. The international community is wary of the statements being heard that the implementation of the Security Council resolutions in Libya as interpreted by NATO is a model for its future actions to exercise the ‘responsibility to protect.’ It’s not hard to imagine that tomorrow ‘united defenders’ may begin to apply this ‘exemplary model’ in Syria as well.” *Id.* The foreign ministry of China has condemned the NATO intervention in Libya as “an abuse” of force. Ananth Krishnan & Sandeep Dikshit, *India and China Had Similar Considerations on Libya*, HINDU (Chennai), Mar. 3, 2011, available at <http://www.hindu.com/thehindu/thscrip/print.pl?file=2011032666941600>; see Vijay Prashed, *Interview with Hardeep Singh Puri, Permanent Representative of India to the United Nations*, FRONTLINE, Mar. 10–23, 2012, available at <http://www.flonnet.com/fl2905/stories/20120323290505700.htm> (noting that representative of India to the UN observed, “Because of the Libyan experience other members of the Security Council, such as China and Russia, will not hesitate in exercising a veto if a resolution . . . contains actions under Chapter 7 of the U.N. Charter, which permits the use of force and punitive and coercive measures”); see also Micah Zenko, *By Overreaching in Libya, NATO Has Left Syria to Fend Alone*, NATIONAL (Abu Dhabi) (Oct. 11, 2011), <http://www.thenational.ae/thenationalconversation/comment/by-overreaching-in-libya-nato-has-left-syria-to-fend-alone> (observing that in view of the North American Treaty Organization (“NATO”) operations in Libya, which exceeded the scope of Resolution 1973, “the UN has been unwilling to endorse intervention in Syria. . . . In June, Russian President Dmitry Medvedev delayed a Security Council resolution condemning Syrian President Bashar Al Assad, stating he would not support ‘a dead ringer for Resolution 1973,’ which he believed had been ‘turned into a scrap of paper to cover up a pointless military operation.’ On October 4 Russia and China vetoed a sanctions resolution”).

5. See, e.g., Marcelo Kohen, *The Principle of Non-Intervention 25 Years After the Nicaragua Judgment*, 25 LEIDEN J. INT’L L. 157, 162 (2012) (observing that “the NATO bombings clearly deviated from its original goal to protect the civilian population by actively supporting one side of the internal armed conflict between the National Transition Council and the Gaddafi dictatorship,” and that the means by which NATO powers toppled the Gaddafi regime “could heavily influence the future of Libya”); Julian M. Lehmann, *All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the Jus in Bello and the Jus ad Bellum*, 17 J. CONFLICT & SEC. L. 117, 145 (2012) (“[T]here were . . . actions casting doubt on the genuine implementation of the mandate to protect civilians. In this regard, the outright support of the rebels, by rejecting cease fires, open claims that regime change was striven for, the provision of weapons and support by military advisors, was highly problematic.”).

6. Keeler, *supra* note 4.

The present article proposes a reform in the practice of the SC that would promote consonance between the aims of an SC authorization to use force and measures taken by states acting upon such authorization (“Operating States”). This reform should ameliorate, as much as possible, the crisis of trust that is paralyzing the collective security mechanism. The article suggests establishing an oversight mechanism within the SC system that would significantly reduce the ability of states to rely on an SC resolution authorizing the use of force to conduct military operations that depart from the terms of such authorization.

Commentators have lamented the character of the SC as an entity completely subjected to the foreign policy considerations of its permanent members, “designed to operate in their interest as individual, powerful states, not in the interest of the international community.”<sup>7</sup> Clearly, the crisis of trust among permanent SC members, resulting from the lack of SC control over the execution of its resolutions,<sup>8</sup> is by no means the only reason for SC inaction in many cases. A range of foreign policy interests of SC members (e.g., inter-state alliances and economic or security interests) arising in relation to one crisis or another may preclude an otherwise forthcoming SC action even in the absence of such a crisis. But the practice of the SC demonstrates that “agreement on Security Council action has often been reached despite the fact that it ran counter to the interests of particular Permanent Members, and this has happened even in the absence of immediate compensation.”<sup>9</sup>

The current crisis of trust does not revolve around the regular obstacles of *realpolitik*, which may prevent the adoption of a resolution authorizing the use of force in one case or another, but rather around the concerns of permanent members of the SC that resolutions would be abused by

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7. Ian Hurd, *The Security Council in a Changing World*, INT’L RELATIONS & SEC. NETWORK (July 9, 2012), <http://www.isn.ethz.ch/isn/Digital-Library/Special-Feature/Detail?lng=en&id=145324&contextid774=145324&contextid775=145318&tabid=1452481000>.

8. See *supra* notes 4–5 and accompanying text.

9. Nico Krisch, *The Security Council and the Great Powers*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945* 141 (Vaughan Lowe et al., eds., 2008). Krisch points in this regard to “Chinese acceptance of sanctions against Libya despite early resistance.” *Id.* at 141, n.43.

Operating States. In theory, any resolution may be hijacked, therefore these concerns can lead to complete inaction and permanent paralysis of the SC. Commentators have thus noted that in the absence of reform promoting SC control over the implementation of SC authorizations to use force “it is most likely that no Security Council mandate is forthcoming in future in other pressing cases like that of Syria. The system of collective security thereby risks being held back in ways similar to the deadlock of Cold War days.”<sup>10</sup>

Indeed, statements made by Russian and Chinese officials seem to suggest that the SC would not have adopted Resolution 1973 under political circumstances that resemble the present crisis of trust.<sup>11</sup> Part I will describe the lack of control that the SC has over the implementation of its resolutions authorizing the use of force, which underlies the current crisis. The current legal literature regarding the possible means of promoting this control has mainly advocated the inclusion of highly specific terms in the resolution, stipulating the scope of the permission to use force.<sup>12</sup> Part II will point out weaknesses of such a measure that would significantly diminish its political feasibility and render it ill-suited to promote consonance between the purpose of the resolution and the measures taken by the Operating States.

A politically feasible reform that would introduce meaningful guarantees against the hijacking of SC resolutions authorizing the use of force must seek to minimize political costs for both permanent SC members and other states acting in

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10. See *A Black Hole*, *supra* note 4, at 416; see also Lehmann, *supra* note 5, at 145 (“A more restrained application of the mandate in Libya would not only have brought intervening states in greater compliance with international law, but would also have been preferable from the political perspective of achieving future consensus on protecting civilians.”); Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT’L L. 124, 129–30 (1999) (“If contractee states refuse to accept clear limitations on the scope and duration of their delegated authority, construe unclear Security Council language to imply authority to use force where no such authority was intended, or stretch the terms of their contracted authority beyond what most Council members support, the result may be increased reluctance to contract out the use of force. The consequence of such a conflict in the current geopolitical circumstances would be to undermine the Security Council’s role in multilateral collective security.”).

11. See *supra* note 4.

12. See *infra* notes 48–54 and accompanying text.

pursuance of an SC authorization to use force. The present article takes up this challenge by bringing together the “culture of law” and the “ethos of diplomats.”<sup>13</sup> Part III will set forth a mechanism whereby a permanent UN committee of legal experts (the “Committee”) would monitor the compatibility of military operations undertaken by a state pursuant to an SC resolution with the terms of the resolution. Part III will also lay out the procedure that the Committee would follow to perform its monitoring role, drawing to some extent on SC practice of establishing committees to monitor the implementation of sanctions.<sup>14</sup>

Should the Committee find that the military measures taken by Operating States exceeded the terms of the SC resolution authorizing the use of force, it would then submit clarifications to the SC regarding the scope of the permission to use force authorized by the resolution. These clarifications may include general legal guidelines (e.g., “the resolution authorizes the use of force only against armed forces that present an *imminent* threat to civilians”) as well as operative recommendations with regard to acts that Operating States should take or refrain from taking in order to bring their operations in line with the resolution. The clarifications issued by the Committee would be binding upon all states as the *authentic interpretation* of the resolution authorizing the use of force, unless rejected within two weeks of their submission by an SC resolution adopted in accordance with its regular voting rules.<sup>15</sup>

This Article argues that the establishment of the proposed oversight mechanism does not require an amendment to the UN Charter, and that such legislative course is not advisable in view of efficiency considerations. Rather, the legal premise of the proposed mechanism is Article 29 of the United Nations

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13. We borrow these terms from J.H.H. Weiler’s analysis of the advantages and disadvantages of the juridification of the World Trade Organization (“WTO”) dispute resolution system. See J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191, 198–99 (2001).

14. See *infra* notes 108–10 and accompanying text.

15. Article 27 of the UN Charter provides that SC resolutions “be made by an affirmative vote of nine members including the concurring votes of the permanent members.” U.N. Charter art. 27, para. 3.

Charter, which authorizes the SC to “establish such subsidiary organs as it deems necessary for the performance of its functions.”<sup>16</sup>

The SC currently delegates its powers to subsidiary organs “for a specified question.”<sup>17</sup> By amending its Provisional Rules of Procedure, however, it can establish a permanent committee and grant it the powers necessary for operation of the proposed mechanism, including the power of authentic interpretation of SC resolutions.<sup>18</sup>

It is important to delineate the boundaries of our inquiry. We do not aim to examine the legal limitations imposed on the powers of the SC<sup>19</sup> or the appropriate scope of judicial oversight of the exercise of such powers.<sup>20</sup> Moreover, the present article

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16. *Id.* art. 29.

17. Rule 28, Provisional Rules of Procedure of the Security Council, U.N. Doc. S/96/Rev.7 (Dec. 21, 1982) [hereinafter SC Provisional Rule 28], available at <http://www.un.org/docs/sc/scrules.htm>.

18. Michael C. Wood, *The Interpretation of Security Council Resolutions*, MAX PLANCK Y.B. OF U.N. L. 71, 82–84 (1998) (“Only the Security Council, or some body authorized to do so by the Council, may give an authentic interpretation in the true sense . . . the decisions of the subsidiary organs are binding to the extent provided for in the relevant SCRs.”). See *infra* notes 151–61 and accompanying text.

19. For an extensive review of the legal literature and the jurisprudence of international tribunals addressing the legal limitations on SC powers see Joy Gordon, *The Sword of Damocles: Revisiting the Question of Whether the United Nations Security Council is Bound by International Law*, 12 CHI. J. INT’L L. 605 (2012). The International Criminal Tribunal for the former Yugoslavia (“ICTY”) held in the *Tadic* Case, “[t]he Security Council is . . . subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).” *Prosecutor v. Tadic*, Case No. IT-94-I-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

In the *Lockerbie* case, the International Court of Justice (“ICJ”) refrained from determining whether, and to what extent, international law imposes limitations on the powers of the SC. See Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya Arab Jamahiriya v. U.S.), Provisional Measures, 1992 I.C.J. 114, ¶ 42 (Apr. 14).

20. See *id.*; see also Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT’L L. 1, 4 (1996) (reviewing the controversy among commentators concerning the question of International Court of Justice oversight of SC actions); Gordon, *supra* note 19, at 636 (reviewing the jurisprudence of the International Court of Justice (“ICJ”), the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the European Court of Justice (“ECJ”), and the European Court of Human Rights (“ECtHR”), Gordon concludes that “the courts are showing increasing willingness not only to



does not aim to explore means of alleviating legitimacy concerns regarding the powers of the SC under the UN Charter, its structure, and the veto power conferred upon permanent SC members.<sup>21</sup>

These inquiries, addressed extensively in current legal literature,<sup>22</sup> are beyond the scope of this article. Rather, it proposes a politically feasible reform in the practice of the SC, which would alleviate the crisis of trust currently hindering the functioning of the SC and promote consonance between the purpose of an SC mandate authorizing the use of force and the measures taken by Operating States.

### I. THE AUTHORIZATION MODEL AND ITS FLAWS

This is not the way the story was meant to unfold. The drafters of the UN Charter envisioned “a centralization of the use of armed forces, with member states placing forces under

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comment upon the legality of Chapter VII measures, but also to issue rulings that effectively block implementation of the Security Council measures”).

21. David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 562 (1993) (observing that “the two broad dimensions of the challenge to the legitimacy of the Security Council’s use of its authority reflect the perceptions (1) that the Council is dominated by a few states, and (2) that the veto held by the permanent members is unfair.”); Bart M.J. Szweczyk, *Variable Multipolarity and U.N. Security Council Reform*, 53 HARV. INT'L L. J. 449, 455–58 (2012) (reviewing critiques concerning the legitimacy of the Security Council (“SC”). See generally Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT'L L. 632 (2005); Kamrul Hossain, *The Challenge and Prospect of Security Council Reform*, 7 REGENT J. INT'L L. 299, 308 (2010); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993).

