THE SECURITY COUNCIL'S OBLIGATIONS OF GOOD FAITH

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July-August 2003

(originally published in Florida Journal of International Law, Vol..XV, No. 4 (Summer 2003), pp.541-573)

Contents

***Abstract**: The paper first demonstrates that the members of the United Nations Security Council are under a legal duty, both under the Charter and under general principles of international law, to carry their Charter obligations in good faith. The paper then proceeds to identify a selected set of situations in which the Council might violate this legal obligation, namely when determining a "threat to the peace", when selecting measures to respond to such a threat and when deciding when the threat has ended. The paper then proceeds to review apparent violations by Council members of their duty of good faith and demonstrates that due to the inherent nature and composition of the Council, its good faith cannot be presumed. Due to this fact and to the lack of effective political and legal restraint, the situation may arise whereby the Council itself or its decisions would represent a threat to international peace and security. In order to prevent this from occurring a number of responses are suggested.*

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Note:The following acronyms are used in this article: SCR=Security Council Resolution; UNGA=United Nations General Assembly, UN=United Nations, US =United States, UK=United Kingdom, ILC=International Law Commission, ICJ=International Court of Justice

I. INTRODUCTION

The primary responsibility of the U.N. Security Council, as stipulated in Article 24 of the U.N. Charter, is to ensure international peace and security. It does so, *inter alia*, by determining whether there exists any threat to the peace, breach of the peace or act of aggression and by deciding how to respond to such situations. Article 2 (2) of the U.N. Charter requires all member States, "in order to ensure to all of them the rights and benefits resulting from membership, [to] fulfil in *good faith* the obligations assumed by them in accordance with the present Charter."[**1**]

The obligation of good faith is a general principle of international law.[**2**] According to Article 26 of the Vienna Convention on the Law of Treaties (Vienna Convention), "[e]very treaty in force . . . must be performed by [its Parties] in good faith".[**3**] The U.N. Charter is a treaty. Its members must therefore fulfill their treaty obligations in good faith, including when acting within organs established by that treaty.

The principle of good faith has a long history and is related to the theory of abuse of rights (*abus de droit)*. Cheng discusses in detail the nature of the theory of abuse of rights (breach of good faith) under the headings (A) The Malicious Exercise of a Right; (B) The Fictitious Exercise of a Right; (C) Interdependence of Rights and Obligation; and

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1 U.N. Charter art. 2, para. 2 (emphasis added)

2 Ian Brownlie, *Principles of Public International Law*, Clarendon Press, Oxford, (1990), p. 19

3 Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331 [hereafter Vienna Convention]

(D) Abuse of Discretion[**4**]. A related area of municipal law is that of the abuse of discretionary rights, applicable mostly to executive, administrative and judicial bodies.

A public authority that repeatedly fails to act in good faith undermines its own legitimacy[5]. David D. Caron writes: "Broadly speaking, a perception of illegitimacy might be said to affect the effectiveness of an institution in two ways: First, it might undercut the perceived legitimacy of the rules that emanate from the institution. Second, it might threaten the future effectiveness of the institution.[**6**]. It is a known fact that political bodies, such as governments, are prone to abuse their discretionary powers. Government abuse can be contained through periodic elections and through constitutional courts or appeals mechanisms. No such mechanism exists with regard to the Security Council and its decisions. In Derek Bowett's words: "[T]he apparent expectation that the Council will function under the Rule of Law is not reinforced by the normal legal safeguards one would expect to find surrounding the exercise of executive powers in a democratic, constitutional system . . . Even more disturbing, the Council frequently fails to indicate the constitutional basis - i.e. the Charter provision - on which it acts." [7] This circumstance alone provides a compelling reason for subjecting the Council to the test of good faith. Caron reviews various issues regarding allegations of illegitimate Council decisions, including "circumstances that underpin two broad perceptions of illegitimacy regarding the collective authority of the Security Council" [8]. He refers to the perception of dominance of the Council by a few states and the perception of unfairness surrounding the veto. In the present article we present further grounds for questioning the legitimacy of the Security Council and its decisions.

II. THE RELEVANCE OF GOOD FAITH WITH REGARD TO THE ABILITY OF THE COUNCIL TO FULFIL ITS MANDATE

The breach of good faith by the Council or its members, by and in itself, does not give rise to international liability, neither that of the United Nations nor of those members states who may breach their duty of good faith. However, subjecting the decisions of the Security Council to the test of good faith may be relevant for states who are loath to pursue Council decisions they consider as *ultra vires*. Should wide segments of popular opinion around the world reach the conclusion that the Security Council, as presently composed, cannot be presumed to act in good faith, this conclusion could have significant, or even revolutionary, consequences.

III. HOW CAN THE GOOD FAITH OF THE COUNCIL BE ASSESSED?

The Security Council possesses a wide margin of discretion to determine when collective action for the maintenance of peace is necessary. Using the terminology introduced by Cheng, we say that the Council possesses certain rights, such as to characterize circumstances as threatening international peace and security, to select measures in response to such circumstances and to implement or order member states to implement such measures.

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4 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* Stevens & Sons Ltd., London (1953), Chapter 4, pp. 121-136

5 See, *inter alia*, T. D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, XXVI Netherlands Yearbook of International Law (1995), pp. 127-134.

6 David D. Caron, *The Legitimacy of the Collective Authority of the Security Council,* 8 AM.J.INT'L L. 558 (1993)

7 Derek Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, EJIL Vol. 5 No. 1 (1993?), http://www.ejil.org/journal/Vol5/No1/art7.html

8 See, e.g., Caron, *supra* note 6, at 552-588

There are numerous occasions in which the Council might abuse such rights. First, abuse may arise when it determines the existence of a threat to the peace, breach of the peace, or act of aggression or fails to do so. Secondly, the selection and design of responses to the threat or breach of the peace may result in abuse. Thirdly, the Council may abuse its discretion when it reviews measures it already imposed.

The Security Council would thus not be acting in good faith if it were to fraudulently characterize a situation as a threat to international peace and security, which by any reasonable standard does not constitute such a threat. States wielding their veto power, or threatening to do so, would equally breach their obligations of good faith, if by such conduct they prevent the Council from responding effectively to serious threats to, or breaches of, the peace. When selecting responses to threats to, or breaches of, the peace, the Council would abuse its discretionary rights, were it to select measures unlikely to restore the peace, or fail to end such measures it has already adopted when it has become obvious that they are not effective to restore the peace.

The Security Council has often been rightly criticized for pursuing double standards. The preamble of the U.N. Charter includes, however, the pledge of U.N. members to "reaffirm faith . . . in the equal rights . . . of nations large and small".[**9**] Article 2(1) of the U.N. Charter also places a duty upon both the United Nations (and its organs) and its members to act in accordance with the "principle of the sovereign equality of all its Members."[**10**] This obligation extends to all purposes of the U.N. Charter (enumerated under Article 1), including action for the maintenance of international peace and security.[**11**] Should the Council only respond to breaches committed by small or weak nations and fail to act when powerful nations commit similar or even more serious breaches, it would not fulfil its duty to act in good faith with respect to the principle of the sovereign equality of all U.N. members.

A. What Could Constitute a "Threat to the Peace"?

Under the provisions of the U.N. Charter, the Security Council is entitled to initiate collective enforcement measures when having determined either one of three situations: The threat to the peace, a breach of the peace, or an act of aggression. While the U.N. General Assembly adopted in 1974 a definition of "aggression",[**12**] its use is not binding on the Council. Moreover, the Council has "never made a determination that a given situation or use of force by any State constituted an act of aggression".[**13**] The Council, in order to retain the highest degree of discretion in responding to such acts, designates even blatant acts of aggression as "breaches of the peace".[**14**] In spite of distinguishing between aggression and a breach of the peace in its terminology, the Council has

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9 U.N. Charter pmbl.

10 *Id*. art. 2, para. 1

11 *Id.* art. 1.

12 UNGA Resolution 3314 (1974). U.,N. GAOR, 29th Sess, U.N. Doc. A/RES/3314 (1974)

13 Gill, *supra* note 5, at 44-45. However, by SCR 573 (1985), the U.N. Security Council condemned "vigorously the act of armed *aggression* perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct" and demanded "that Israel refrain from perpetrating such acts of *aggression* or from the threat to do so" (emphasis added). The Council did not, however, refer to Article 39 of the Charter in its resolution.

14 *Id.* (Gill), at 45. Even the invasion and occupation of Kuwait by Iraq in August 1990 was not characterized as an act of aggression, but as a "breach of the peace". *Id.*

responded to various breaches of the peace in a similar manner as if they were acts of aggression, particularly by designating the guilty party.[**15**]

Of interest here is the third elusive situation that may be invoked by the Council to trigger enforcement action – threats to the peace. There exists no definition what this expression actually means. Most observers, including those who have identified legal limits to U.N. enforcement action, consider that the Council possesses unlimited discretion to determine what constitutes a threat to the peace.[**16**] Few, if any, have questioned this unlimited discretion.[**17**]

Indeed, a plain reading of the U.N. Charter provides little if any criteria to be used in gauging the existence of a threat to the peace. No provisions of the U.N. Charter place an explicit limit on what could conceivably constitute a threat to the peace. Theoretically, any situation, circumstance or act, by a single person or by a whole nation, could be determined as a threat to the peace. According to a textual reading of the U.N. Charter, the Council would be entitled to do nothing even in the face of the most blatant violation of a member state's sovereignty or of its territorial integrity, as a threat to the peace; conversely, it would also be entitled to designate legitimate or even trivial conduct by states or individuals as such a threat to international peace and security.

1. The Concept of 'State of Necessity" in Justification of Countermeasures

When carrying out its primary responsibility for the maintenance of international peace and security, the Council is acting in lieu of member States. States are entitled to use force against, or engage in unfriendly conduct towards, other states in cases of necessity. The plea of necessity must not be contrived. Cheng lists several rules that can be deduced from case law regarding the plea of necessity:

1. When the existence of a State is in peril, the necessity of self-preservation may be a good defence for certain acts which would otherwise be unlawful . . .
2. [T]he proprietary rights of others . . . may be disregarded in case of an irresistible and absolute necessity.
3. This necessity must be "absolute" in that the very existence of the State is in peril
4. This necessity must be "irresistible" in that all legitimate means of self-preservation have been exhausted and proved to be of no avail.
5. This necessity must be actual and not merely apprehended.[**18**]

The judgement of the International Court of Justice (ICJ) regarding the Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia) (1997) demonstrates how a court ascertains the legality of acts in the light of the principle of a "state of necessity". [**19**] In that case, the ICJ referred in paragraph 50 to Article 33 of the International Law Commission Draft Articles on State Responsibility.[**20**] According to this Article a state

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15 For example, in SCR 660 of 2 August 1990, the Security Council determined "that there exists a breach of international peace and security" and identified the guilty party by "condemn[ing] the Iraqi invasion of Kuwait." S.C. Res. 660, U.N. SCOR, 45th Sess.,2932d mtg., U.N. Doc. S/RES/660 (1990).

16 Gill writes, for example: "The Security Council is not bound by any definition or formula as to what constitutes a threat to or breach of the peace or act of aggression." Gill, *supra* note 5, at 40.

17 See D.W. Greig, International Law, ch. 13 (1976)

18 Cheng, *supra* note 5, at 71

19 Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997, I.C.J. REP. 7 (Sept. 25), available at http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925_frame.htm (last visited Apr. 7, 2003)

20 *Id.* para. 50.

of necessity would only preclude the wrongfulness of acts (countermeasures) when it "was the only means of safeguarding an essential interest of the State against a grave and imminent peril . . ."[**21**]

The ICJ considered in paragraph 51 "that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation."[**22**] When circumstances arise in the world that threaten gravely and imminently the existence of the international community or the international order, those mandated to ensure the peace would be entitled to invoke a state of necessity.

2. Application of the Concept of "Necessity" to the U.N. Security Council

Let us now apply the criteria of necessity to situations in which the Security Council deems a circumstance as constituting a threat to international peace, warranting the use of coercion or force against individuals or states. It is obvious that the Council cannot wait for a situation to evolve to the point that a number of individuals could put the existence of the international community, or mankind, in peril. It is, however, equally true that the Security Council – as the agent of the collective will of U.N. members – may only act when a threat to international peace is imminent and grave and certainly not as a response to contrived or hypothetical threats, or to threats that are not imminent and can be dealt with by consultation, negotiation and other peaceful recourse.

States invoking the plea of necessity for violating the rights of other states, or imposing a state of emergency in their internal order, bear a burden of proof to demonstrate the irresistible need for such measures.[**23**] By analogy it is submitted that the Council, when invoking a threat to the peace as the key to the imposition of forceful measures, would equally bear the burden of proving the existence of an imminent and grave threat that cannot be dealt with by any other means.

After the demise of the Soviet bloc, a perceptible widening could be observed in the interpretation by the Western-dominated Council of the concept of threat to the peace. Whereas formerly the concept was mostly limited to blatant interstate threats, the Council widened its interpretation to selected internal conflicts and other circumstances in which no direct threat is levelled at any particular state.

By resolution 794 (1992), the Council determined that the "magnitude of the human tragedy caused by the conflict in Somalia" constituted a threat to international peace and security.[**24**] Similar determinations were made with regard to the internal situation in Haiti[**25**] and in Iraq.[**26**] Such determinations were not made, however, with regard to

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21 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *adopted by the* International Law Commission, 53d Sess. art. 25 (1)(a) (2001)

22 Gabcikovo-Nagymaros Project, *supra* note 19, ¶ 51.

23 Cheng, *supra* note 4, at 73-74

24 S.C. Res. 794, U.N. SCOR, 47th Sess, U.N. Doc. S/RES/794 (1992); Caron, *supra* note 6, at 552, n.3.

25 SCR 841 (1993) refers to "these unique and exceptional circumstances, the continuation [of which] threatens international peace and security in the region". S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg.,U.N. Doc. S/RES/841 (1992). The circumstances referred to in the resolution are mainly domestic in nature although in order to bring the resolution into conformity with the mandate of the Security Council to respond to "international" threats, it refers to the flow of refugees from Haiti as threatening "negative repercussions in the region".*Id.*

26 In SCR 688 (1991) the Council "condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security in the region." S.C. Res. 688, U.N. SCOR,

the genocide committed in Rwanda, to the use of force in Chechnya or to the continued occupation by Israel of Palestinian territories and Israel's oppressive measures, to name just three glaring examples. In the case of Libya, the Council determined that the refusal to extradite alleged terrorists constituted a "threat to international peace"[**27**] while in other cases, the Council, basing itself on Chapter VII (which implies the existence of a threat or breach of the peace), established international ad hoc criminal tribunals[**28**] and the U.N. Compensation Commission[**29**] as a "response" to such threat or breach which was not identified.

The expression "threat to the peace" is thus increasingly losing its original meaning and becoming a mere password permitting the invocation of Chapter VII of the U.N. Charter, the legal garb for forceful intervention under the authority of the Council. Opinions differ whether widening the scope of Council activism is advisable or not. Without entering this debate, we venture that the international community has not delegated to the Council the prerogatives of a global government or that of a court of justice. It remains a political forum where the most powerful states negotiate their global interests.

The following example suggests that norms, such as the principle of good faith, are needed in order to objectively assess the performance of the Council. After the terrorist attacks on the World Trade Centre in New York on September 11, 2001, Western media started to speculate on the role that Islamic schools might have played in the indoctrination of suicide bombers. According to a broad interpretation of the expression threat to the peace, the Council would be entitled to monitor Islamic education worldwide, on the presumption that such education could threaten international peace.[**30**] The same reasoning could be extended in support of an international body that would monitor the teaching of physics and chemistry, anywhere, because such education could provide young people with the skills needed to build weapons of mass destruction that could "threaten the peace".[**31**] The most varied human activities could be used for terrorist purposes (as the use of a civil airplane as a tool for terrorism demonstrated) and therefore subject to stringent regulation and monitoring by the Council. Ultimately, the very existence of human beings is potentially a threat to the peace, because every human being is capable of harbouring ill designs and conspire in acts threatening international peace and security. Cameras and recorders could be installed in selected private homes under the authority of a Council resolution to ascertain whether

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46th Sess., 2982d mtg., U.N. Doc. S/RES/688 (1991). This resolution, however, does not refer to Chapter VII of the Charter.

27 SCR 748, U.N. SCOR, 47th Sess., 3063d mtg., pmbl. para. 7, U.N. Doc. S/RES/748 (1992).

28 The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established under the terms of SCR 808 (1993) and the International Criminal Tribunal for Rwanda (ICTR) was established under the terms of SCR 955 (1994). *See generally* S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

29 SCR 687, U.N. SCOR, 46th Sess., 2981st mtg., para. 18, U.N. Doc. S/RES/687 (1991). The resolution does not identify, except in deliberately vague terms, what conduct by Iraq constitutes a threat to international peace and security. The establishment by the Council of a quasi-judicial body, such as the Compensation Commission, has been criticized by a number of legal scholars as *ultra vires* the Charter, a matter outside the scope of this article.