22. See *supra* notes 20–21 and accompanying text; see generally Malcolm N. Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function*, in *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* 219, 230 (A.S. Muller et al., eds., 1997); Bernd Martenczuk, *The Security Council, the International Court, and Judicial Review: What Lessons from Lockerbie?*, 10 EUR. J. INT'L L. 517, 518–19 (1999); Gabriël H. Oosthuizen, *Playing the Devil’s Advocate: The Security Council is Unbound by Law*, 12 LEIDEN J. INT'L L. 549, 562–63 (1999); Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INT'L & COMP. L.Q. 309, 314 (1997); Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT'L L. 285, 303 (1996) [hereinafter Gardam, *Legal Restraints*]; Thomas M. Franck, *The “Powers of Appreciation”: Who is the Ultimate Guardian of the UN Legality?*, 86 AM. J. INT'L L. 519, 522 (1992); August Reinisch, Note, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 855 (2001).

the control of the Security Council . . . .”<sup>23</sup> The collective security mechanism established under Chapter VII of the UN Charter allows the SC to resort to coercive measures in order to maintain or restore international peace and security if it identifies, in accordance with Article 39 of the Charter, “the existence of any threat to the peace, breach of the peace, or act of aggression . . . .”<sup>24</sup> If the SC is satisfied that non-military measures have been or will be inadequate, it may take military action “[A]s may be necessary to maintain or restore international peace and security” in accordance with Article 42 of the Charter.<sup>25</sup> Article 43 of the Charter required member states to “make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces . . . necessary for the purpose of maintaining international peace and security.”<sup>26</sup> The Charter contemplated that such forces be placed “at the disposal of the Security Council”<sup>27</sup>, and be strategically directed by a Military Staff Committee consisting of the Chiefs of Staff of the permanent members of the SC.<sup>28</sup>

But practice has departed from the language of the Charter, and Article 43 has become a dead letter,<sup>29</sup> as “agreements of the sort contemplated by Article 43 have never been concluded, the Military Staff Committee has never gained significance, and the Charter’s centralized mechanism of military enforcement has never been implemented in practice.”<sup>30</sup>

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23. Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT’L L. 355, 366 (2012).

24. See U.N. Charter art. 39.

25. *Id.* art. 42.

26. *Id.* art. 43, para. 1.

27. *Id.* art. 47, para. 3.

28. *Id.*

29. Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 65, 68 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

30. Payandeh, *supra* note 23, at 366–67; see Schachter, *supra* note 29, at 68 (“Article 43, though drafted in obligatory language, has never been applied. The Security Council has not taken the initiative to negotiate such special agreements though Article 43 requires that this be done ‘as soon as possible.’ It does not appear that any member state requested such negotiation.”).

In view of the failure of the international community to carry out the scheme stipulated in Article 43, the SC resorted to the current model of authorizing member states to use force, “in essence franchising UN members to act in the Organization’s behalf.”<sup>31</sup> In using its powers under Article 42 of the Charter to resort to military enforcement measures, “the United Nations has . . . thus become only an authorizing body, ceding control of the actual military operations to individual states.”<sup>32</sup>

Indeed, “the ‘black hole’ in the system of collective security”<sup>33</sup> underlying the current crisis of trust concerns the inability of the SC to control the execution of its resolutions.<sup>34</sup> The lack of such control was evident during the First Gulf War, a US-led military intervention carried out pursuant to SC Resolution 678 authorizing UN members “to use all necessary means” to end the occupation of Kuwait by Iraq and “to restore international peace and security in the area.”<sup>35</sup> The lack of the SC’s ability to control the execution of its resolutions was even more prominent in the face of the US and British argument that the mandate to use force granted by Resolution 678 remained in

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31. See Lobel & Ratner, *supra* note 10, at 126. Addressing the authorization model, Thomas Franck observed that “the adaptive capacity of the Charter has functioned dramatically and controversially to fill the vacuum created by Article 43’s non-implementation . . . . The gradual emancipation of Article 42 as a free-standing authority for deploying collective force, *ad hoc*, has prevented the collapse of the Charter system in the absence of the standby militia envisioned by Article 43.” THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 23 (2002).

32. See Lobel & Ratner, *supra* note 10, at 126.

33. *A Black Hole*, *supra* note 4, at 416.

34. *Id.*

35. S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990). Noting the lack of Security Council control over the implementation of Resolution 678, Burns Weston observed that “the resolution did not require any meaningful accounting to, or guidance from, the Security Council . . . . In other words, in Resolution 678, the Security Council gave the UN members *carte blanche vis-à-vis* Iraq after January 15, including the waging of war on whatever terms and in whatever ways they might choose.” Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT’L L. 516, 525–26 (1991); see John Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder?*, 25 CORNELL INT’L L.J. 1, 28 (1992) (“As matters stood, the Council could only sit back and hope the states taking action were not doing more than was needed. This absence of Security Council control violated the requirements of Chapter VII.”). Some have suggested that as a result of such lack of SC control over the military operation, the United States resorted to military force in a manner exceeding the authorization provided by Resolution 678. *Id.* at 12, 18–19.

force even after the cease-fire marking the end of the First Gulf War.<sup>36</sup> This argument, advanced by the United States and the United Kingdom despite vigorous opposition by three permanent members of the SC and many other states, served as the legal premise for a series of military operations against Iraq, culminating in the Second Gulf War in 2003.<sup>37</sup> Commentators observed that the approach followed by the United States and the United Kingdom exemplifies the problematic nature of the authorization regime, which “leaves individual states with wide discretion to use ambiguous, open-textured resolutions to exercise control over the initiation, conduct and termination of hostilities. Such states may seek to apply resolutions by the Security Council in conflict with its aims and objectives or the view of many of its members.”<sup>38</sup>

Similarly, regarding the recent military intervention in Libya it was observed that “[t]hrough the authorization of the

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36. At the heart of the US and UK argument lay the assertion that “Resolution 678 . . . contains no self-imposed time limit, and none of the resolutions relating to Iraq . . . explicitly terminated the resolution’s endorsement of the use of force. Unless the Security Council had clearly stated, using the same language that it has in the past, that it has terminated Resolution 678’s authorization for the use of force, any such authorization continued.” John Yoo, *International Law and the War in Iraq*, 97 AM J. INT’L L. 563, 568 (2003).

37. The US and UK argument relied on the joint reading of three SC Resolutions: (a) Resolution 678, which authorized UN members “to use all necessary means” to end the occupation of Kuwait by Iraq and “to restore international peace and security in the area”; (b) Resolution 687, adopted in April 1991, which established the terms of the cease-fire terminating hostilities in the Persian Gulf. Resolution 687 required Iraq, inter alia, to destroy its chemical and biological weapons and ballistic missiles and agree to on-site inspections; (c) Resolution 1441 of November 2002, which found that Iraq has “materially breached” its obligations under those terms of the cease-fire. See S.C. Res. 678, *supra* note 35, at ¶ 2; S.C. Res. 1441, ¶ 1, U.N. Doc. S/RES/1441 (Nov. 8, 2002); S.C. Res. 687, ¶ 8, U.N. Doc. S/RES/687 (Apr. 3, 1991). A reading of the said resolutions that supports the legality of the Second Gulf War maintains that “Resolution 1441’s finding that Iraq was in material breach allowed the United States and its allies to terminate the cease-fire created by Resolution 687 and resume the use of force as authorized by Resolution 678.” Yoo, *supra* note 36, at 568; see also Lord Goldsmith, *Attorney General Clarifies Legal Basis for Use of Force Against Iraq* (Mar. 18, 2003), <http://www.fco.gov.uk/en/news/?view=Speech&id=5424753> (statement in answer to a parliamentary question); William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM J. INT’L L. 557 (2003). Yet a large segment of the international community adhered to the view of prominent international lawyers that this reading of the resolutions was unsustainable. See Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM J. INT’L L. 607, 612–14 (2003); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 177 (2004).

38. Lobel & Ratner, *supra* note 10, at 125.

use of force in the case of Libya, the Security Council, to a considerable degree, transferred its Chapter VII powers to the intervening states. It retained neither authority nor control over the intervention.”<sup>39</sup>

The amenability of SC mandates to abuse turns largely on “the irrevocability of a Security Council mandate once given.”<sup>40</sup> This is the result of the “reverse veto” power, which allows permanent members of the SC to block an SC resolution revoking, revising, or clarifying an authorization to use force after such authorization has been issued by the SC.<sup>41</sup> Thus, in the case of the military intervention in Libya, “the very fact that the USA (initially), the UK and France, all members of the Security Council with a veto right, were involved in the exercise of this Security Council mandate, and were involved in the bombing of Libya . . . automatically led to a Security Council that would not be able to fulfill its task of supervising the way the mandate was being implemented.”<sup>42</sup>

Commentators have proposed divesting permanent SC members of their reverse veto power as a means of promoting SC control over the implementation of its resolutions. David Caron advocated the introduction of such reform by incorporating in every resolution adopted under Chapter VII “a modified voting procedure for future use in terminating the action taken.”<sup>43</sup>

Under the modified voting clause, “the required affirmative votes should probably be higher than the nine required as an initial matter, but not so high, say fourteen, as virtually to perpetuate the present situation regarding the reverse veto.”<sup>44</sup> Others have voiced a similar opinion.<sup>45</sup>

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39. Payandeh, *supra* note 23, at 400.

40. *A Black Hole*, *supra* note 4, at 416.

41. *See id.*; Payandeh, *supra* note 23, at 400; Caron, *supra* note 21, at 577 (observing that “‘reverse veto’ does not block the Security Council from authorizing or ordering an action but, rather, blocks it from terminating or otherwise altering an action it has already authorized or ordered.”).

42. *A Black Hole*, *supra* note 4, at 415–16.

43. Caron, *supra* note 21, at 584.

44. *Id.* at 586.

45. *See, e.g.*, ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 45, 270 (2004) (proposing an amendment to the current authorization regime, whereby “the authorization to use force will cease when it

Abolishment of the reverse veto would clearly enhance the responsiveness of the SC to changed circumstances that in the opinion of a significant majority of SC members warrant the revocation or revision of action previously taken by the SC. Such circumstances may include, among others, alleged overstretching of SC mandates committed or sanctioned by at least one permanent member opposing the revision of prior SC action.<sup>46</sup>

However, review of SC practice over the two decades following Caron's proposal shows no indication of a willingness by permanent members of the SC to cede reverse veto power in the context of major, high-stakes conflicts.<sup>47</sup> In contrast to the proposal advanced below, revoking reverse veto power could result in the revocation of the mandate altogether, requiring intervening states to incur the political costs associated with a withdrawal from a military operation that is already underway. The prospects of intervening states assuming the risk of such a high political cost seem remote, especially given the fact that such a risk depends on the discretion of a purely political decision-maker that is the SC.

Furthermore, revoking the reverse veto may do little to alleviate the crisis of trust undermining the collective security

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becomes clear that it does not enjoy the support of the majority of Security Council members anymore, including a majority of the permanent members").

46. *A Black Hole*, *supra* note 4, at 416 (pointing to claims that the execution of Resolution 1973 led to violations of humanitarian law and human rights law and that the mandate provided by the resolution "was interpreted in such a way to also allow for regime change," the Editorial observed: "[t]he very fact that the USA (initially), the UK and France, all members of the Security Council with a veto right, were involved in the exercise of this Security Council mandate, and were involved in the bombing of Libya, this automatically led to a Security Council that would not be able to fulfill its task of supervising the way the mandate was being implemented"); see Caron, *supra* note 21, at 587 (proposing to repeal the reverse veto). Caron mainly addressed concerns beyond overstretching of prior resolutions. For instance, Caron contended that doing away with reverse veto "would be desirable in terms of the objectives of sanctions [(imposed by the SC under Chapter VII—the authors)] in that it would enable the state targeted by the sanctions to act with a view to ending them. For if the target state and its citizenry conclude that, no matter what they do, the sanctions will remain in place because of the wishes of one or two permanent members, they may simply stiffen their resistance and reject further efforts to satisfy what they see as an unreasonable and unresponsive Council." *Id.*

47. See Tarcisio Gazzini, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 53 (2005) (observing that Caron's proposal "implies a significant reduction of the veto power unlikely to be accepted by permanent members").

mechanism because military action perceived by certain permanent SC members to exceed the SC mandate may nevertheless gain the support of the majority of Council members. Because the adoption of SC resolutions requires the agreement of *all* permanent members of the SC, each permanent member would consider the resolution to be “hijacked” if the use of force exceeded its own understanding of the mandate. For example, in the Libyan crisis, if a revised voting clause along the lines proposed by Caron had been included in Resolution 1973, it would not have saved the mandate from its NATO “hijackers” as far as the Russians and Chinese were concerned because the military intervention retained the support of a significant number of SC members throughout the conflict.

## II. INCREASED SPECIFICATIONS OF AUTHORIZATIONS TO USE FORCE?

Commentators have long maintained that fundamental values underpinning the UN Charter—“that peaceful means be used to resolve disputes and that force be used in the interest and under the control of the international community and not individual countries”<sup>48</sup>—require that the SC retain strict control over the implementation of resolutions authorizing the use of force.<sup>49</sup>

It has been suggested that such control could be accomplished by highly specified terms qualifying the SC mandate, stipulated in the resolution, which would ensure that “contractee states employ force to secure the UN objectives and not their own.”<sup>50</sup> According to this view, “[m]aintaining the control of the Council over the warfare it authorizes requires that, although operational command may be delegated to states, major policy changes in objectives, or major military actions that

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48. Lobel & Ratner, *supra* note 10, at 125.

49. *See id.* at 127 (submitting that “the Security Council must retain clear control over authorizations to use force . . . even if political and military considerations require that it delegate military command to individual nations”); DE WET, *supra* note 45, at 265–66 (“A complete delegation of command and control of a military operation to a member state or a group of states, without any accountability to the Security Council, would . . . open the door to abuse by states who claim to be acting on behalf of the United Nations whilst (exclusively) pursuing their own national interests.”).

50. Lobel & Ratner, *supra* note 10, at 127.

seriously threaten to widen the war, must be authorized by the United Nations.”<sup>51</sup>

This approach was initially advanced in the wake of the First Gulf War in response to the legal controversy regarding the scope of permission to use force against Iraq under SC Resolution 678.<sup>52</sup> The approach gained support in the legal literature in light of the recent legal controversy about the international military intervention in Libya. Commentators have noted with regard to SC Resolution 1973 that “[t]he notion of ‘all necessary means’ remains ambiguous, clearer mandates are thus desirable.”<sup>53</sup> Hence, “the Security Council should have defined the objective of Resolution 1973 and the means acceptable to accomplish this objective in more detail.”<sup>54</sup>

Is increased specification of SC resolutions authorizing the use of force an advisable means of reducing the uncertainty that follows the adoption of such resolutions? We believe that the answer is negative, primarily because the uncertainty inherent to war makes it impossible to anticipate the range of actions that would be consistent with the principle of proportionality.

#### A. *Proportionality and Uncertainty in War*

The most substantial impediment to the drafting of an SC mandate containing highly specified terms for the use of force is the interaction between the principle of proportionality and the element of uncertainty in war. Efforts to promote consonance between the purpose of an SC mandate and the measures employed by the Operating States concern the realization of the principle of proportionality. Proportionality, which “determines the amount of force that can legitimately be used to achieve the

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51. *Id.* at 139. Lobel and Ratner further submit that a “change in objectives poses grave risks of widening the war, a risk that eventuated in Korea. Because of those risks, Security Council resolutions must be interpreted to authorize what was clearly intended, not what can conceivably be justified.” *Id.*; see DE WET, *supra* note 45, at 269 (submitting that an SC resolution authorizing the use of force “should specify clearly the extent, nature and objective of the military action, since broad and indeterminate language provides states with an opportunity to employ force for potentially limitless objectives”).

52. See *supra* notes 36–37 and accompanying text.

53. Lehmann, *supra* note 5, at 145.

54. Payandeh, *supra* note 23, at 400.



goal,”<sup>55</sup> is a basic principle of the law on the use of force,<sup>56</sup> enshrined in several provisions of the UN Charter.<sup>57</sup> Thus, “proportionality . . . ought to be a principle inherent in all Chapter VII UNSC Resolutions.”<sup>58</sup> It was observed that use of the term “*all necessary measures*” by the SC in resolutions authorizing the use of force “imported a notion of proportionality into the action being authorized.”<sup>59</sup> Moreover, regardless of the extent to which proportionality places a legal limitation on the powers of the SC,<sup>60</sup> there is little disagreement that the Council ought to act in accordance with this principle as a matter of good policy.<sup>61</sup>

The function of proportionality is “to limit the destructive impact of armed conflict.”<sup>62</sup> In the context of *jus ad bellum*, such destructive impact extends beyond injuries to civilians and damage to civilian objects, and encompasses the destruction of enemy forces and damage to territory, the infrastructure of the target state, and the environment in general.<sup>63</sup> It also concerns

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55. Gardam, *Legal Restraints*, *supra* note 22, at 305.

56. Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391 (1993) [hereinafter Gardam, *Proportionality and Force*] (observing that “[p]roportionality is a fundamental component of the law on the use of force”).

57. JUDITH G. GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 189 (2004) (“The constraints of proportionality are also recognized in the words of Article 42 of the United Nations Charter in that ‘the Council may only take such [forceful] action . . . as may be necessary to maintain or restore international peace and security.’”). Gardam further submits that Article 1(1) of the Charter, which requires UN organs to operate in conformity with the principles of international law “can be viewed as encompassing proportionality as a principle of general international law that is applicable to all uses of force.” *Id.* at 207; see Lehmann, *supra* note 5, at 132–33; THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 631 (Bruno Simma et al., eds., 1st ed. 1994).

58. Lehmann, *supra* note 5, at 133; see Gardam, *Proportionality and Force*, *supra* note 56, at 391; Christian Henderson, *International Measures for the Protection of Civilians in Libya and Cote d’Ivoire*, 60 INT’L. & COMP L.Q. 767, 769 (2011).

59. Quigley, *supra* note 35, at 17 (observing that “the term ‘necessary’ in Resolution 678 imported a notion of proportionality into the action being authorized”).

60. See Wood, *supra* note 18; see also GARDAM, *supra* note 57, at 211–12 (arguing that in exercising its powers the SC is bound by the principle of proportionality).

61. GARDAM, *supra* note 57, at 12 (“As with the unilateral resort to force, it is generally assumed that any forceful action, either by United Nations forces under the control and command of the United Nations or state forces acting in pursuance of Security Council authorization, should be proportionate.”).

62. *Id.* at 20.

63. See *id.* at 168 (“Integral to decisions relating to the choice of means and methods of warfare and targets must be consideration of the anticipated overall scale of

the undermining of international peace and the compromising of state sovereignty that are inherent to any act of inter-state belligerency.<sup>64</sup> The requirement of proportionality presupposes that each act of inter-state belligerency inherently compromises a “constitutive principle of the United Nations, stated in the Charter’s stirring preamble: ‘to save succeeding generations from the scourge of war.’”<sup>65</sup>

Therefore, application of this principle in the exercise of SC powers under Chapter VII “ought to entail a functional balancing test between the aim pursued and the means used analogous to the standard in *jus ad bellum* on self-defence.”<sup>66</sup> In the case of an SC-authorized humanitarian intervention, proportionality requires balancing the expected benefit of a military measure in thwarting threats to civilians with the costs of the destructive effect inherent in any act of inter-state belligerency.

Such a balancing requirement suggests that even when the mandate allows the use of force to protect civilians, not *any* benefit, however slight, in advancing this purpose would justify *all* military measures necessary to achieve it. In other words, the balancing test reflected in the principle of proportionality requires accepting certain minor or remote risks to the civilian population in order to restrain the use of force as far as possible.<sup>67</sup>

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civilian casualties, the level of destruction of the enemy forces, and finally damage to territory, the infrastructure of the target state and the environment generally.”); Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, in *INTERNATIONAL LAW IN A TIME OF COMPLEXITY* 273, 278 n.22 (Yoram Dinstein ed., 1989).

64. See GARDAM, *supra* note 57, at 208 (observing that one of the purposes of proportionality is “to limit the impact of any forceful action on the sovereign rights of a delinquent State and helping to ensure a more lasting peace at the end of hostilities”); Gardam further noted that proportionality concerns “the minimization of the disruption of international peace and security.” *Id.* at 16.

65. Lobel & Ratner, *supra* note 10, at 128.

66. Lehmann, *supra* note 5, at 133.

67. Hence, while the demonstrated barbarity of the Gaddafi regime as well as statements made by Gaddafi himself clearly indicated that the purpose of the mandate could be fully realized only by affecting a regime change Western powers operating in Libya expressly recognized that an attempt to affect regime change by force would fall outside the scope of Resolution 1973. See Barack Obama et al., Op-Ed., *Libya’s Pathway to Peace*, N.Y. TIMES, Apr. 14, 2011, available at <http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html> (“Our duty and our mandate under UN Security Council Resolution 1973 is to protect civilians, and we are doing that. *It is not to remove Gaddafi*

To examine the proportionality of military measures contemplated by states engaged in SC-authorized humanitarian intervention one must assess the gravity of the threat to the civilian population in the absence of such measures. The appropriate scope of permission to use force turns on such an assessment.

Nevertheless, the element of uncertainty inherent in war would significantly burden any proportionality analysis conducted before the beginning of hostilities and aimed at regulating the use of force throughout an armed conflict. Therefore, the role of proportionality is never complete at the time of the initial decision to resort to force.<sup>68</sup> Rather, “the assessment of proportionality . . . is an ongoing process throughout the conflict.”<sup>69</sup>

The Libyan crisis is a case in point. On February 26, 2011, in response to large-scale attacks by forces of the Gaddafi regime against civilians, the SC adopted Resolution 1970, which referred the situation in Libya to the International Criminal Court and imposed an arms embargo as well as sanctions aimed at the regime and its leaders.<sup>70</sup> Fears of mass atrocities were aggravated in the course of the subsequent weeks as regime forces rapidly approached the city of Benghazi, the largest rebel stronghold, while Gaddafi himself declared that he would show “no mercy” to the rebels.<sup>71</sup> Such concerns have led to the adoption of SC Resolution 1973, which demanded the “immediate establishment of a cease-fire and a complete end to

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*by force.*”) (emphasis added). The leaders stated, however, that “it is impossible to imagine a future for Libya with Gaddafi in power” so that “as long as Gaddafi is in power, NATO and its coalition partners must maintain their operations so that civilians remain protected and the pressure on the regime builds.” *Id.*; see also Henderson, *supra* note 58, at 777 (“Indeed, it is clear that the UK does not view regime change as a lawful basis for the use of force under international law.”).

68. See Gardam, *Legal Restraints*, *supra* note 22, at 305.

69. *Id.*

70. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011). For a detailed review of the events leading to the adoption of SC Resolution 1970, see Payandeh, *supra* note 23, at 372–75.

71. See Payandeh, *supra* note 23, at 376–78 (reviewing the events leading to the adoption of SC Resolution 1973); see also Douglas Stanglin, *Gadhafi Vows to Attack Benghazi and Show ‘No Mercy’*, USA TODAY (Mar. 17, 2011), <http://www.usatoday.com/communities/ondeadline/post/2011/03/gadhafi-vows-to-attack-benghazi-and-show-no-mercy/1>.

violence and all attacks against, and abuses of, civilians . . . .”<sup>72</sup>  
 The resolution authorized the use of force for the protection of civilians:

[The SC] [a]uthorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to *take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi*, while excluding a foreign occupation force of any form on any part of Libyan territory, and *requests* the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council . . . .<sup>73</sup>

It is widely agreed that “UNSC Resolution 1973 was ambiguous on when force could be used in Libya.”<sup>74</sup> The main legal controversy regarding the scope of the permission to use force granted to intervening powers under Resolution 1973 concerned the quality of the required nexus between an attack on Libyan military objectives and the purpose of protecting civilians.<sup>75</sup> The expression “all necessary measures” gives rise to a spectrum of possible constructions.<sup>76</sup> A strict nexus

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72. S.C. Res. 1973, *supra* note 1, ¶ 1.

73. *Id.* ¶ 4 (emphasis added).

74. Lehmann, *supra* note 5, at 144; see Henderson, *supra* note 58, at 778 (commenting on Resolution 1973, Henderson observed that “the problem of ambiguity, intentional or otherwise, in the mandates of Chapter VII resolutions . . . is one that still persists”); see also ROBIN COLLINS, THINKING ABOUT LIBYA, THE RESPONSIBILITY TO PROTECT AND REGIME CHANGE: A “LESSONS LEARNED” 6 (2011), (“We can safely acknowledge that there was loose language within the central UN resolution (1973) in regards to the use of force.”); Payandeh, *supra* note 23, at 399 (“[T]he resolution chooses a considerably broad objective, the exact scope of which is open to debate.”); Kenneth Anderson, *Strategic Ambiguity and Libya*, OPINION JURIS (Mar. 22, 2011), <http://opiniojuris.org/2011/03/22/strategic-ambiguity-and-libya>.