30 Such hypothesis is not entirely fortuitous. Presumably as a consequence of US pressure, the Government of Yemen has closed Islamic educational institutions and deported hundreds of foreign students. See http://www.yementimes.com/01/iss46/ln.htm; also http://english.pravda.ru/usa/2001/11/28/22264.html

31 Such reasoning may have prompted the effective ban on items for teaching physics and chemistry imposed on Iraq since August 1990 and the cultural and intellectual isolation of Iraq. See, *inter alia*, http://www.pitt.edu/~mmcclure/Iraq%5CIraqi_MOE.html ; also Leila Richards *et al*, *Living under the Sanctions in Iraq: The Oil-for-Food Program and the Intellectual Embargo*, ed. Leila Richards, American Friends Service Committee, Philadelphia, US A, (1999) http://www.afsc.org/iraqhome.htm

parents indoctrinate their children with ideas, whose application might threaten the peace.

The above reasoning, taken to its absurd limits, demonstrates that if the Council were deemed to possess unlimited discretion in making presumptions regarding looming threats to the peace, it could be regarded by the peoples of the United Nations as a totalitarian body that threatens international peace and security. To the extent the Council edges towards such totalitarian practices it undermines its own legitimacy and becomes, itself, a threat to the peace.

Accordingly, it is difficult to escape the conclusion that the Council's powers to characterize a situation as a threat to the peace must be assessed in the light of the principle of good faith. Good faith in this context requires that the Council act responsibly, effectively, objectively, fairly and with a sense of proportion.[**32**] To act responsibly would mean to place international peace and security at the centre of its concerns and not its permanent members' particular interests. To act effectively requires that the Council achieve its aims with the least human and material costs and refrain from adopting measures unlikely to restore the peace.[**33**] To act objectively would mean that its assessments must be based on verifiable facts, conduct or threats, rather than on speculation. To act fairly would mean to respond in a similar manner to similar threats and avoid double standards. To act with a sense of proportion would be adjust responses to the immediacy and severity of the threat to the peace that has been determined.[**34**]

In his textbook *International Law* D.W. Greig provides some evidence on state practice relative to the cases when Council enforcement measures are warranted:

> In its discussions of the Palestine question in 1948, the Security Council was faced with what action to take on a proposed partition plan. Even if a solution imposed by the Council might in general terms help the restoration of international peace and security, the majority of UN members would have agreed with the view of the US representative that Articles 41 and 42 only enabled the Council to take action *directly related to*, and not simply with the ultimate object of, restoring international peace security[**35**].

Greig also concurs with the view of the United States and the United Kingdom that decisions of the Council "take on a binding quality only as they relate to the prevention or suppression of breaches of the peace", and that decisions referred to in Article 25 (...) are limited by the words "in accordance with the provision of the Charter".[**36**] He adds:

> The restrictive view of Article 41 is reinforced by a further reference to Article 39. Under Article 39, once the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression, it can, inter alia, decide what

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32 Bin Cheng, *supra* note 4, at 133-4, discussing the "abuse of discretion", suggests that an exercise of good faith by an actor possessing discretionary power means that it must act "reasonably, honestly, in conformity with the spirit of the law and with due regard to the interests of others."

33 The first listed Purpose of the UN Charter (Article 1(1)) is to "maintain international peace and security, and to that end […] take *effective* collective measures for the prevention and removal of threats to the peace…" (emphasis added). The obligation of effectiveness is double: Firstly, to effectively remove genuine threats to the peace and secondly, to end measures previously adopted that turn out to be ineffective to remove such threats (or not adopt such measures in the first place).

34 The principle of proportionality here is limited to *jus ad bello*, to be distinguished from the principle by the same name used in *jus in bello*.

35 GREIG, *supra* note 17, at 746 (citation omitted) (emphasis added)

36 MARJORIE M. WHITEMAN, U.S. DEP'T OF STATE, PUB. NO. 8424, DIG. INT'L L. 361-62 (1968)

> measures shall be taken in accordance with Article 41 to maintain or restore international peace and security. In other words, the threat to the peace under the first part of Article 39 must, in order to justify action under Article 41, be *of such a degree* as to place the continuation of peace in jeopardy, so that action is *immediately* necessary in order to maintain international peace and security. The Rhodesian situation [referred in the same chapter] is hardly a threat to the peace in the sense of requiring immediate remedial action. Indeed, the Council in its second resolution [S/RES/217 (1965)] after Rhodesia's Unilateral Declaration of Independence characterised this action by the 'illegal authorities' as 'extremely grave' but determined that the 'continuance' of the situation would only 'in time' constitute a threat to international peace and security...."[**37**]

Does the U.N. Charter contain provisions supporting the above view that U.N. action under Article 41 requires the threat to the peace to be of such a degree as to place the peace in jeopardy? Is it possible to determine a particular threshold of gravity that could guide the Council in its determinations? The U.N. Charter, indeed, includes various provisions supporting the view that the drafters intended a gradation of responses to threats, implying varying degrees of threats to the peace. Article 1 (1) of the U.N. Charter, distinguishes between two approaches by the United Nations to "maintain international peace and security".[**38**] One approach is to "bring about by *peaceful* means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".[**39**] The other approach is "to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."[**40**] Those effective collective measures are listed in Chapter VII of the U.N. Charter and include both non-military measures (exemplified under Article 41) and military measures (exemplified under Article 42).[**41**] We have here already three gradations: Peaceful measures, non-military collective enforcement measures, and military collective enforcement measures. Within each of these categories, further gradations are possible and could be observed in the practice of the Council. The principle of graded responses can also be inferred from the language of Article 40[**42**] and Article 42 [**43**].

B. Good Faith and the Choice of Responses to a "Threat to the Peace"

The principle of good faith is also applicable to responses adopted by the Council to threats to, or breaches, of the peace. Assuming the existence of such a threat or breach requiring an international response, the Council has to act in good faith in selecting an adequate response to such a threat or breach. The obligation of good faith would be breached were the Council members to select responses to a threat to, or breach of, the peace, in order to promote their own interests rather than the removal of the threat or breach. Good faith would also be breached if forceful responses were imposed in cases

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37 GREIG, *supra* note 17, at 747 (emphasis added).

38 U.N. Charter art. 1, para. 1.

39 *Id.* (emphasis added).

40 *Id.*

41 *Id.* arts. 41-42.

42 "In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable." *Id.* art. 40.

43 "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." U.N. Charter Art. 42.

that do not represent an imminent threat to the peace[**44**] or in cases when attempts to "bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" have not been exhausted[**45**].

The adequacy of a proposed measure to remove the threat or breach provides clues regarding the good faith of the Council and its members. Unless the proposed measure(s) can reasonably be expected at the outset to remove the threat to, or breach of, the peace, it cannot be deemed to have been imposed in good faith. The concept of adequacy encompasses both the principles of necessity and proportionality; in other words there must be a compelling necessity to select and impose particular measures and the measures must be commensurate or proportional to the alleged threat or breach.

Under the provisions of Article 42 of the U.N. Charter, the Council is expected to determine whether the measures provided for in Article 41 would not suffice to restore the peace, before taking further action, permitted under Article 42.[**46**] The principle of a graded response by the United Nations to situations that may or do threat or breach the peace is well entrenched within the U.N. Charter itself. A logical inference is that the Council should, in good faith, adjust a response to the overall nature of a threat to the peace, including its immediacy and scope, respecting the principle of proportionality.

C. Ending Previously Imposed Coercive Measures and Good Faith

After the Council has adopted measures to address a threat to, or breach of, the peace, it must at some point formally determine whether such threat or breach has ended. Such a formal determination is necessary in order to remove the binding effect of its previous decisions imposing such measures. Should the measures adopted previously by the Council prove ineffective to end the threat or breach and unlikely to do so in the foreseeable future, the Council would act in bad faith, were it to maintain these measures.

IV. EVIDENCE OF COUNCIL BREACHES OF GOOD FAITH IN DETERMINING (OR FAILING TO DETERMINE) THREATS TO THE PEACE

The following examples illustrate various circumstances in which the Council has arguably breached obligations of good faith, either by abusively characterizing a situation as a threat to the peace or by failing to do so when a situation obviously required international action.