75. See Lehmann, *supra* note 5, at 130 (“What would be decisive in such requirement of necessity is the quality of the nexus between the objective to be achieved and the actions undertaken.”).

76. Lehmann thus observed, “On one side of the spectrum, a remote nexus, that is one that takes a broad approach to necessity, would allow force that makes a positive contribution to the mandate objective (namely, protection of civilians), irrespective of whether that contribution is characterized as one of direct effect. For instance, when the Gaddafi Regime launched indiscriminate attacks, a way of stopping this was by

requirement would allow Operating States to target only military objectives that present an *imminent* threat to civilians.<sup>77</sup> A more moderate nexus requirement along the spectrum would examine the *individual dangerousness* of a military objective regardless of whether or not the threat it poses is imminent.<sup>78</sup> The broadest conception of the nexus requirement would suggest that given the general dangerousness of the Gaddafi regime, any military objective enhancing the strength of the regime in general is a legitimate target.<sup>79</sup>

Legal literature discusses additional questions that may be viewed as derivatives of the nexus question. These questions concern the permissibility of targeting Gaddafi;<sup>80</sup> whether or not the intervening powers could legitimately aim to affect a change of regime in Libya;<sup>81</sup> the extent to which the mandate allows the

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fighting that regime in general, by attacking military and political leaders. Under such dictum, Resolution 1973 would have had no limiting effect on the use of force exceeding [international humanitarian law] IHL. On the other side of the spectrum, where there is an extremely strict nexus, the *jus in bello* would be considerably restricted: only military objects having a direct effect on the indiscriminate violence against civilians might then be targeted. The term ‘necessary’ (*necessaire/necesaria*) alone is ambiguous on the quality of the link between objective and action. Only if it is understood in its first synonym ‘indispensable’ (i.e. ‘absolutely necessary or requisite’), the link is close.” *Id.* at 130–31.

77. *Id.* at 120.

78. Under such rule of engagement, past occurrence of indiscriminate violence (as an indication of intent), combined with the capacity of the particular military objective to repeat it would fulfill the nexus requirement.

79. See Payandeh, *supra* note 23, at 384 (contending that “[i]n light of the general consensus that the Libyan regime committed illegal violence against civilians, the authorization of the use of force to protect civilians is considerably broad and includes military action against the regime whenever there is a threat that the regime attacks civilians or civilian-populated areas”). Payandeh thus submits, “[a]ttacks on military facilities were therefore generally encompassed by Resolution 1973, as were attacks on political institutions that were directly responsible for and involved with the Libyan attacks on civilians.” *Id.* at 390.

80. Commentators disagree on whether SC Resolution 1973 allowed targeting Gaddafi. Lehmann argues that “there was consensus that Resolution 1973 precluded targeting Gaddafi.” Lehmann, *supra* note 5, at 143. Other commentators disagree, contending that Gaddafi was a legitimate target. See Payandeh, *supra* note 23, at 390; see also Henderson, *supra* note 58, at 775.

81. Commentators disagree on this question. Kohen, *supra* note 5, at 162 (“In fact, the NATO bombings clearly deviated from its original goal to protect the civilian population by actively supporting one side of the internal armed conflict between the National Transition Council and the Gaddafi dictatorship.”); Henderson, *supra* note 58, at 772 (“Whilst the opposition forces winning the civil war would in many respects be a laudable outcome, it simply does not equate to the protection of civilians.”). *But see* Payandeh, *supra* note 23, at 387 (“[T]here are indications that the Security Council

conduct of ground operations short of occupation;<sup>82</sup> the permissibility of military cooperation between the forces of the intervening powers and rebel forces.<sup>83</sup>

Spelling out the nexus requirement by the drafters of Resolution 1973 would enhance its clarity. Proponents of further specification in SC resolutions concede, however, that “[a]uthorization to engage in a large-scale, long-term military operation will often be viewed as requiring that contractees be granted broad discretion so that they can effectively operate and cope with unpredictable military situations.”<sup>84</sup>

In the case of a humanitarian intervention authorized by the SC, it is difficult to pre-assess at the drafting stage of the mandate the gravity of the risks to the civilian population that may arise as the crisis unfolds and the nature of the military measures that would be required to thwart such risks. Such an assessment concerns both the intent and the ability of regime forces to inflict injury upon the civilian population.<sup>85</sup> Assessments of intent and capacity to attack civilians are typically

mandate did not categorically rule out the possibility of regime change in Libya on the basis of Resolution 1973.”).

82. The authorization provided by Resolution 1973 excluded “a foreign occupation force of any form on any part of Libyan territory.” S.C. Res. 1973, *supra* note 1, ¶ 4. Payandeh opined that “ground troops were allowed to be deployed to fight directly against Libyan troops, though they were prohibited to besiege Libyan territory.” Payandeh, *supra* note 23, at 386. *But see* Op-Ed., *The Goal in Libya Is Not Regime Change*, N.Y. TIMES, Mar. 23, 2011, available at <http://www.nytimes.com/2011/03/24/opinion/24iht-edmoussa24.html> (citing an interview with Amr Moussa, Ex-Secretary General of the Arab League).

83. *See* Henderson, *supra* note 58, at 771–72.

84. Lobel & Ratner, *supra* note 10, at 127; *see* DE WET, *supra* note 45, at 269 (“Defining the mandate clearly may not be as easy as it seems, as the Security Council cannot, in advance, prescribe the military tactics of the authorised states, if they are to react effectively to unpredictable situations. These decisions have to be taken in the field in the light of rapidly changing circumstances. As a result, ambiguous and broad language cannot be avoided completely.”).

85. Statements made by military commanders of the NATO powers operating in Libya at the initial stage of hostilities acknowledged that such assessment ought to guide NATO operations. General Carter Ham, US Chief of Staff for the intervention in Libya, explained the rules of engagement for US forces as follows: “Where they see a clear situation where civilians are threatened, they have . . . intervened . . . . When it’s unclear that it’s civilians that are being attacked, the air crews are instructed to be very cautious . . . . What we look for, to the degree that we can, is to discern intent . . . . There’s no simple answer.” Josh Rogin, *Rules of Engagement are Murky in Libya Air War*, FOREIGN POLICY (Mar. 21, 2011), [http://thecable.foreignpolicy.com/posts/2011/03/21/rules\\_of\\_engagement\\_are\\_murky\\_in\\_libya\\_air\\_war](http://thecable.foreignpolicy.com/posts/2011/03/21/rules_of_engagement_are_murky_in_libya_air_war).

intertwined. Intent on the part of regime forces is demonstrated by prior and current conduct of such forces (e.g., prior commission of atrocities against the population; current movements of armed forces)<sup>86</sup> and by the statements of the leaders. Therefore, the severity of the threat to the civilian population, as far as intent is concerned, may be fully revealed only in the course of the conflict.

Similarly, circumstances pertinent to the assessment of *ability* to attack civilians (e.g., geographic vicinity of armed forces to civilians; type of weapons held by regime forces and their military capacity in general)<sup>87</sup> may rapidly change, rendering such assessment extremely dynamic. The weight attributed to certain objective parameters (e.g., geographic vicinity to civilians) in the assessment of risk may vary throughout the conflict. For example, the risk to the civilian population in the course of a “dynamic” civil war characterized by fast movements of forces far exceeds the one arising in the course of a “static” civil war.<sup>88</sup> Whether the war takes a static or a dynamic form may often be revealed only after the mandate has been drafted.

Moreover, although in view of the circumstances prevailing in Libya throughout the military intervention Resolution 1973 probably did not allow military operations aimed at toppling the Gaddafi regime,<sup>89</sup> a drastic change of circumstances as the crisis unfolded (e.g., increased commission of atrocities by regime

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86. Elaborating on the circumstances pertinent to the assessment of threat to the civilian population throughout the Libyan conflict, Lehmann observed: “What qualifies as an indication of intent clear enough to satisfy the quality of the threat is to be determined in each individual case. For ground forces, one indicator may be direction of movement. When Gaddafi forces seemed to be attacking, they might be targeted; in cases of retreat, they might not. Another indicator may be geographic vicinity. It may not be permissible to attack forces that are rallying too remotely from civilians to pose a threat to them. Movable military supply would appear to be a legitimate target if designated for forces that are attacking civilians . . . .” Lehmann, *supra* note 5, at 140.

87. *Id.*

88. See Henderson, *supra* note 58, at 772 (“Ultimately, although not a long-term solution, a stalemate may well be the only outcome in which civilians are truly protected. If one accepts this view then ‘it may be lawful to assist the rebels to defend the areas they hold but not to assist them to advance on other towns.’”).

89. Lehmann, *supra* note 5, at 140 (“[P]rotecting civilians cannot be equated to fighting the regime in support of one belligerent.”); Henderson, *supra* note 58, at 772 (“Whilst the opposition forces winning the civil war would in many respects be a laudable outcome, it simply does not equate to the protection of civilians.”).

forces) could have brought such efforts within the contours of the mandate.<sup>90</sup>

Proportionality analysis aimed at determining the scope of permission to use force in the course of an SC-authorized humanitarian intervention clearly extends beyond the purpose of protecting civilians and encompasses risks to the forces of the intervening power. As the military operation unfolds, such risks also lend themselves to a clearer assessment than at the drafting stage of the mandate.

In conclusion, it seems that the rules of engagement emanating from proportionality balancing analysis may shift, as the crisis unfolds, across a continuum of possible formulas. Therefore, a mandate containing highly-specified terms regarding the scope of permission to use force may prove to be either overly broad, allowing military operations that may turn out, as the conflict unfolds, to be disproportional to the purpose of the mandate, or overly narrow, imposing unreasonable limitations on the freedom of the intervening powers to act given the aims of the operation (i.e., protecting the civilian population) and the risk facing the forces of the intervening power. Mandates that have the potential of being overly narrow are likely to frustrate military efforts to achieve the purpose of the mandate, and to inhibit military powers from assuming the task of enforcing SC resolutions.

#### B. *Past Practice of the Security Council: Bosnia and Somalia*

Proponents of highly-specified mandates point to past practice of the SC, which demonstrates their feasibility. Jules

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90. A similar contention can be raised with regard to the provision contained in Resolution 1973 authorizing the use of military force to protect "civilian populated areas" *in addition* to the permission to protect civilians. See S.C. Res. 1973, *supra* note 1, ¶ 4. This language could be construed either to allow the use of force against military objectives engaged in *any* form of hostilities within a populated area or to allow the use of force only to prevent attacks that are contrary to humanitarian law, that is, *indiscriminate attacks* against civilian populated areas. Compare Payandeh, *supra* note 23, at 386 (construing it the former), with Lehmann, *supra* note 5, at 136 (construing it as the latter). An authorization adhering to the former interpretation with regard to all populated areas in Libya seems tantamount to an authorization to affect a regime change. Although such a measure may appear to be inconsistent with the principle of proportionality at the time of the drafting of the resolution, subsequent events, as the crisis unfolds can bring it within the scope of this principle.



Lobel and Michael Ratner note that “in Bosnia, the Council enacted specific resolutions, first to authorize force to secure the delivery of humanitarian supplies, next to enforce the no-fly zone, and then to protect the safe havens.”<sup>91</sup> The SC took a similar approach regarding the humanitarian intervention in Somalia.<sup>92</sup> More recently, the mandate to use force granted by the SC to French forces and special UN operation forces in Côte d’Ivoire was more circumscribed than the one allowing military operations in Libya in extending only to the protection of civilians under *imminent* threat of violence.<sup>93</sup> Lobel and Ratner argue that the cases of Bosnia and Somalia suggest “that relatively narrow authorizations are workable; and that contractee states can be required to seek new authorizations to undertake expanded uses of force.”<sup>94</sup>

Proponents of an increased specification regime concede, however, that past practice may have limited value in assessing the feasibility of such a regime with regard to high-stakes conflicts. Lobel and Ratner acknowledged that:

[I]t could be argued that these recent efforts by the Security Council to control the scope and extent of the uses of force add little to our understanding. In contrast to the Korean and gulf wars, they involved relatively small-scale operations in which the major powers were reluctant to employ force. Thus, in the Bosnia crisis, the Western states and Russia were cautious or opposed to the assertive use of force, and often rejected draft resolutions proposed by the nonaligned members of the Security Council seeking broad authorizations. Similarly, in Somalia the United States initially, and at various points thereafter, sought to narrow the objective for which force would be used, while the Secretary-General pushed to widen the mandate. In these

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91. Lobel & Ratner, *supra* note 10, at 141.

92. *See id.* at 141–42 (“In Somalia, the initial Resolution 794 authorized ‘the Secretary-General and Member States . . . to use all necessary means to establish . . . a secure environment for humanitarian relief operations . . . . After the attacks against the UN troops by the forces of General Aid, the Security Council explicitly authorized his arrest in Resolution 837. The Council and participating states did not rely on the arguably broad language of Resolution 794, but specifically authorized each escalation of force.”).

93. S.C. Res. 1975, ¶ 6, U.N. Doc. S/RES/1975 (Mar. 30, 2011); *see also* Henderson, *supra* note 58, at 768.

94. Lobel & Ratner, *supra* note 10, at 142.

situations, the major powers often willingly accepted temporal and substantive controls on the use of force, restrictions that would have been rejected in a major war in which a permanent member had substantial interests.<sup>95</sup>

Indeed, the practice of the SC with regard to Bosnia of repeatedly expanding the scope of permission to use force in order to achieve the humanitarian objective of the military intervention demonstrates that resolutions defining permission very specifically will often yield overly narrow mandates. Although the political circumstances surrounding the Bosnia crisis allowed the expansion of the original, overly narrow mandate by subsequent SC resolutions, Operating States can hardly be expected to rely on such precedent in the context of more substantial conflicts such as the one in Libya.

The point bears emphasis: notwithstanding the agency rhetoric underlying the authorization model,<sup>96</sup> states going to war in the name of the international community have political stakes in winning the war (i.e., achieving the goals of the military intervention) that exceed those of other states. The nature and weight of such political stakes, unique to the Operating States, may vary from one situation to another. Therefore, in the case of a high-stakes conflict, states would probably be reluctant to serve as the military arm of the SC in a war whose outcome depends on the future discretion of other states, members of the SC, whether or not to permit the use of military measures necessary to achieve the purposes of the intervention.

### C. *Temporal Limitations on Authorizations to Use Force*

Commentators have contended that SC resolutions authorizing the use of force should stipulate a time limit for the intervention, “forcing the members of the Security Council to re-evaluate the situation and the intervention and, if necessary,

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95. *Id.* at 143–44. This observation proved accurate, as Resolution 1973 authorizing the military intervention in Libya “constitutes a return to the problematic approach employed by Resolution 678. With the ‘protection of civilians and civilian populated areas under threat of attack,’ the resolution chooses a considerably broad objective, the exact scope of which is open to debate.” Payandeh, *supra* note 23, at 399.

96. See Schachter, *supra* note 29, at 72 (commenting on the SC-authorized military intervention in Korea and observing that “the U.S. government described itself as the ‘Executive Agent of the United Nations’ in its agreements with other participating states for troop contributions”).

to make adjustments to the mandate.”<sup>97</sup> Such “sunset clauses” were contained in resolutions authorizing interventions in Rwanda and Somalia, in the wake of the international controversy regarding the American and British understanding of Resolution 678 as an open-ended authorization to use force against Iraq.<sup>98</sup>

It has been noted that temporal limitations cannot guarantee strict SC control over a military intervention as they “would not affect the virtually absolute unaccountability of Member States until the expiring of the deadline.”<sup>99</sup> Indeed, a temporal framework of several months would often allow Operating States ample time to pursue military campaigns and successfully advance political ends that grossly exceed the scope of the mandate, especially in view of the unequivocal military superiority typically enjoyed by such powers.<sup>100</sup>

In theory, the SC could stipulate extremely tight temporal limitations that would allow it to “dynamically tailor its response to a situation as it unfolds.”<sup>101</sup> But the purely political nature of the SC may preclude such dynamic response on the part of the SC. In cases of humanitarian interventions, for example, the objectives of a mandate to protect civilians cannot be reconciled with termination of the intervention in a manner that does not provide any guarantee of their safety. Tight temporal limitations could therefore prove to be a type of overly-narrow mandate,

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97. Payandeh, *supra* note 23, at 400; see James Cockayne & David Malone, *The UN Security Council: 10 Lessons from Iraq on Regulation and Accountability*, 2 J. INT'L L. & INT'L REL. 1, 16–17 (2006); Lobel & Ratner, *supra* note 10, at 143 (arguing that resolutions authorizing the use of force “should be temporally limited”); Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 Nw. U. J. INT'L HUM. RTS. 24, 50 (2007) (advocating temporal limitations, Schott argues “[n]ecessity and proportionality demand that the Council dynamically tailor its response to a situation as it unfolds to prevent Chapter VII from becoming a permanent fixture. . . . [O]nce an operation is established the operational flexibility and authority provided by Chapter VII authority has a ‘narcotic effect’”).

98. Lobel & Ratner, *supra* note 10, at 142; see S.C. Res. 929, ¶ 4, U.N. Doc. S/RES/929 (June 22, 1994); S.C. Res. 814, ¶ 6, U.N. Doc. S/RES/814 (Mar. 26, 1993); Cockayne & Malone, *supra* note 97, at 17 (observing that the controversy surrounding the US and UK interpretation of Resolution 678 “has probably cemented the practice of the Council specifying an end-date for delegated mandates: since the late 1990s, France has asserted that it would never again accept open-ended sanctions regimes”).

99. Gazzini, *supra* note 47, at 53.

100. SC authorizations to use force in Somalia usually provided for six-month mandates, periodically renewed by the SC. See, e.g., S.C. Res. 814, *supra* note 98, ¶ 6.

101. Schott, *supra* note 97, at 50.

frustrating good-faith efforts on the part of Operating States to meet the objectives of the mandate, and would most likely inhibit states from undertaking this function.

### III. A PROPOSED OVERSIGHT MECHANISM

#### A. Purpose and Tasks of the Proposed Committee

Reforming the SC's practice, as proposed in this Article, would promote consonance between the aims of an SC authorization to use force and measures taken by the Operating States, relieving the crisis of trust that currently encumbers the functioning of the collective security mechanism of the SC. The reform would introduce an oversight mechanism in the SC system to reduce significantly the ability of Operating States to conduct military operations that depart from the terms authorized by an SC resolution to use force.

Political feasibility represents a substantial but not insurmountable challenge to such an effort. It seems that *all* permanent SC members, including those that have traditionally been more hesitant to use the collective security mechanism, share a strong incentive to resolve the current crisis of trust.<sup>102</sup> Commentators have noted that the increased reluctance on the part of certain permanent SC members to allow the use of the SC collective security mechanism, following the current crisis of trust, will eventually "undermine the Security Council's role in multilateral collective security and probably increase the unilateral uses of force by militarily powerful nations."<sup>103</sup> All permanent members of the SC share an obvious interest in maintaining the monopoly of the SC over the uses of force except in the exercise of the right of self-defense. An erosion of

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102. See, e.g., Mohamed, *supra* note 2, at 329 (observing that in the discussions held by the SC, Russia and China were among those members of the SC that warned against accepting the responsibility to protect doctrine).

103. Lobel & Rauner, *supra* note 10, at 130; see also INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT I (2001) (cautioning that the Security Council will lose legitimacy if it fails to fulfill its responsibility to act in the face of humanitarian crises); see also Mohamed, *supra* note 2, at 326.

this authority would diminish the unique political power conferred upon permanent SC members by the UN Charter.<sup>104</sup>

Moreover, the inequality inherent in the current collective security mechanism has long been the subject of sharp criticism, and many reform proposals have suggested limiting or diluting the exclusive powers enjoyed by permanent SC members.<sup>105</sup> The inability of the SC to overcome the differences between permanent members, and the fact that the impasse reached by the SC is causing loss of lives serves as ammunition to those calling for reform limiting the powers of the permanent members.

Any reform introducing a control mechanism over the implementation of SC resolutions entails certain political costs for permanent SC members and for other states acting pursuant to such resolutions. Because permanent members of the SC are often among the Operating States, the use of any meaningful oversight process within the collective security mechanism as a guarantee against the abuse of an SC resolution by Operating States requires imposing some form of limitation on the veto power of permanent members. In the past, permanent SC members have expressed strong reluctance to cede any aspect of their veto power.<sup>106</sup> They are likely to be especially opposed to surrendering their power to veto changes to SC resolutions authorizing military interventions in which they are acting as Operating States in a high-stakes armed conflict. Revoking the veto power of permanent members may also inhibit states that are not permanent SC members from acting as Operating States together with their permanent member allies because they will no longer enjoy the protection afforded by the veto power of the permanent members. Therefore, a politically feasible reform that introduces an oversight mechanism within the SC system as a guarantee against the hijacking of SC resolutions must minimize political costs for both permanent SC members and

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104. See Krisch, *supra* note 9, at 145 (observing that the position conferred on permanent SC members under the UN Charter “facilitates their exercise of dominance and, as institutional privilege is somewhat insulated from shifts in material power, it also stabilizes their continuing dominance into the future”).

105. See *supra* note 22.

106. See, e.g., Kamrul Hossain, *The Challenge and Prospect of Security Council Reform*, *The Challenge and Prospect of Security Council*, 7 *REGENT J. OF INT’L L.* 299, 309 (2010).

for other states acting in accordance with an SC authorization to use force.

The present article attempts to meet this challenge by bringing together the “culture of law” and the “ethos of diplomacy.”<sup>107</sup> It proposes a mechanism whereby a permanent UN committee of legal experts would monitor the compatibility of military operations undertaken by a state pursuant to an SC resolution with the terms of the resolution. A monitoring role of this type would require the committee, an intermediary body between the SC and the Operating States, to interpret and clarify the authorization provided by the SC. As discussed below, the committee’s interpretation of the mandate and its views regarding the operational consequences that such construction entails would become binding upon the Operating States, unless the SC explicitly decides otherwise.

The idea of establishing subsidiary SC organs aimed at monitoring state compliance with SC resolutions is not new. The SC has frequently resorted to such practice, establishing sanctions committees for the monitoring and implementation of sanctions imposed under Article 41 of the Charter, specifically sanctions that do not involve the use of force.<sup>108</sup> The mechanism proposed here differs significantly from the existing sanctions

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107. See *supra* note 14 and accompanying text.

108. For example, the Security Council Committee established, pursuant to Resolutions 751 for Somalia and 1907 for Eritrea, that the SC is authorized “to consider and decide upon requests for exemptions” from the sanctions imposed and has the power to add and remove individuals and entities from the list of those to whom sanctions apply. S.C. Res. 751, ¶ 11, U.N. Doc. S/RES/751 (Apr. 24, 1992); see also S.C. Res. 1907, ¶ 187, U.N. Doc. S/RES/1907 (Dec. 23, 2009). Similar powers are also vested with other committees. See, e.g., Security Council Committee established pursuant to Security Council Resolution 2048 concerning Guinea-Bissau, S.C. Res. 2048, ¶ 9, U.N. Doc. S/RES/2048 (May 18, 2012); Security Council Committee established pursuant to Resolution 1970 concerning Libya, S.C. Res. 1970, ¶ 24, U.N. Doc. S/RES/1970 (Feb. 26, 2011); Security Council Committee established pursuant to Resolution 1591 concerning the Sudan, S.C. Res. 1591, ¶ 3, U.N. Doc. S/RES/1591 (Mar. 29, 2005); Security Council Committee established pursuant to Resolution 1572 concerning Côte d’Ivoire, S.C. Res. 1572, ¶ 14, U.N. Doc. S/RES/1572 (Nov. 15, 2004); Security Council Committee established pursuant to Resolution 1533 concerning the Democratic Republic of the Congo, S.C. Res. 1533, U.N. Doc. S/RES/1533 (Mar. 12, 2004); S.C. Res. 1989, ¶ 21, U.N. Doc. S/RES/1989 (June 17, 2011); Security Council Committee established pursuant to Resolution 1521 concerning Liberia, S.C. Res. 1521, ¶ 21, U.N. Doc. S/RES/1521 (Dec. 22, 2003); Security Council Committee established pursuant to Resolutions 1267 and 1989 concerning Al-Qaida and associated individuals and entities, S.C. Res. 1267, ¶ 6, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

committees not only in the subject matter of its monitoring function but also in the nature of the mechanisms. Sanctions committees are political bodies consisting of representatives of all members of the SC and acting by consensus, which allows each member of the SC to prevent any action that is contrary to its interests.<sup>109</sup> By contrast, the committee proposed here would be an independent, quasi-judicial body whose conclusions may be unfavorable to SC members. Because of these differences, political feasibility concerns that do not arise with regard to existing sanctions committees bear heavily on the structuring of the model advanced here. Nevertheless, the model of existing sanctions committees provides a helpful point of reference in determining the best way of introducing the proposed oversight mechanism and the administrative framework that would govern its operation.