• Since the establishment of the State of Israel in 1948, a de facto state of war has existed between that state and most of its neighbors.[**47**] Its occupation of Palestinian and other Arab territories in the 1967 war has been regularly and overwhelmingly condemned by the U.N. General Assembly and resisted by the inhabitants of the occupied territories. At various times in its short history, the State of Israel resorted to invasions

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44 The International Military Tribunal at Nuremberg stated that "preventive action in foreign territory" would be permissible only when justified in case of "an instant and overwhelming necessity for self-defence, leaving no choice of means, and no moment of deliberation." Cited by Cheng, *supra* note 2, p. 84

45 U.N. Charter art. 1, par. 1.

46 *Id. art. 42.*

47 Israel has signed peace agreements with Egypt and Jordan and established some relations with other members of the Arab League. But popular opinion in these countries, as well as in all member States of the Arab League, appears overwhelmingly opposed to normalization with Israel. For all practical purposes, peace between the State of Israel and Arab countries remains elusive.

and attacks on Egypt (1956 [**48**] and 1967 [**49**]), Jordan (1967 [**50**] and twice in 1968 [**51**]), Iraq (1981) [**52**], Syria (1956 [**53**] and 1967 [**54**]), Lebanon (1968 [**55**], 1969 [**56**], 1970 [**57**], 1972 [**58**], 1973 [**59**], 1982[**60**], 1993[**61**], 1996[**62**) and Tunisia

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48 See, *inter alia*, Kennet I. Love, *Suez: The Twice-Fought War* (McGraw-Hill, New York, 1969); Anthony Nutting, *The Story of Suez* (Constable, London, 1967). The U.N. Security Council, due to the veto of two permanent members (the UK and France) could not adopt a resolution condemning this act of aggression (see also SCR 119 (1956)).

49 See particularly SCR 242 (1967); *see also* Randolph and Winston Churchill, *The Six-Day War* (Heinemann, London, 1967); Henry Cattan, *The Palestine Question* (Croom Helm, London, 1988), pp. 111-114.

50 Randolph & Winston Churchill, *ibid.*

51 Condemned by SCR 248 (1968) and SCR 256 (1968) as constituting "flagrant" violations by Israel of the UN Charter.

52 Israel attacked Iraqi non-military nuclear installations in 1981. This attack was condemned by the Security Council (SCR 487 (1981) See also GA Resolutions 36/27 (1981), 39/14 (1984) and 40/6 (1985) which noted Israel's refusal to comply with the resolution of the Security Council. See also resolution GC(XXV)/RES/381 adopted on 26 September 1981 by the General Conference of the International Atomic Energy Agency, considering the attack on Iraq as "an attack against the Agency and its safeguards regime".

53 Condemned by SCR 111 (1956) as a "a flagrant violation [...] of Israel's obligations under the Charter of the United Nations."

54 See *supra* note 49

55 Condemned by SCR 262 (1968) as a "premeditated military action in violation of [Israel's] obligations under the Charter."

56 Condemned by SCR 270 (1969) as a "premeditated air attack by Israel on villages in southern Lebanon in violation of its obligations under the Charter and Security Council resolutions."

57 Condemned by SCR 280 (1970) as a "premeditated military action [by Israel] in violation of its obligations under the Charter of the United Nations."

58 The Council under SCR 316 (1972) condemned the "repeated attacks of Israeli forces on Lebanese territory and population in violation of the principles of the Charter of the United Nations and Israel's obligations thereunder."

59 The Council under SCR 332 (1973) condemned again "the repeated military attacks conducted by Israel against Lebanon and Israel's violation of Lebanon's territorial integrity and sovereignty in contravention of the Charter of the United Nations."

60 See, in general, Noam Chomsky. "Middle East Terrorism and the American Ideological System." In *Blaming the Victims: Spurious Scholarship and the Palestine Question*, edited by Edward Said and Christopher Hitchens, pp. 97-148. London & New York: Verso, 1988.

61 The Sunday Times, 1 August 1993, reported: "Late yesterday, he [Rabin] called off his personal seven-day war in southern Lebanon. (...) Rabin's War - Operation Accountability - has killed at least 130 and sent hundreds of thousands of Lebanese fleeing towards Beirut. (...) Southern Lebanon had become a land without people.(...) About 80 villages have been hit." See, in particular Noam Chomsky *"Limited war" in Lebanon* at http://www.zmag.org/chomsky/articles/z9309-war-lebanon.html

62 On 15 April 1996, 32 speakers addressed a Security Council meeting on the Israeli bombardment of towns in Lebanon, including the suburbs of Beirut. In a letter asking for the meeting, Lebanon's representative said the attacks killed, wounded or displaced thousands of persons and caused severe damage to property. He asked the Council to order Israel to stop its aggression and help Lebanon's recovery from the attacks. The representative of Israel said his country's Defence Forces were hitting back at Hezbollah strongholds after exhausting all political and diplomatic means. Three days later, the Council unanimously adopted resolution 1052 (1996) seeking an immediate cessation of hostilities, after rejecting an Arab- sponsored draft that would have strongly condemned the Israeli aggression. Sponsored by 19 Arab States, it received only 4 votes in favour (China, Egypt, Guinea-Bissau, Indonesia) to none against, with 11 abstentions. The UN General Assembly, on 25 April, condemned Israel's

(1985[**63**] and 1988[**64**]). Judging by the concern expressed by U.N. members and the extent of the efforts by the United Nations to deal with the conflict, there is hardly any doubt that the conflict has and continues to threaten international peace and security.[**65**] In spite of this persistent threat, the possession by Israel of weapons of mass destruction, and repeated and blatant breaches of the peace committed by the State of Israel, the Council has never determined that the situation in Israel-Palestine constitutes a threat to the peace, which could pave the way for U.N. enforcement measures for the removal of that threat. Since 1967 alone, the United States vetoed over 40 attempts by the Council to address this situation. [**66**] Even modest attempts to reduce the level of violence in the area, such as through an international monitoring mechanism, have been vetoed by the United States.[**67**]

• On December 20, 1989, twenty-four thousand U.S. troops invaded Panama in a military mission, code-named "Operation Just Cause." The declared purposes of the invasion were to "(A) Protect U.S. lives and key sites and facilities [in Panama]. (B) Capture and deliver [Panamian President] Noriega to competent authority [in the United States]. (C) Neutralize PDF (Panamian Defense Forces) forces. (D) Neutralise PDF command and control; (E) Support establishment of a U.S.-recognized government in Panama. (F) Restructure the PDF."[**68**] In spite of the U.S. invasion of Panama being a blatant violation of international law[**69**] and of the U.N. Charter, a draft resolution in

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attacks, adopting a resolution to that effect by a vote of 64 in favour to 2 against (Israel, United States), with 65 abstentions. UN Press Release, Doc. SC/6313 of 14 January 1997

63 Condemned "vigorously" by SCR 573 (1985) as an "act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct". Chomsky, *supra* note 60, p. 99, writes: "[Shimon] Peres arrived in Washington to discourse on peace and terrorism with his partner in crime directly after having sent his bombers to attack Tunis, where they killed twenty Tunisians and fifty-five Palestinians, Israeli journalist Amnon Kapeliouk reported from the scene. That target was undefended, 'a vacation resort with several dozen homes, vacation cottages and PLO offices side by side and intermingled in such a way that even from close by it is difficult to distinguish' among them. [...] 'The people who were in the bombed buildings were mangled beyond recognition.' [...]Tunisia had accepted the Palestinians at Reagan's behest after they had been expelled from Beirut in a US -supported invasion [by Israel] that left some twenty thousand killed and much of the country destroyed." Further (p. 101): "The United States officially welcomed the Israeli bombing of Tunis as 'legitimate response' to 'terrorist attacks'...The US drew back from such open support after an adverse global reaction, but it abstained from UN [...] - alone as usual."

64 Condemned "vigorously" by SCR 611 (1988) as an "aggression perpetrated on 16 April 1988 against the sovereignty and territorial integrity of Tunisia in flagrant violation of the Charter of the United Nations, international law and norms of conduct."

65 In the debate preceding the vote on a draft resolution placed on the Council on 14 December 2001 (UN Doc S/2001/1199), a number of representatives (China, Singapore, Columbia, Bangladesh) referred to the conflict in the Middle East as endangering or threatening "international peace and security"..

66 Phyllis Bennis, *Calling the Shots: How Washington Dominates Today's UN*, Olive Branch Press, New York, (1996), p. 27

67 See, for example, draft resolution placed before the Council on 14 December 2001 (UN Doc S/2001/1199). The draft resolution was defeated by the veto of the United States against 12 affirmative votes and two abstentions (the UK and Norway).