#### *B. Legal Basis for Establishing the Committee*

The proposed mechanism may be established in two ways: through an amendment to the UN Charter or by SC action in the exercise of its current powers to regulate its operations. Establishing the committee by amending the Charter may be preferable from the point of view of legitimacy, but the difficulty of amending the Charter reduces the likelihood that such a change will take place.<sup>110</sup> Thus, from the point of view of

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109. See Kalyani Munshani, *The Essence of Terrorist Finance: An Empirical Study of the U.N. Sanctions Committee and the U.N. Consolidated List*, 19 MICH. ST. J. INT'L L. 229, 238 (2010) (arguing, with regard to the operation of the U.N. Al-Qaida/Taliban Sanctions Committee, that the "consensus process, therefore, can be viewed as serving as an effective restraint or check in the decision-making process"); Paul Conlon, *Lessons from Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice*, 35 VA. J. INT'L L. 633, 647 n.73 (1995) (noting "the consensus principle universally applied in all subsidiary organs of the Security Council").

110. Article 108 of the UN Charter determines that: "Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council". U.N. Charter, art. 108. For discussion of the challenges involved in amending the Charter, see Carolyn L. Willson, *Changing the Charter: The United Nations Prepares for the Twenty-First Century*, 90 AM. J. INT'L L. 115 (1996). See also Blum, *supra* note 21, at 648 ("The UN Charter has frequently been called a 'rigid' constitution, which certainly explains the infrequency of Charter amendments since the Organization's establishment six decades ago. . . . This paucity of Charter amendments is not

efficiency it would be preferable to introduce the proposed mechanism by SC action under Article 29 of the United Nations Charter, which authorizes the SC to “establish such subsidiary organs as it deems necessary for the performance of its functions.”<sup>111</sup>

The SC has frequently exercised its powers under Article 29, establishing a wide variety of subsidiary bodies, including missions, field offices, working groups, and committees.<sup>112</sup> To facilitate the exercise of its Article 29 powers, the SC enacted Rule 28 of its Provisional Rules of Procedure, which provides that “The Security Council may appoint a commission or committee or a rapporteur for a specified question.”<sup>113</sup> The SC has resorted to Rule 28 several times in establishing sanctions committees for monitoring sanctions imposed in accordance with Article 41 of the Charter.<sup>114</sup> To the extent that the language of Rule 28 concerning the establishment of subsidiary organs “for a specified question” does not accommodate the establishment of a *permanent* committee, the SC may revise its language or incorporate a new rule into its Provisional Rules of Procedure to allow it to fully exercise its authority under Article 29 of the Charter.

### C. Permanence of the Committee

The sanctions committees discussed above are temporary, ad hoc committees established to monitor a particular situation.<sup>115</sup> Unlike economic sanctions, which often last for years, the timeframe for the use of force under Chapter VII is relatively short, extending from the adoption of an SC resolution authorizing the use of force to the initiation of

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surprising, given the cumbersome process provided for adopting them.”). On the other hand, it must be noted that because amendment of the UN Charter requires the agreement of two thirds of the member states of the UN, changes to existing practices made through Charter amendments reflect a democratic decision of member states; *infra* note 124.

111. U.N. Charter, art. 29.

112. See *Repertoire of the Practice of the Security Council, Subsidiary Organs: Overview*, UNITED NATIONS, [http://www.un.org/en/sc/repertoire/subsidiary\\_organs/overview.shtml](http://www.un.org/en/sc/repertoire/subsidiary_organs/overview.shtml) (last visited Mar. 26, 2013).

113. SC Provisional Rule 28, *supra* note 17.

114. See *supra* note 108.

115. *Id.*



military enforcement measures on the part of the Operating States. For this reason, we believe that the committee should be a permanent body that assumes its role automatically when a resolution authorizing the use of force is adopted, rather than an ad hoc body that must be constituted anew and whose members must be agreed upon each time the SC authorizes the use of force. The model of ad hoc committees would turn the monitoring mechanism into yet another obstacle to the function of the collective security mechanism rather than facilitate its operation. The permanence of the committee will also increase its independence and allow it to develop expertise, which would further enhance its legitimacy.<sup>116</sup>

#### D. *Election of Committee Members*

Our proposal for electing committee members is informed by considerations of legitimacy as well as of political feasibility. The former calls for an election process that involves all member states of the United Nations, whereas the latter requires maintaining primary control in the hands of the SC.

Several election processes that the UN employs involve both the General Assembly and the SC. For example, judges of the International Court of Justice (“ICJ”) are elected from among nominees offered by national groups, which may suggest the names of up to four people, no more than two of whom are their own nationals.<sup>117</sup> The Secretary General then compiles an alphabetical list of the names, which is submitted to both the General Assembly and to the SC.<sup>118</sup> To be elected to the Court,

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116. The claim that permanent dispute resolution bodies were inherently more professional and independent than dispute resolution bodies established ad hoc has been made with regard to other international quasi-judicial entities. For example, Claus-Dieter Ehlermann and Lothar Ehring argue, with regard to WTO dispute resolution panels, that “in contrast to the Appellate Body Members who are appointed for several years, one cannot expect that the *ad-hoc* appointed panel members will act as resolutely as the members of a permanent institution with regard to the outlined problems of fact finding.” See Claus-Dieter Ehlermann & Lothar Ehring, *WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body’s Experience*, 26 *FORDHAM INT’L L. J.* 1505, 1553 (2002).

117. See Statute of the International Court of Justice, art. 5, June 26, 1945, 59 *Stat.* 1055, 3 *Bevans* 1179 (1945) [hereinafter ICJ Statute].

118. *Id.* art. 7.

candidates must receive an absolute majority in both the General Assembly and in the SC.<sup>119</sup>

A different procedure governs the election of the fourteen permanent judges of the International Criminal Tribunal for the former Yugoslavia (“ICTY”). All member states of the United Nations are invited to nominate candidates. The Secretary General compiles a list of these nominees and submits it to the SC, which then establishes a list of no fewer than twenty-eight and no more than forty-two candidates.<sup>120</sup> This list is submitted to the General Assembly, which selects from it the fourteen permanent judges of the ICTY.<sup>121</sup> The procedure for electing judges of the International Criminal Tribunal for Rwanda (“ICTR”) is similar.<sup>122</sup>

We suggest modeling the procedure for electing members of the committee after the procedure for electing judges of the ICTY and the ICTR, both tribunals established by SC resolutions.<sup>123</sup> This procedure allows for the participation of all member states of the UN, which strengthens its democratic nature, and at the same time retains considerable power in the hands of the SC.<sup>124</sup> We recommend electing fourteen members, which would allow the formation of two seven-member panels. The Secretary General of the United Nations would be responsible for nominating panel members from among the fourteen members of the committee. Similarly to the procedure

119. *Id.* arts. 7–10.

120. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res 827, art. 13, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

121. *See id.*

122. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 12, U.N. Doc. S/RES/955 (Nov. 8, 1994).

123. The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) was established by S.C. Resolution 827, for the purpose of “prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace . . .” ICTY Statute, *supra* note 120. The International Criminal Tribunal for Rwanda was established by S.C. Res. 955, *supra* note 122.

124. *See* Blum, *supra* note 21, at 645 (“[T]he General Assembly has frequently been referred to as the ‘democratic’ organ of the United Nations. If ‘democracy’ and ‘equality’ are the watchwords of the General Assembly, they clearly do not apply—and were not intended to apply—to the Security Council.”). Blum thus subscribes to the view that “for any reform proposals of the Security Council to stand a chance of success, the criteria of ‘responsibility’ and ‘effectiveness’ . . . [must] be mixed with a healthy dose of ‘representation’ and ‘democracy.’” *Id.*

for the election of the permanent judges of the ICTY and the ICTR, the SC would establish a list of twenty-eight to forty-two candidates, which would be submitted to the General Assembly to elect the fourteen committee members.

The ICTY's and the ICTR's election model is the preferred one for considerations of both political feasibility and legitimacy. Retaining the final power of appointment in the hands of the SC ensures that the SC would not object to the election process. The decision of the SC to opt for this election model in the past, albeit in a different context, provides further indication that its introduction under the proposed reform would enhance the prospects of the SC adopting the reform, or at the very least would not hurt them. Moreover, this election process has already been used several times and was proven to be workable.<sup>125</sup> Inclusion of the General Assembly in the election process of the committee would render the process more inclusive, enhancing its legitimacy in the eyes of member states. This is consistent with most proposals for UN and SC reform.<sup>126</sup>

It is important to point out that these election processes have been criticized and that scholars have noted, for example, the politicization of the election process of judges of the ICJ.<sup>127</sup> The criticisms of judicial tribunals' election process, however, are of limited relevance to the appointment of the committee. Institutional independence is an important characteristic of a legitimate court system, in particular in light of judicial review, where the courts rule on the legality of actions taken by other

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125. For the list of present ICTY judges elected by the General Assembly, see United Nations ICTY-TPIY, *About the ICTY*, <http://www.icty.org/sections/AbouttheICTY> (last visited Nov. 17, 2012). For the list of present International Criminal Tribunal for Rwanda ("ICTR") judges elected by the General Assembly, see United Nations International Criminal Tribunal for Rwanda, *About ICTR*, <http://www.unictt.org/tabid/111/Default.aspx> (last visited Nov. 17, 2012).

126. See, e.g., Hossain, *supra* note 21, at 300 ("Based mainly on the perceived need for equitable representation, the idea of reform encouraged an increase in the number of members seated on the Security Council. Membership was increased from eleven to fifteen in 1965, but the number of U.N. member states has significantly increased thereafter. The argument in favor of reform was that the Security Council does not clearly represent the whole membership of the U.N.") (citations omitted).

127. CTR. FOR INT'L COURTS & TRIBUNALS, UNIV. COLLEGE LONDON, *SELECTING INTERNATIONAL JUDGES: PRINCIPLES, PROCESS AND POLITICS* 19 (2008), available at [http://www.ucl.ac.uk/laws/cict/docs/Selecting\\_Int\\_Judges.pdf](http://www.ucl.ac.uk/laws/cict/docs/Selecting_Int_Judges.pdf).

branches of government.<sup>128</sup> The committee we propose here, however, will not have judicial review powers over the SC itself (i.e., the power to examine the legality of SC resolutions).<sup>129</sup> Rather, the committee would be established as a quasi-judicial body that operates under the auspices of the SC. Although the committee would be independent in conducting its work and drawing its conclusions, the ultimate authority with regard to the collective use of force remains, in our model, in the hands of the SC.

### E. *Qualifications of Committee Members*

For the proposed mechanism to succeed, it is essential that committee members have international stature and be perceived as being both professional and independent. Although the committee is not a judicial tribunal, it may aptly be described as a quasi-judicial body because its function of interpreting SC resolutions and applying such interpretations to particular situations is of a legal nature and has judicial characteristics.<sup>130</sup> Based on rules stipulating various qualification requirements for membership of international tribunals and quasi-judicial treaty-bodies, we suggest that committee members be “persons of high moral character, integrity and impartiality, with recognized expertise in the fields of international law and, in particular, the law on the use of force.”<sup>131</sup>

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128. THE FEDERALIST NO. 78 (Alexander Hamilton).

129. For sources addressing the issue of judicial review of SC resolutions, see *supra* note 21.

130. Because SC resolutions are binding legal documents, the task of the interpretation of such documents, in particular in light of the principles of interpretation we propose, can aptly be described as a legal task. See *infra* notes 138–50, and accompanying text.

131. Judges of the ICJ, for example, are required to be “independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris consults of recognized competence in international law.” See ICJ Statute, *supra* note 117, art. 2. Judges of the ICTY and the ICTR are required to be “persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices,” and the ICTY Statute determines that “[i]n the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.” See ICTY Statute, *supra* note 120, art. 13. Judges of the International Criminal Court are required to possess established competence in either criminal law

F. *Working Method of the Committee*

With the adoption of a resolution authorizing the use of force, the Secretary General of the United Nations would appoint a seven-member panel from among the committee's fourteen members to begin its oversight function. The panel would be entitled to receive both solicited and unsolicited information from any source, including states, media outlets, NGOs, and private individuals, and would rely on such information in its observations.

Resolution 1973 requests Operating States to inform the Secretary General immediately of the military measures they take pursuant to the authorization, and states that such information "shall be immediately reported to the Security Council."<sup>132</sup> Although SC resolutions authorizing the use of force only "request" Operating States to report to the SC "states seem to regard themselves as obliged to give effect to this request."<sup>133</sup> We recommend that Operating States be bound by such reporting requirement both to the SC and to the committee. But Operating States would not be required to provide information that they believe may endanger their troops and weaken their military position if it were known to the enemy. Such a requirement would be unrealistic<sup>134</sup> and would diminish the willingness of states to carry out SC resolutions authorizing the use of force.

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and procedure or in relevant areas of international law. See Rome Statute of the International Criminal Court, art. 36, U.N. Doc. A/CONF. 183/9 (July 17, 1998), 37 I.L.M. 999. Members of quasi-judicial committees and panels are generally required to possess more modest qualifications. Members of the UN Human Rights Committee, for example, are required to be "independent experts who are persons of high moral character and recognized competence in the field of human rights." International Covenant on Civil and Political Rights art. 28, Dec. 16, 1966, 999 U.N.T.S. 171. While members are not required to be jurists, the Covenant indicates that "consideration [is] being given to the usefulness of the participation of some persons having legal experience." *Id.* Since the proposed committee is not a judicial tribunal, it seems not only unnecessary to require that its members possess the qualifications required to hold judicial offices in their respective countries but also undesired from a political perspective, since it may characterize the committee as a court, which may, in turn, deter Operating States from action. On the other hand, the committee would be required to interpret SC resolutions, a task that is of a legal nature.

132. S.C. Res. 1973, *supra* note 1, ¶ 4.

133. DE WET, *supra* note 45, at 272.

134. *Id.* at 273.

In examining the compatibility of the actions of Operating States with the mandate provided by the resolution, the panel would be authorized to appoint a team of experts to assist in gathering, analyzing, and assessing the relevant information.

The sanctions committees commonly rely on the assistance of experts. SC resolutions establishing sanctions committees have often also established a group or panel of experts to assist the committees.<sup>135</sup> The Secretary General of the United Nations appoints the experts. In contrast with sanctions committees, however, the proposed committee would not be a political arm of the SC but rather a professional body. It is therefore reasonable to allow the committee itself to designate the matters for which it would require expert assistance, but for reasons of administrative convenience the formal appointment should be made by the Secretary General upon the request of the committee.

Having reviewed the available information, and before submitting any observations and clarifications to the SC, the panel would be required to give the Operating States an opportunity to respond to any concerns the panel may have regarding the compatibility of their operations with the mandate.

For reasons of efficiency, we propose that the committee make its decisions by majority vote.<sup>136</sup> To strengthen the independence of committee members and to reduce the political pressures on them, we recommend that submissions to

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135. *See, e.g.*, S.C. Res. 1973, *supra* note 1, ¶¶ 13–14, 15, 17, 19, 23–26 (stating that S.C. Resolution 1970 established a committee to monitor the implementation of the sanctions imposed on the Libyan regime under the resolution). Resolution 1973 requested the Secretary General to create, in consultation with the sanction committee, a group of up to eight experts, under the direction of the committee, to assist the committee in performing its tasks). *Id.* ¶ 24; *see also* S.C. Res 1929, ¶ 29, U.N. Doc. S/RES/1929 (June 9, 2010) (requesting the Secretary General to establish a group of eight experts to assist the Iran sanctions committee in its work); S.C. Res. 1591, ¶ 3(b), U.N. Doc. S/RES/1591 (Mar. 29, 2005) (deciding to establish a Panel of Experts to assist the Sudan sanctions committee).

136. *See id.* (stating that while other subsidiary bodies, such as sanction committees, operate by consensus, a requirement of consensus has the potential of seriously impairing the committee's efficiency and the effectiveness of its recommendations).

the SC be signed by the committee as a whole and that individual opinions not be published.<sup>137</sup>

### G. *The Interpretative Role of the Committee*

One of the central functions of the committee would be interpreting SC resolutions. As commentators have noted, the SC's subsidiary organs often interpret SC resolutions while performing their functions, and their interpretation is binding if the relevant resolutions so determine.<sup>138</sup>

There is no coherent body of law specifying the principles of SC-resolution interpretation. However, the ICJ in the 1971 Namibia Advisory Opinion provided some guidance. The ICJ observed that an SC resolution should be construed "having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution."<sup>139</sup>

Scholars who have addressed the issue offered several guiding principles for such interpretation. For example, Michael Wood proposed a model of interpretation based on the principles governing the construction of treaties, stipulated in Articles 31 to 33 of the Vienna Convention on the Law of Treaties.<sup>140</sup> Wood conceded, however, that the analogy with the construction of treaties is of limited reach because "the differences are very great."<sup>141</sup> Unlike treaties, SC resolutions are often drafted hastily, contain internal inconsistencies, and lack

137. Rules of Procedure of the Court of Justice, art. 64.2, 2012 O.J. L 265/1 (showing how this suggestion draws on the model of the European Court of Justice, where all judges that deliberated a particular case sign the court's decision).

138. Wood, *supra* note 18, at 84 (mentioning the ICTY, as well as the ICTR, the United Nation's Claims Commission, and the Sanctions Committees as examples of bodies that produce binding interpretation of SC resolutions).

139. Legal Consequences for States of Continued Presence of South Africa in Namibia (W. Afr.) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 53 (June 21). Michael Wood observed that "the Court was not necessarily making a general statement about the interpretation of SCRs [Security Council resolutions], but was dealing with the question whether particular SCRs had binding effect. But its remarks in this case may offer some guidance to the more general issues." Wood, *supra* note 18, at 75.

140. See Wood, *supra* note 18, at 88–95; see also Vienna Convention on the Law of Treaties arts. 31–33, May 23, 1969, 1155 U.N.T.S. 331.

141. *Id.*

the preciseness of treaties. There is little dispute, however, that the text of an SC resolution is the starting point for interpretation and that the general aim of interpretation should be “to give effect to the intention of the Council as expressed by the words used by the Council in the light of the surrounding circumstances.”<sup>142</sup> Such “surrounding circumstances” relevant to the identification of the Council’s intention include the “legislative history” of the resolution, that is, documents constituting the preparatory work leading to the adoption of a resolution, as well as “statements made by Council members (and by others) in the Security Council before and after adoption.”<sup>143</sup> They also include related SC resolutions both preceding and following the adoption of the resolution at hand, as “[u]nlike most treaties, SCRs [Security Council resolutions] are often part of a series and it is only possible to understand them as such.”<sup>144</sup>

The intention of the SC, however, cannot always be identified. The difficulty in identifying the Council’s intention lies precisely in the type of situations the present article addresses, one in which a resolution can be interpreted in good faith in several ways. In these situations, the interpretation is informed by external principles of international law, such as the general principle of proportionality,<sup>145</sup> the principles of international humanitarian law<sup>146</sup> and *jus ad bellum*,<sup>147</sup> and the goals of the United Nations.

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142. *Id.* For the view that interpretation of SC resolutions should rely primarily on the resolution’s text, see James D. Fry, *Remaining Valid: Security Council Resolutions, Textualism, and the Invasion of Iraq*, 15 TUL. J. INT’L & COMP L. 609 (2007).

143. Wood, *supra* note 18, at 90, 93.

144. *Id.* at 87.

145. See Lehmann, *supra* note 5, at 133 (examining the scope of permission to use force under SC Resolution 1973 and concluding that “[p]roportionality thus ought to be a principle inherent in all Chapter VII UNSC Resolutions”).

146. Lehmann submits that “[i]t would appear that at least the use of terms by the UNSC is to be understood in accordance with IHL [international humanitarian law] and that there is a presumption of compliance.” Lehman resorts to the relationship between Resolution 1973 and humanitarian law examining the contours of the authorization to use all necessary means to protect “civilian inhabited areas under threat of attack.” *Id.* at 123, 135–36.

147. Observing that the term “all necessary measures” used by the SC in Resolution 1973 is ambiguous, Lehmann suggests that “analysis of the meaning of the term in other *jus ad bellum* situations may help to clarify its meaning.” *Id.* at 131.



Several authors have advocated a restrictive or at least conservative approach to interpreting SC resolutions.<sup>148</sup> Even without ruling on the desirability of adopting a general principle of restrictive interpretation, it seems safe to assume that a committee of the type we describe, appointed in the manner we suggest, will likely interpret resolutions in a more conservative manner than would Operating States volunteering to carry out such resolutions.

#### H. *Status of the Committee Findings*

It is the task of the committee to interpret SC resolutions authorizing the use of force and to examine the compatibility of military measures taken by Operating States with these resolutions. Were the committee to find that the military measures taken by Operating States exceeded the terms of the SC resolution authorizing the use of force, it would submit *clarifications* to the SC regarding the scope of the permission to use force granted by the resolution. These clarifications may include general legal guidelines (e.g., “the resolution authorizes the use of force only against armed forces that present an *imminent* threat to civilians”) as well as operative recommendations regarding acts that Operating States should take or refrain from taking in order to bring their operations in line with the resolution.

Michael Wood observed that “[o]nly the Security Council, or some body authorized to do so by the Council, may give an authentic interpretation in the true sense . . . . [T]he decisions of the subsidiary organs are binding to the extent provided for in the relevant SCRs [Security Council resolutions].”<sup>149</sup> Because an authentic interpretation of SC resolutions is legally binding

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148. See N. Jansen Calamita, *Sanctions, Countermeasures, and the Iranian Nuclear Issue*, 42 VAND. J. TRANSNAT'L L. 1393, 1415 (2009) (“A conservative approach to the resolution of ambiguities safeguards the interpretative exercise from reading into the text of the resolution what negotiation and drafting have failed to provide. Moreover, given the usually self-assessed character of the interpretation of the Council’s resolutions, a restrictive approach may serve to place constraints on aggressive unilateral interpretation or at least remove broad and malleable supporting principles (on the international legal plane) from the consideration of the legitimacy of such interpretations.”) (citations omitted). See also Lobel & Rainer, *supra* note 10, at 125 (“[A]mbiguous authorizations should be narrowly construed.”).

149. Wood, *supra* note 18, at 82–84.

for all states involved, “the line between interpretation and amendment is not always clear.”<sup>150</sup> Under the proposed mechanism, the clarifications of the committee would have the status of *authentic interpretation* of the resolution authorizing the use of force, and its operative recommendations would become binding for the Operating States, unless they were rejected within two weeks of their submission by an SC resolution adopted in accordance with the regular voting rules of the Council. Hence, each permanent member of the SC would be able to ensure the binding status of the committee’s clarifications by vetoing a resolution rejecting such clarifications.

Under the model we propose, the SC would authorize a subsidiary organ to interpret and monitor its resolutions while maintaining the ultimate authority over the operation of the collective security mechanism. Because the powers to provide an “authentic interpretation” of SC resolutions and to monitor the execution of such resolutions are vested with the SC as part of its exclusive responsibility for the maintenance of international peace and security, the authorization of the committee could be perceived as a delegation of the powers of the SC. We believe this model is compatible with the limits imposed on the ability of the SC to delegate its powers.

Danesh Sarooshi defined the delegation of powers in the international arena as “taking place whenever an organ of an international organization which possesses an express or implied power under its constituent instrument conveys the exercise (sic) of this power to some other entity.”<sup>151</sup> He explained that “[a] delegation of powers does not involve the transfer of a power *in toto*.”<sup>152</sup> This implies a requirement that the delegating organ retain the ability to both revoke the delegation of powers and exercise its powers concurrently with the delegate.<sup>153</sup> According to Sarooshi, “[t]he Security Council possesses a general competence to delegate its powers to certain entities.”<sup>154</sup>

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150. *Id.* at 84.

151. DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS* 4–5 (1999).

152. *Id.* at 7.

153. *Id.*

154. *Id.* at 16. This competence exists both under the UN Charter and as a general principle of the law of international organizations. *Id.* at 16–17.

This competence, however, is not absolute, and limitations to such delegation should be construed to ensure that the SC retains ultimate authority for the maintenance of international peace and security.<sup>155</sup> The proposed oversight mechanism is consistent with this requirement because the SC does not cede its powers under the UN Charter. Just as the SC can establish the committee, it can disestablish it or revise its mandate. There is nothing to prevent the SC from rejecting any clarifications the committee may submit or from adopting resolutions that concern the interpretation or execution of a previous resolution authorizing the use of force. The responsibility for the operation of the collective security mechanism would thus remain within the hands of the SC.

Under our model, unless the SC decides otherwise, the clarifications of the committee effectively become binding interpretations of the initial resolution authorizing the use of force. Sarooshi suggested that the ability of the SC to delegate the power to issue binding decisions stems from the “general competence of the Council to delegate its powers,” provided that the authority to issue binding decisions is conferred upon the organ explicitly<sup>156</sup> and that the SC finds the delegation of such authority to be “necessary for the maintenance of international peace and security.”<sup>157</sup> The SC may thus authorize the committee to issue decisions that are binding upon states.<sup>158</sup>

In many cases the clarifications of the committee will be binding because if the committee were to find that an operating state overstepped the limits of the mandate to use force, it is plausible that at least one permanent member of the SC will veto a resolution that rejects the findings of the committee. Although this is a probable scenario, it will not necessarily occur in every instance. Political circumstances underlying the agreement among permanent members of the SC on the initial authorization to use force may also support continued

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155. *See id.* at 36–41.