68 Military Analysis Network, Operation Just Cause. http://www.fas.org/man/dod-101/ops/just_cause.htm. See also speech by James A. Baker, US Secretary of State on 20 December 1989, justifying the invasion, at http://www.historychannel.com/cgi-bin/frameit.cgi?p=http%3A//www.historychannel.com/speeches/archive/speech_13.html

69 See Military.com web-page on the Invasion of Panama: http://www.military.com/Resources/HistorySubmittedFileView?file=history_panama.htm ; also film review by the Washington Post: http://www.washingtonpost.com/wp-srv/style/longterm/movies/videos/thepanamadeceptionnrhinson_a0a7bd.htm

the Council condemning the invasion was defeated on 23 December by the veto of the P-3 (France, the United Kingdom, and the United States). By their veto, the P-3 prevented the Council from censoring the United States for violating the U.N. Charter, breaching the peace and stating the responsibility of the aggressor under international law for the consequences of that breach.

• In 1992 the Council decided to impose sanctions on Libya for the "failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests of resolution 731 (1992)".[**70**] The request referred to the demand made by the United States, the United Kingdom and France for Libya to extradite to the named countries Libyan nationals allegedly responsible for the destruction of Pan-Am flight 103 and UTA flight 772, resulting in the deaths of hundreds of passengers and crew[**71**]. No evidence was presented to the Council that the Libyan Government or Libyan nationals were responsible for these crimes.[**72**] The alleged failure by the Libyan Government to cooperate with the Council - or with the Governments of France, the United Kingdom, and the United States which alleged Libya's responsibility - was characterised as a "threat to international peace and security".[**73**] While international terrorism is generally considered as a scourge, there exists actually no recognised definition of this term under international law. None of the other cases of destroying civilian airplanes in midair were submitted to the Council and characterised as international terrorism, let alone a "threat to international peace and security".[**74**] In the case of Libya, a threat to international peace and security was based on a presumption of guilt, a selective application of the term "international terrorism" [**75**] and on the claim that the mere lack of cooperation by the government of Libya on the question of criminal extradition constituted a threat to international peace and security, warranting forceful measures.

• When SCR 687 (1991) regarding the continued maintenance of economic sanctions against Iraq was debated, Cuba introduced an amendment that would have placed demands for Iraqi elimination of weapons of mass destruction in the context of being "a first step towards the full elimination of weapons of mass destruction and weapon systems incompatible with the aim of achieving a comprehensive, just, and lasting peace in the Middle East".[**76**] The United States secured the defeat of this amendment, leaving unaddressed - even at the hortatory level - the question of Israel's weapons of mass destruction that is directly related to the militarization of Middle Eastern states, including Iraq.[**77**] It must be remembered that Israel persistently, and without incurring any

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70 SCR 748 (1992) of 31 March 1992

71 See particularly SCR 731 (1992) of 21 January 1992

72 The only reference to any factual evidence were undisclosed "investigations" by the Governments of the US, the UK and France, referred to in Preambular paragraph 6 of SCR 731 (1992).

73 SCR 748) 1992 of 31 March 1992, sixth preambular paragraph.

74 Israel shot down a Libyan civilian plane on 21 February 1973 (see http://www.washington-report.org/backissues/091983/830919003.html); the Soviet Union downed a South Korean civilian airliner (flight KAL007), see http://www.fair.org/extra/best-of-extra/kal007-iranair655.html. On 31 August 1983; a US warship downed an Iranian civilian airliner on 3 July 1988, see Washington Post, 4 July 1988, at A01; On 20 April 2001, a Peruvian pilot guided by CIA employees downed a civilian plane suspecting of carrying drug smugglers. See http://www.november.org/razorwire/may-june2001/24002.html.

75 The shooting down of civilian aeroplanes by Israel (1983), the Soviet Union (1983) and the US at different times, was never alluded to by the Council as acts of international terrorism nor as a "threat to international peace and security".

76 Bennis, *supra* note 66, at 39.

77 Bennis, *supra* note 66, p. 39; see also the comments by Cuba's ambassador to the UN during the debate on SCR 687 (1991), UN Doc S/PV.2981

sanction, disregards SCR 487 (1981) which called on Israel to "urgently . . . place its nuclear facilities under the safeguards of the International Atomic Energy Agency" - a call reiterated by U.N. General Assembly resolutions - and noted that Israel "has not adhered to the Treaty on the Non-Proliferation of Nuclear Weapons".[**78**]

Yet, no resolution by the Council has ever referred to the threat to the peace emanating from the possession by Israel of weapons of mass destruction[**79**] nor has any effective measure been undertaken by the Council to secure the quest of the international community for a nuclear-free zone in the Middle-East.[**80**]

V. CAN THE COUNCIL BE GENERALLY PRESUMED TO ACT IN GOOD FAITH?

Most scholarly writings on the prerogatives of the Council proceed from the presumption that it acts in good faith. Such opinion is supported by the dicta of the ICJ in the Advisory Opinion on *Certain Expenses of the United Nations* (1962). In that Opinion the ICJ held that "when the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations . . . the presumption is that such action is not *ultra vires* the Organisation."[**81**]. The presumption of good faith is also regarded as a general principle of law. But is the presumption of good faith applicable to any actor, regardless of his or her previous record?

A. Arguments for the Presumption of Good Faith

1. A general presumption of innocence

The presumption of innocence is a general principle of law but not a general prescription for human conduct. As individuals observe others' conduct, they develop expectations regarding others' probable conduct. When an individual or an institutional actor demonstrates a pattern of mendacity, third parties cannot be blamed when their conduct toward that actor reflects some distrust. Such a presumption of bad faith is also warranted when an institutional actor engages in efforts to avoid accountability, hides decision-making mechanisms or provides inadequate justifications for discretionary acts. To the extent that the Council, or its dominant members, have demonstrated a pattern of mendacity or have attempted to escape accountability for their decisions, a presumption of bad faith would be justified.

2. States' general acquiescence to Security Council decisions

It is true that most Security Council decisions are adopted with a comfortable majority and that states generally comply with binding Council decisions[**82**]. There are a number

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78 For example UNGA Resolution of 16 November 1984 (UN Doc. A/RES/39/14) and UNGA Resolution of 1 November 1985 (UN Doc A/RES/40/6)

79 However, UNGA Resolution 46/39 of 6 December 1991 (and others adopted earlier and later) specifically refers to the danger to "international peace and security as a result of Israel's development and acquisition of nuclear weapons."

80 See, for example, UNGA Resolution 46/30 of 6 December 1991, adopted without a vote on the "[e]stablishment of a nuclear-free zone in the region of the Middle-East." (UN Doc. A/46/667), as well as UNGA Resolution 46/39 adopted on the same day by a vote of 76-3-75 on "Israeli nuclear armament" (with only US Israel and Romania opposing the resolution).

81 I.C.J. Reports 1962, p. 168, cited by Georg Schwarzenberger, *International Constitutional Law: Fundamentals - The United Nations - Related Agencies*, Stevens & Sons Limited, London, (1976), pp. 137-8

82 This statement must, however, be qualified. Formal acquiescence is often accompanied by various degrees of covert non-compliance. Measures of "covert non-compliance" may range

of reasons for the acquiescence to the will of the Council. Initiators of draft resolutions usually do so after having sounded out other members. Drafts unlikely to pass are seldom submitted for voting in the first place.

Furthermore, affirmative votes within the Council are often secured through pressures exercised outside the Council, particularly when powerful members are determined to force the adoption of their draft resolutions. It is therefore not always possible to gauge the degree of free will exercised by the members of the Council when casting their vote. In order to evaluate the reasons for acquiescence to Council decisions, it is necessary to take into consideration the vulnerability of each member state to political, economic and military pressure by powerful members who are determined in securing the adoption of a resolution.

Finally, it must be noted that a country's government does not necessarily represent the interests or the will of the majority of its constituents.[**83**] Depending on the perspective, what for may appear as acquiescence to an overriding international good could well be regarded as an act of complicity with powerful states. More significant is, however, that widespread compliance with the decisions of a public authority does not necessarily prove the good faith of that authority. It may only reflect the power wielded by that authority to induce compliance.

B. Arguments Against the Presumption of Good Faith

There are two main reasons for not presuming good faith by the Council. The first reason relates to systemic factors, such as its lack of accountability, its composition and its rules of procedure. The second reason is that its permanent members have demonstrated over a long period a pattern of mendacity, hypocrisy and recklessness.

An institution possessing vast unaccountable powers is prone to abuse its powers. The Council possesses such vast powers. And it is unaccountable in various ways to the collective membership of the United Nations: its composition is unrepresentative of the U.N. membership;[**84**] its procedures are not democratic;[**85**] its meetings are generally held behind closed doors;[**86**] and the deliberations of these closed meetings are not publicised, even post facto. Its decisions are neither subject to political review by the U.N. General Assembly nor reviewable as to their constitutionality by the ICJ (the main judicial organ of the United Nations). To reach its conclusions the Council is not bound

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from deliberately negligent domestic enforcement of Security Council decisions to devious attempts to subvert the effect of Security Council decisions. The covert nature of such measures reflects the fear of States to openly challenge the most powerful international actor(s). Acquiescence in such cases is mere lip service.