156. *Id.* at 109.

157. *Id.* at 107.

158. *See id.* (discussing a situation in which the SC delegated powers to the international criminal tribunals to issue decisions that were binding on states with regard to cooperation with the tribunals).

consensus within the SC rejecting a narrow construction of such authorization by the committee.

More important, however, is the ability of SC members that are not Operating States to use the findings of the committee as leverage in negotiating with Operating States the terms of their continued discharge of the mandate. Faced with committee clarifications that threaten to become binding, Operating States may be more receptive to critique raised by other states regarding their operations. A permanent member may offer to withhold its objection to a resolution rejecting the clarifications of the committee in exchange for the Operating States changing their course of action. Thus, the clarifications of the committee can serve as an incentive for members of the SC to renegotiate the terms and conditions of the use of force. Whereas reluctance to apply the conclusions reached by a legal body may be problematic in a legal setting, the collective security mechanism is essentially a political setting. In the context of the use of force, a solution that is based on the agreement of SC members is not only efficient but also reflects the basic principles of the Charter.

Our proposal may raise concerns about the need to establish a new body to monitor the implementation of SC authorizations to use force. It may be argued that the SC can simply empower the Secretary General of the United Nations to oversee the implementation of its resolutions rather than establish a committee. The Secretary General oversaw the execution of Chapter VII resolutions on at least two occasions. In 1993, the SC adopted Resolution 814 on Somalia. Declaring that it was acting under Chapter VII of the U.N. Charter, the SC requested that the Secretary General utilize the expanded UN forces in Somalia (“UNOSOM II”),<sup>159</sup> “to support from within Somalia the implementation of the arms embargo” and “to direct the Force Commander of UNOSOM II to assume responsibility of the consolidation, expansion and maintenance of a secure environment throughout Somalia.”<sup>160</sup> In the same year, the SC adopted Resolution 836, which authorized member states to take “all necessary measures, through the use of air

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159. See S.C. Res. 814, U.N. Doc. S/RES/814 (Mar. 26, 1993); *Completed Peacekeeping Operations*, U.N. DEP'T OF PUB. INFO., <http://www.un.org/en/peacekeeping/missions/past/unosom2.htm> (last visited Mar. 26, 2013).

160. S.C. Res. 814, ¶¶ 10, 14, U.N. Doc. S/RES/814 (Mar. 26, 1993).

power . . . to support [the United Nations Protective Force] UNPROFOR,” deployed in Croatia, Bosnia and Herzegovina, “subject to close coordination with the UN Secretary General and UNPROFOR.”<sup>161</sup> The SC explicitly requested that the “Member States concerned, the Secretary General and UNPROFOR . . . coordinate closely on the measures they are taking . . . .”<sup>162</sup> It was observed that the Secretary General “interpreted the phrase ‘coordinate closely’ to mean that his consent must be given, as the agent of the Council, before air power can be used”<sup>163</sup> and that this interpretation “received widespread support from many other Council Members.”<sup>164</sup>

Commentators have questioned the relevance of the Somalia and Bosnia precedents to the drafting of highly specific authorizations to use force.<sup>165</sup> The reasons they cited apply equally to the possibility of granting extensive oversight powers to the Secretary General. Here too, those precedents “add little to our understanding,”<sup>166</sup> as “they involved relatively small-scale operations in which the major powers were reluctant to employ force.”<sup>167</sup> The interventions in Somalia and Bosnia involved relatively little risk that the Operating States would grossly exceed the limits of the mandate and were viewed by the Operating States as “low-stakes” conflicts in which the potential costs of an overly narrow construction of the mandate were not substantial.<sup>168</sup> Indeed, the disagreement between the United States and the Secretary General with regard to the situation in Somalia, the former seeking to narrow the scope of the mandate to use force while the latter arguing that it should be

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161. S.C. Res. 836, ¶ 10, U.N. Doc. S/RES/836 (June 4, 1993).

162. *Id.* ¶ 11.

163. SAROOSHI, *supra* note 151, at 83.

164. *Id.*; *see also* Lobel & Ratner, *supra* note 10, at 141 (“In Bosnia, a dispute between the United States and the Secretary-General arose as to whether air strikes against Bosnian Serb targets had to be authorized by the Secretary-General and approved by the UN commander. When most of its NATO allies supported the Secretary-General, the United States backed down and recognized UN authority. The Somalia authorizations accorded substantial authority to the Secretary-General as well.”) (footnote omitted).

165. Lobel & Ratner, *supra* note 10, at 143–44; *see also supra* note 95 and accompanying text.

166. *Id.* at 143.

167. *Id.*

168. *Id.* at 143–44.

broadened, is revealing.<sup>169</sup> The fundamental reluctance of all permanent members of the SC to use force was the underlying reason for their general willingness to accept various controls on the use of force, including substantial oversight powers granted to the Secretary General, “restrictions that would have been rejected in a major war in which a permanent member had substantial interests.”<sup>170</sup>

We noted above that the willingness of SC members to accept the proposed oversight mechanism depends largely on the international stature of committee members and their being perceived as both highly professional and independent jurists. In this respect, it seems that the proposed committee would be better suited than the Secretary General to carry out the oversight function proposed here. Replacing the proposed committee with the Secretary General raises concerns of both institutional and professional competence. The Secretary General and the members of the SC coordinate on a variety of situations and issues. Authorizing the Secretary General to issue binding interpretations to SC resolutions can potentially lead to tensions between the Secretary General and members of the SC, which could have a negative effect on the working relations between the two organs, and eventually weaken the UN.

Moreover, the tasks of interpreting SC resolutions and examining state action in light of such interpretation, which we propose to bestow on the committee, are quasi-judicial tasks and as such subject to a strict requirement of objectivity. To maintain such objectivity, the individuals examining a situation should have no prior involvement with that situation, a requirement that would be difficult to impose on the Secretary General, who is often involved in political negotiations aimed at preventing the need to use force, and in coordinating and supervising

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169. *Id.* (“[I]n Somalia the United States initially, and at various points thereafter, sought to narrow the objective for which force would be used, while the Secretary-General pushed to widen the mandate.”).

170. *Id.* SC Resolution 1973, which authorized the use of force in Libya, requested Operating States “to coordinate closely with each other and the Secretary-General on the measures they are taking” to implement the resolution. S.C. Res. 1973, *supra* note 1, ¶ 10. However, there is no indication that either the Operating States or the Secretary General viewed this provision as vesting the latter with substantial oversight powers. The Resolution also requests Operating States to coordinate with each other, which supports the view that such coordination does not imply oversight powers.

peacekeeping operations that precede the use of force. Finally, the interpretation of SC resolutions is a legal task requiring legal expertise, which the Secretary General does not necessarily possess.

The model proposed here significantly moderates the risks assumed by permanent SC members acting as Operating States, compared to a model that allows the revocation of a mandate altogether over the objection of a permanent SC member. By contrast, the model proposed here would not expose Operating States that volunteer to act as agents on behalf of the international community to the risk of incurring the political costs that may attach to a newly imposed legal obligation to withdraw from a high-stakes armed conflict initiated by such states at the bidding of the SC. Such an outcome, which may be perceived by the Operating States as “losing the war,” would presumably be considered unacceptable to these states, and therefore significantly diminish the feasibility of such a scheme. Rather, the proposed model may require Operating States that exceeded the original mandate only to make the necessary adjustments that would bring their operations in line with the mandate.

To some extent, the proposed model draws on the negative (or reverse) consensus model embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) of the World Trade Organization (“WTO”),<sup>171</sup> which regulates the resolution of all disputes arising under the main WTO trade agreements.<sup>172</sup> The DSU provides for the resolution of disputes through proceedings held before panels of professional experts who submit recommendations to the Dispute Settlement Body (“DSB”), a political body comprised of all members of the WTO.<sup>173</sup> The recommendations submitted by the panel of experts become binding upon adoption by the DSB.<sup>174</sup> But under a reform to the dispute settlement mechanism introduced in 1995, the decision of the DSB

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171. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

172. DSU, *supra* note 171 (providing the list of covered agreements is specified in Appendix 1 to the Dispute Settlement Understanding (“DSU”)).

173. DSU, *supra* note 171, art. 16.

174. *Id.*

whether to adopt a recommendation submitted by a panel of experts is governed by the rule of reverse consensus: unless all members of the DSB, including the state filing the complaint, agree otherwise, the decision to adopt the recommendation of the panel is automatically accepted.<sup>175</sup>

The objective of this reform was to correct the systematic deficiencies of the previous DSB voting system, which required that panel recommendations be adopted by consensus, a requirement that often led to stalled and ineffective proceedings.<sup>176</sup> The reform represents a precedent of the willingness of states to cede veto powers within the framework of an international organization in matters involving significant national interests, as part of a shift from an “ethos of diplomacy” to a “culture of law.”<sup>177</sup> Some have gone as far as arguing that the reverse consensus amounts to forgoing elements of state sovereignty. For example, Laurence Tribe argued before the United States Congress:

[T]he “reverse consensus” requirement is a 180-degree turnaround from prior GATT practice; it means that individual nations, including the United States, no longer maintain a de facto veto over GATT dispute panel decisions. This turnaround . . . is alone sufficient to distinguish the Uruguay Round’s potential effects on state sovereignty from the effects of all previous GATT agreements.<sup>178</sup>

The example of the WTO reverse consensus mechanism demonstrates that states may be willing to forgo considerable powers to enable the operation of an international institution they consider deserving. Although ability to appeal a panel’s decision mitigates, to some extent, the finality of panel recommendations,<sup>179</sup> the reverse consensus mechanism remains an example of a political body voluntarily limiting its powers for the sake of strengthening the overall system of international

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175. *Id.* art. 16.4.

176. See Ari Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT’L L. & BUS. 775, 796–801 (1997).

177. Weiler, *supra* note 13, at 181, 185, 187.

178. See Memorandum from Walter Dellinger, Assistant Att’y Gen., Office of Legal Counsel, to Ambassador Michael Kantor, United States Trade Representative (Nov. 22, 1994), available at <http://www.justice.gov/olc/gatt.htm>.

179. See DSU, *supra* note 171, art. 17.



cooperation.<sup>180</sup> The precedent of states forsaking their previous veto powers indicates that it is politically feasible to agree upon such a mechanism, at least under certain conditions.

### CONCLUSION

The United States has voiced “disgust”<sup>181</sup> with the Russian and Chinese veto of any Western initiative for SC action in Syria. There seems to be a connecting thread between this disgust and the distrust toward any similar initiatives displayed by Russia and China following the NATO military intervention in Libya. The chill of the crisis of trust between the permanent members of the SC after the military intervention in Libya has brought the operation of the SC collective security mechanism close to Cold War temperature, as exemplified by the SC inaction in the face of the atrocities in Syria.

The crisis of trust is the result of a lack of sufficient SC control over the implementation of its resolutions authorizing the use of force. Any reform in SC practices aimed at enhancing such control would require that permanent members of the SC cede certain aspects of their veto power. Such concessions cannot be expected in the context of the purely political process that currently characterizes the SC collective security mechanism. But the experience of the WTO shows that member states of an international organization can be more receptive to concessions affecting their veto power within a context of reform that brings together the “culture of law” and the “ethos of diplomats.” The present article proposes such a reform in the practice of the SC in the form of an oversight mechanism that would rely on the services of jurists but leave ultimate authority over the operation of the collective security mechanism in the hands of the SC.

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180. It should be noted that some have claimed the requirement of adoption by the Dispute Settlement Body (“DSB”) distinguishes the WTO dispute settlement system from a “truly judicial” system. See Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, 38 *TEX. INT’L L.J.* 469, 478 (2003).

181. *Strong Words at U.N. After Syria Veto*, CNN (Feb. 5, 2012), <http://www.cnn.com/2012/02/04/world/meast/syria-un-remarks> (quoting Susan Rice, the US Ambassador to the United Nations, as saying “[t]he United States is disgusted that a couple of members of this council continue to prevent us from fulfilling our sole purpose here—addressing an ever-deepening crisis in Syria and a growing threat to regional peace and security”).

The cornerstone of the proposed mechanism is the establishment of a committee of legal experts whose interpretation of SC resolutions authorizing the use of force would be binding for Operating States unless the SC decided otherwise. We suggest that such a reform is both politically feasible and effective in promoting consonance between the aims of SC authorizations to use force and the measures taken by states acting upon such authorizations.