83 As these lines are written in March 2003[after the submission of the article for publication], public opinion in most European and Middle-Eastern countries appears, according to opinion polls, overwhelmingly opposed to the use of force against Iraq. The governments of the U.K., of Spain, Italy and of some East-European countries, who have declared their support for a U.S.-led war against Iraq, do not even claim to represent the will of their populations.

84 Gowlland-Debbas, p. 71, is emphatic: "The Council is a political organ: it is composed of governmental representatives which cannot even be said, in contrast to the General Assembly, to represent the international community as a whole." Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 International and Comparative Law Quarterly (1994)

85 The special rights secured by the victors of World War II to themselves (US, UK, France, Soviet Union and China) within the Security Council (permanent seat, veto rights) stand in glaring contradiction with the democratic principle of the equality of nations, small and large, enshrined elsewhere in the Charter.

86 Global Forum and World Federalist Movement: *Increasing the Transparency and Accountability of the Security Council*, Briefing Paper, 25 November 1996 http://www.globalpolicy.org/security/ngowkgrp/brief96.htm

to "examine in any depth the legal considerations" of its decisions.[**87**] Its decisions often diverge from those, on the same issues, adopted by the U.N. General Assembly.[**88**]

Notwithstanding the repeated claim that the Council acts in the name of the international community, the Council and its dominant members seldom consult that community of states, let alone the constituent peoples of that community of states, supposed to be its ultimate beneficiaries. The overwhelming majority of mankind is probably not aware even of the existence of the Council. Even within educated elites of those nations who dominate it, only few have a working knowledge of the competence and composition of the Council, and only a small proportion of those who possess such knowledge can actually influence the policies their government pursues in the Council.

The Council's rules of procedure, its aristocratic composition and its powers of appreciation cannot be changed without amending the U.N. Charter. But such amendment can be blocked by any permanent member of the Council. The international community is thus constitutionally prevented from exercising an effective control over the Council. It is effectively held hostage by those who established their institutional privileges after World War II, the Permanent Five. Non-accountability is built into the U.N. Charter and taints thereby the work and decisions of the Council.

When participating in international organizations, states act in accordance with their perceived self-interest. They pursue within such organizations their foreign policies and cannot be presumed to act solely or even principally for the common good of the international community.

It may be retorted that the Council, indeed, reflects nothing but the convergence of particular interests, informed by real power relations within the international order. Based on a decentralized international order, the Council could not be expected to reflect a common moral purpose. What such "realist" view fails to capture is that an effective international authority requires legitimacy. It cannot rule simply by asserting its might. The conduct of the Council does not become legitimate or its decisions binding in law because its members declare it to be. Legitimacy and legality can only be assessed from the outside. Any person can observe and examine the conduct of international organizations and organs and determine whether such conduct is lawful or not. While determinations by private persons or legal commentators do not bind states acting under the authorization of the Council, state acting under invalid or bad faith resolutions of the Council can only do so by deceiving their own constituents.

It cannot be denied that if states are willing to implement Council decisions and committed to enforce these decisions, there is no physical force capable to prevent such action. This does not make such action legitimate or even lawful nor prevent individuals and groups to designate the Council as an usurper. The peoples of the United Nations, who are the true sovereign of this organisation, may at any time conclude that the Council is not promoting but actually threatening international peace and security and

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87 Gowlland-Debbas, *supra* n. 84

88 Koskenniemi provides the following examples: "A non-aligned draft resolution in the Council (S/21048) would have deplored the intervention [of the US in Panama in December 1989] but was vetoed on 23 December by the US , France and United Kingdom (the vote having been 10-4-1). A resolution closely following the text of the earlier non-aligned draft was passed by the General Assembly on 29 December, UNGA Res. 44/240 (75-20-40). A comparable method was used by the Assembly in 1980 to condemn the Soviet invasion in Afghanistan - where a resolution essentially similar to that passed in the Assembly had been subject of the Soviet veto; and the US invasion of Grenada - where the Assembly passed a resolution essentially similar to an earlier draft vetoed in the Council by the US ." [Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN - A Dialectical View*, 6 European Journal of International Law 325, Chapter VI, n.63 (1999)] http://www.ejil.org/journal/Vol6/No3/art2-05.html#TopOfPage

that consequently acts and policies pursued by governments under the authority of Council resolutions must be resisted by all available means.

C. A Pattern of Mendacity, Hypocrisy and Recklessness

1. Politically motivated action and inaction

In addition to the above examples of politically motivated actions and dereliction, the following accounts throw light on the dominating position of the United States within the Council and American self-perception of its role as the world's ruler. Noam Chomsky provides an example how the United States overtly asserts the primacy of its national self-interest over global collective security. According to Chomsky the United States' position

> was forthrightly articulated by Secretary of State Madeleine Albright, then UN Ambassador, when she informed the Security Council during an earlier US confrontation with Iraq that the US will act "multilaterally when we can and unilaterally as we must," because "[w]e recognize this area as vital to US national interests" and therefore accept no external constraints. Albright reiterated that stand when UN Secretary-General Kofi Annan undertook his February 1998 diplomatic mission [to Iraq]: "We wish him well," she stated, "and when he comes back we will see what he has brought and how it fits with our national interest," which will determine how we respond. When Annan announced that an agreement had been reached, Albright repeated the doctrine: "It is possible that he will come with something we don't like, in which case we will pursue our national interest." President Clinton announced that if Iraq fails the test of conformity (as determined by Washington), "everyone would understand that then the United States and hopefully all of our allies would have the unilateral right to respond at a time, place and manner of our own choosing . . ."[**89**].

Chomsky's analysis is supported by John Bolton, U.S. Under-Secretary of State for International Organisations, who gave an unusually frank and chilling description of the United Nations:

> There is no United Nations. There is an international community that occasionally can be led by the only real power left in the world, and that is the United States, when it suits our interest, and when we can get others to go along . . . The success of the United Nations during the Gulf War was not because the United Nations had suddenly become successful. It was because the United States, through President Bush, demonstrated what international leadership, international coalition building, international diplomacy is really all about . . . When the United States leads, the United Nations will follow. When it suits our interest to do, we will do so. When it does not suit our interest we will not[**90**].

When a State remains the "only real power left in the world", it is obviously not interested in self-limiting its discretionary power by international rules, custom or precedent. A common approach by rulers to avoid accountability is to claim that each situation they face requires a unique approach that precludes their use of guidelines or norms or the invocation of precedents, which are essential elements for mounting a legal challenge to conduct. Such an approach is essentially the institutionalisation of discretionary rule.

U.S. Supreme Court Justice William Douglas captured well the evil nature of discretion:

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89 Chomsky (1999), "US policy: Rogue States", publ. on Zmag http://www.lol.shareworld.com/ZMag/articles/chomskyapr98.htm

90 Speaking at Global Structures Convocation, Washington, D.C., February 1994 (Cited by Bennis *supra* note 66, p. xv)

> Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other invention[**91].**

An example of an attempt to prevent Council decisions from having any precedent-value is provided by the U.S. representative to the Council in the course of adopting SCR 687 (1991):

> The circumstances that are before us are *unique* in the history of the United Nations, and this resolution is *tailored* exclusively to these circumstances . . . Certainly, the United States does not seek, nor will it support, a new role for the Security Council as the body that determines international boundaries.[**92**]

2. Securing Votes by Bribes and Threats

Generally, little public evidence transpires about covert efforts by powerful members of the Council to secure votes for draft resolutions they propose. In two specific occasions, however, such evidence surfaced and was widely reported. To secure the adoption of SCR 678 (1990), which gave the United States and its allies a carte blanche to use force against Iraq for the liberation of Kuwait, the United States, according to former U.S. Attorney-General Ramsey Clark, "engaged in open bribery, blackmail, and coercion".[**93**] Details regarding the nature and extent of such machinations are provided by Clark and Bennis. Apart from according Ethiopia, Zaire and Colombia new aid packages and access to World Bank credits, and in some cases arrangements of IMF grants or loans[**94**], the United States thawed its relations with China (frozen after the Tiananmen Square massacre), forgave $7 billion in Egyptian debt and secured $4 billion in loans and extended emergency aid to the then Soviet Union (to be paid by Saudi Arabia, Kuwait and the United Arab Emirates after the Soviet Union voted for the resolution).[**95**] Strong pressures were levelled at Malaysia, Cuba and Yemen. While Malaysia yielded to the pressure (and was "widely criticized by its people"), neither Cuba nor Yemen did.[**96**] The United States had no leverage on Cuba but it severely punished Yemen by cancelling its $70 million aid package to that wretchedly poor country.[**97**] Indeed, within minutes of the vote of the Council on 29 November 1990, "Yemen's Ambassador Abdallah Saleh al-Ashtal was informed by a U.S. diplomat, in full earshot of the world via the U.N. broadcasting system, that 'that will be the most expensive 'no' vote you ever cast.' ".[**98**]

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91 *United States v. Wunderlich*, 342 U.S. 98, 101 (1951), dissenting opinion. Cited by Ramsey Clark, *The Fire This Time: U.S. War Crimes in the Gulf*, Thunder's Mouth Press, New York, (1992) , p.155

92 Comments by Cuba's Ambassador, (emphasis added). UN Doc. S/PV.2981 (cited by Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts*,, Martinus Nijhoff Publishers, Dordrecht; Boston; London, (1994), p.42). The US representative alludes to the provision of the resolution to impose a border settlement between Iraq and Kuwait.

93 Clark, *supra* note 91, at 153

94 Bennis, *supra* note 66, at 32; also Clark, *supra* note 96, at 154

95 Clark. *supra* note 91, at 154

96 *Id.* at 154.

97 *Id.* at 155

98 Bennis, *supra* note 66, at 33

Buying votes occurred again at the occasion of passing SCR 686 (1991) for a "temporary halt in hostilities" in the Gulf.[**99**] Bennis describes how Washington proceeded to secure the support of Zimbabwe and Ecuador, "two important Non-Aligned members of the [Security] Council" for the US draft[**100**].

Bennis elaborates on other methods of pressure used by the United States on third world countries in order to secure compliance with U.S. goals:

> According to one Non-Aligned diplomat with many years experience at the U.N., U.S. control emerges partly through what he terms "psychological pressure on the South". Some of the pressure emerges from U.S. control over the Bretton Woods institutions. "Sometimes all it takes is for a poor country's ambassador to be asked, pointedly, 'Don't you have a loan pending ?' for them to get the message". Every year, a few months before the General Assembly convenes, he recalled, the U.S. Mission to the U.N. publishes a compendium of issues. It includes a clear statement of which issues Washington considers priorities, and what the US position is on each. "So without direct pressure," he said, "the U.S. is telling all the other countries, especially the South, how they are expected to act."
>
> The vulnerability of any country to that pressure, of course, stands in direct correlation to its economic precariousness and dependency on outside aid.[**101**]

James Baker, who served at the time of Gulf War as U.S. Secretary of State, confirmed in his autobiography that the adoption of U.N. SCR 678 (1990) that paved the way for the Gulf war, was secured by bribes and threats. In his own words: "I met personally with all my Security Council counterparts in an intricate process of cajoling, extracting, threatening, and occasionally buying votes. Such are the politics of diplomacy."[**102**]

While previous efforts to secure votes in the Council have mainly been covert, the United States appears now confident to engage in overt bribing and coercion to secure other states' support for its long-sought war on Iraq.[**103**] Erskine Childers, who served for 22 years in "virtually all of the organisations of the U.N." in the field of economic development, was considered an "outspoken champion of the United Nations and its mission."[**104**] A special issue of Global Governance was dedicated to Childers after his death in 1996. Because of his life-long commitment to the mission of the United Nations, Childers came to the conclusion that the Council is "not worth trying to save if the price is the neat trickery of breaking solidarity in the South by seducing a few of its largest countries to join Germany and Japan in an expansion of the present reliquary cabal of so-called permanent members".[**105**] Alluding in his article to the "economic extortion against member governments such as is now practised with total impunity by the Permanent Three [France, the United Kingdom, and the United States]", Childers called on the U.N. General Assembly to "close down the council by refusing to elect any

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99 *Id.* at 37.

100 Id., p. 37

101 Bennis, *supra* note 66, at 47

102 James Baker, *The Politics of Diplomacy*; Revolution, War and Peace 1989-1992 (Putnam Publ. Group, 1995), p. 305 (cited by James Paul at http://www.accuracy.org/un2/)

103 Sarah Anderson, Phyllis Bennis, and John Cavanagh: *Coalition of the willing or coalition of the coerced ? How the Bush Administration Influences Allies in its War on Iraq*, Institute for Policy Studies, 26 February 2003, http://www.ips-dc.org/coalition.htm

104 In *Renewing the United Nations System,* Childers wrote: "The only hope of effectively dealing with the world's major problems in the interest of all humankind is through the progressive development of a working world community." (cited by Brian Urquhart, *Erskine Childers, 1929-1996*, 3 Global Governance (1997), p. 278)

105 Erskine Childers, *The United Nations and Global Institutions: Discourse and Reality*, 3 Global Governance (1997)

more non-permanent members . . .".[**106**] He further called for "legal specialists [to] examine the implications for international law of such extortion being a criminal felony in the laws of the countries that practice it at the U.N."[**107**] Ramsey Clark had earlier proposed to criminalize "bribery, corruption, coercion, or violence by or against [U.N.] elected or appointed personnel".[**108**] Under international law, coercing or corrupting state representatives may render the conclusion of a treaty (and other binding international decisions) void [**109**] while subtler forms of pressure are not yet deemed violations of international norms[**110**].

3. Undermining the Purposes and Principles of the United Nations

China, France, Russia, the United Kingdom and the United States (the Permanent Five, or P-5), possess two crucial assets as members of the Council: a permanent seat and the right of veto, which ensures their immunity against U.N. coercive action. Such aristocratic privileges are commonly seen as a price the international community conceded to these States for their undertaking - under the provisions of the U.N. Charter - to act in good faith for the maintenance of international peace and security. Can the P-5 be trusted for this task ? The following summary of acts and policies by the P-5 might suggest an answer.

- While the primary responsibility of the Council is to ensure international peace and security, the governments of the P-5 who dominate the Council are actually the world's main weapons exporters[**111**] while their leaders act sometimes even as weapons super-salesmen [**112**]. The P-5 are thus the main disseminators of tools of war among U.N. members. Such activity is hardly commensurable with their specific mandate under the U.N. Charter nor with the purposes of the United Nations Organization to work for international peace.

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106 *Id*. at 275

107 *Ibid*.

108 Ramsey Clark, *supra* note 91, writes at 239: "The United Nations shall create an International Court of Criminal Justice with jurisdiction to hear and decide on all formal charges of [....]; crimes against the UN, including bribery, corruption, coercion, or violence by or against its elected or appointed personnel." Such ideas are based on and extend the scope of Articles 50 and 51 of the Vienna Convention on the Law of Treaties which address the effect of "corruption" or "coercion" of a "representative of a State" on the validity of Treaties.

109 Articles 50 and 51 of the Vienna Convention on the Law of Treaties.

110 Such reasoning can be found, for example, in the Dissenting Opinion of Judge Padilla Nervo in the *Fisheries Jurisdiction (Jurisdiction of the Court)* case (1973), ICJ reports 1973, at 14 and 59. He mentions various forms of pressure, deemed lawful, such as "Notes" delivered by powerful to less powerful nations. In fact, the mere existence of gross disparity in the balance of forces between States and in their respective negotiating leverage, often suffices to induce weaker States to bow to the wishes of the stronger ones, particularly in matters that do not directly affect their own interests.

111 According to the Stockholm International Peace Research Institute (SIPRI), the combined arms exports of the five permanent members of the Security Council (the United States, the United Kingdom, France, Russia and China) between 1995 and 1999, amounted to $88 billion or 80 percent of world arms exports. The US and UK alone supplied more than 50 percent of world arms exports. http://projects.sipri.se/expcon/db1.htm - Table 7A.2 (major arms suppliers)

112 Thus, for example, former British Prime Minister Margaret Thatcher is reported to have shown "extraordinary" interest in British arms exports, ostensibly "battling for Britain" but possibly in relation with her son's direct involvement in arms' trade and personal enrichment (cited by John Pilger, *Hidden Agendas*, Vintage, London (1998), p. 132-3)

- Each of the P-5 is a nuclear power. The ICJ determined that nuclear weapons could hardly be used lawfully[**113**]. As the possession, let alone deployment, of nuclear weapons is a latent threat to the peace, it follows that developing, stocking and deploying, nuclear weapons by any nation represents a threat to the peace. The ICJ had moreover declared that the P-5 have not fulfilled their obligations to negotiate, in good faith, the elimination of nuclear arms.

- Each of the P-5 has committed at various times serious breaches of the U.N. Charter and of international law. Among such reported breaches figure acts of aggression[**114**], military occupation[**115**], international terrorism[**116**], war crimes[**117**] and complicity with genocide.**118** The US government is alleged to have attempted the assassination of foreign leaders[**119**].

- The two most powerful members of the Council (the United Kingdom and the United States) have for decades provided massive military and economic support to governments known to engage in unlawful belligerent occupation[**120**], racial

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113 ICJ, The legality of the threat or use of nuclear weapons (Advisory Opinion), 1996. By a vote 8:7 the Court ruled that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law." Three of the Judges who voted against this decision did so because in their opinion the threat or use of nuclear weapons would be contrary to the rules of international law in all circumstances.

114 US has reportedly used armed force without UN authorization against Vietnam, Laos, Cambodia, Cuba, Grenada, Libya, Panama, Iraq, Yugoslavia and Afghanistan. In most if not all of the above cases the United States acted in violation of Article 2(4) of the UN Charter. See, *inter alia*, William Blum, *Killing Hope: US military and CIA interventions since World War II*,, Common Courage Press, Monroe, Maine, (1995). Another Permanent Member of the Council, the by now defunct Soviet Union invaded Hungary in 1956, Czechoslovakia in 1978 and Afghanistan in 1979 and forcefully prevented the Baltic nations for decades to enjoy the right of self-determination. The UK and France, also Permanent Members of the Security Council, conspired with Israel in attacking Egypt in 1956 in violation of the UN Charter. The UK has joined the US in mounting repeated military attacks against Iraq since 1991 in the so-called no-flight zones, in violation of international law and the UN Charter.

115 Including particularly the occupation of Tibet by China since 1950 . See, *inter alia*, the White Paper issued by the Government of Tibet in Exile, at http://www.tibet.com/WhitePaper/

116 A number of acts by the US, such as the subversive efforts by the CIA against Cuba shortly after the Cuban revolution (which included sabotage and military attacks), the mining of Managua's harbour (Nicaragua's capital) in 1984 and the bombing of Tripoli and Benghazi in Libya on 14 April 1986 (with 60-100 casualties, mostly civilians), would be considered in today's perspective acts of international terrorism. The US provided training of, as well as financial, military and logistical support to, terrorist groups and death squads in various Latin American countries as well as in Angola.

117 War crimes have been attributed by numerous authors to acts by US armed forces in Korea, Vietnam, Laos, Cambodia, Panama, Somalia, the former Yugoslavia and Iraq; to the United Kingdom in Malaysia in the 1950s and Kenya in 1955; to the UK and France in Yugoslavia in 1999; to the former Soviet Union in Afghanistan; and to the Russian Federation in Chechnya.(see, *inter alia*, Blum, *supra* note 114; Clark, *supra* note 91; Pilger, *supra* note 112).

118 Evidence has been published on alleged U.S. complicity in the genocide committed in Indonesia in 1965 and between 1975 and 1989 in East Timor. *See generally* Blum, *supra* note 114, 1t 193-200.

119 Blum, *supra* note 114, provides details on thirty-five US plots to assassinate foreign officials and leaders. A summary list appears on p. 453-4 of Blum's book.

120 Israel has since 1967 occupied unlawfully Palestinian and Syrian territories. It annexed the entire city of Jerusalem and the Golan Heights into Israel in violation of Security Council

discrimination[**121**], war crimes[**122**], genocide[**123**], gross violations of human rights[**124**] or violations of UN resolutions [**125**]. Until the 1990s such support was justified by the Cold War. Today the United States invokes, depending on the circumstances, a war on drugs or a war on terrorism, as justifying support to states who violate international norms.

VI CONCLUDING REMARKS

Even if the permanent members of the Council had never breached the U.N. Charter and international legal norms; even if they had never used or possessed weapons of mass destruction; even if they had not been major arms exporters; and even if they could be presumed to act solely for the common good of humanity rather than to further their national interests within the Council; prudence alone would suffice as a compelling reason for subjecting their decisions to the test of good faith. Such test is warranted, if only because any human authority is fallible and prone to abuse a position of power. The need for accountability with regard to good faith is particularly important when the decisions of a public authority may affect the well-being or even lives of millions of human beings as well as the international order. Yet, the conduct and decisions of the Council are not subject to effective political accountability nor to judicial review. Individuals whose human rights have been violated by the implementation of victimized by Council decisions are not provided with any form of judicial remedies [**126**]. This shortcoming was not particularly glaring during the Cold War when the two superpowers effectively neutralized each other within the Council. The need for accountability became a serious cause of concern after the demise of the bipolar world.

The following tentative conclusions can now be made:

- The members of the Council are under the legal obligation to act in good faith when carrying out their mandate. Such obligation is enshrined in the U.N. Charter itself and is fundamental principle of international law. This obligation to act in good faith applies particularly with regard to the determination of a threat to the peace, the choice of means to respond to such a threat and the decision when collective enforcement measures are no longer justified.
- The permanent members of the Council have repeatedly breached their duty to fulfill their U.N. Charter obligations in good faith when acting within and outside the United Nations and continue to do so; the permanent members have at various times breached international peace, violated the U.N. Charter and permitted or even

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resolutions. The People's Republic of China occupies Tibet since 1950. Turkey occupies Northern Cyprus since 1974 in violation of Security Council resolutions. Morocco occupies Western Sahara since 1975 in violation of Security Council resolutions.

121 For example South African's policy of *apartheid* and Israel's regime of systematic discrimination against non-Jews.

122 Among governments under whose jurisdiction war crimes were reportedly committed while and receiving weapons from P-5 governments, figure Colombia, Israel, Indonesia, Sri Lanka and Iraq.

123 Evidence has been published on alleged US complicity in the genocide committed in Indonesia in 1965 and between 1975 and 1989 in East Timor. See, *inter alia*, Blum, *supra* note 114, at 193-200; see also Pilger, *supra* note 112, at 139

124 Turkey, El Salvador, Guatemala, Chile, Indonesia, and numerous other countries.

125 UK ministers "made it clear to [Indonesia's Foreign Minister] Atalas that the U.K., the second-largest arms supplier to Indonesia after the U.S.A., would not cut off aid or arms sales," in spite of Indonesia's refusal to abide by U.N. resolutions. [Keesing's Record of world events (February 1992), item nr. 38769

126 One attempt to address such shortcoming is pursued by the International Trust Fund to Promote Remedies for Injuries Caused by Economic coercion (PRICE), of which the present author is director. See http://www.juscogens.org

ordered their nationals to commit international terrorism, war crimes and crimes against humanity. They continue to lead the worldwide dissemination of lethal and inhumane weapons, refuse to dismantle their stocks of weapons of mass destruction and profit from armed conflicts. They are on record as using bribes and coercion on weaker states in order to give the appearance of international legitimacy to the resolutions of the Council.

- The composition of the Council, its rules of procedure and the historical record of its permanent members justifies the presumption of bad faith towards its decisions.
- When Council decisions are secured by bribes and threats or are adopted in bad faith, their legitimacy may be questioned. The possible *ultra vires* character of such decisions may in such cases be invoked by states in support of their refusal to comply with such decisions.

As there exists no mechanism to ensure that the Council acts in good faith, and as it is presently composed may be presumed to act *ultra vires*, whenever its most powerful members so desire, it follows that decisions by the Council threatens rather than ensures international peace and security. If this conclusion is accepted, the question arises what measures the nations composing the United Nations could take in order to remove that threat to the peace. A number of measures have been suggested, including

> restraints imposed by the [U.N.] General Assembly through the exercise of its powers in budgetary matters, non-compliance with []Council decisions by individual States, increase of the membership of the [] Council and its restructuring as well as other possible forms of judicial or quasi-judicial control through subsidiary organs, World Trade Organisation panels, *ad hoc* arbitrations and even municipal courts,[**127**]

as well as a decision by the U.N. General Assembly not to elect non-permanent members to the Council as was suggested by Erskine Childers, the adoption of a Declaration by the U.N. General Assembly on the Obligation by U.N. Organs to Respect Fundamental Human Rights in All Circumstances, the adoption by the U.N. General Assembly of Uniting for Peace resolutions when the Council fails to enforce the peace or terminate coercive measures and the adoption of effective measures against abusive practices by and in the Council, such as securing votes by bribes and coercion. Ultimately, any attempt to make international institutions, such as the Security Council, accountable to the world's peoples, to legal principles and to human rights norms, will require determined, persistent and world-wide efforts by civil society.

END

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127 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 International and Comparative Law Quarterly (1997)