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# The Security Council and Measures Not Involving the Use of Force

This chapter considers certain legal issues that arise under some of the main provisions of Chapter VII of the Charter relating to measures not involving the use of force. In this regard, the words of warning expressed by Leland Goodrich and Anne Simons are at least as relevant today as they were in 1969:

In the use of the documentary records of the United Nations to explain how the Charter has been interpreted and applied, we have encountered the difficulty of relating particular decisions and discussions to particular articles. Sometimes the relation to a particular article is clear, but more often there is no reference in a resolution adopted or statement made to the particular article of the Charter upon which it is based. Often in the course of discussions various reasons are advanced and different articles are cited with no clear indication in the end as to which considerations have been decisive in the final decision. The tendency in the United Nations to politicize issues and to seek accommodations makes the task of using United Nations practice for the purpose of showing how specific articles have been interpreted and to what extent these interpretations have been accepted an extremely difficult one. Very often one has to rely on what seems to be reasonable inferences.<sup>1</sup>

The difficulty has been exacerbated by the move, since the late 1980s, to conduct much of the Council's business in informal consultations, without official documentation.

Article 39 provides that the Security Council 'shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain international peace and

<sup>1</sup> Goodrich and Simons (1969) x.

security'. Before doing so, and '[i]n order to prevent an aggravation of the situation', under Article 40 the Council may also 'call upon the parties concerned to comply with' provisional measures.

The present chapter first considers provisional measures under Article 40, and then turns to measures not involving the use of armed force under Article 41.

### 5.1 Article 40: Provisional Measures

The Security Council may adopt what might be termed 'provisional measures'<sup>2</sup> in various contexts and under various provisions of the Charter, including Chapter VI. Here, we are concerned with the one provision that expressly uses the term 'provisional measures', Article 40, which reads:

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. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.<sup>3</sup>

The ordinary meaning of Article 40 raises several questions concerning the powers of the Council contained in it and the Article's relationship with the powers of the Council to adopt binding measures under Articles 41 and 42.

#### 5.1.1 *Are Provisional Measures under Article 40 Binding?*

Article 40 provides that the Council may 'call upon' – a term normally used in a non-binding context in Council outcome documents – parties to a situation to adhere to certain temporary measures, before resorting to binding measures or recommendations under Articles 41 and 42. The preceding Article 39 speaks of the Council resorting to measures and recommendations under Articles 41 and 42 in cases of a threat to the peace, breach of the peace, or act of aggression, but does not refer to Article 40. This may

<sup>2</sup> Not to be confused with 'provisional measures' adopted by international courts and tribunals, which serve a quite specific and different purpose.

<sup>3</sup> See Goodrich et al. (1969); Krisch, 'Article 40' (2012); Nasu (2009).

suggest that provisional measures under Article 40 are not binding decisions of the Council, as opposed to the explicit authority to take such decisions to be found in Articles 41 and 42.<sup>4</sup>

On the other hand, this is not the only possible reading of the text of Article 40. As indicated by the ICJ, the term ‘calls upon’ may be used to issue a binding decision by the Council in some contexts.<sup>5</sup> The Council itself has even used the term to authorize the use of force.<sup>6</sup> And, from the very beginning, writers have interpreted the term ‘calls upon’ in Article 40 and provisional measures as potentially binding if so decided by the Council (much like the use of the term in Article 41).<sup>7</sup> Writers have also suggested that Article 40 is redundant if it does not allow for binding provisional action by the Council as the Council can make similar recommendations under Chapter VI.<sup>8</sup>

The Security Council’s practice from its early years shows that the Council has issued binding decisions explicitly under Article 40 that have not met with opposing legal views by states.

In 1947, the Council adopted a resolution on the situation in Indonesia, calling upon the parties to cease hostilities forthwith and settle their dispute by arbitration or by other peaceful means.<sup>9</sup> Disagreement ensued thereafter about whether the resolution was adopted under Articles 39 and 40, as explicit references to the Articles in the original Australian draft<sup>10</sup> were removed from the resolution as adopted. The USA took the view that the resolution was adopted under Article 40 and was, therefore, binding on the parties.<sup>11</sup> Other Council members denied that the text was adopted under Article 40, but in so doing implicitly accepted the legally binding nature of provisional measures adopted under Article 40.<sup>12</sup>

<sup>4</sup> Provisional measures imposed by the Security Council are quite distinct from provisional measures indicated by the ICJ under Article 41 of its Statute and by other international courts and tribunals; it will be recalled that the ICJ’s 2001 judgment in the *LaGrand* case found that its own provisional measures were binding.

<sup>5</sup> *Namibia* Advisory Opinion, at p. 53, para. 115.

<sup>6</sup> S/RES/221, 9 April 1966, para. 5.

<sup>7</sup> Goodrich and Hambro (1946) 159; Higgins et al., (2017b) 27.36; admittedly, this is not entirely without doubt as the ICTY declined to take an affirmative stance on the issue, see *Prosecutor v. Tadić* (1995), para. 33.

<sup>8</sup> Krisch, ‘Article 40’ (2012) MN 12. <sup>9</sup> S/RES/27, 1 August 1947.

<sup>10</sup> S/454, 31 July 1947. <sup>11</sup> S/PV.398, 11 January 1948.

<sup>12</sup> *Ibid.*, statement of Belgium, p. 11.

Comments made by Council members on draft resolutions on the ‘Greek frontier incidents’ that failed adoption reflected similar views.<sup>13</sup>

In 1948, the binding nature of Article 40 was reflected in an official Council outcome. The Council ‘ordered’ a ceasefire in Palestine ‘pursuant to Article 40’, including an ‘immediate and unconditional’ ceasefire in Jerusalem to take effect within twenty-four hours.<sup>14</sup> The Council subsequently reminded the warring parties of their binding obligations under the resolution.<sup>15</sup> Then it imposed, ‘as a further provisional measure’ on the parties’ an obligation to negotiate an armistice.<sup>16</sup>

In the midst of the Iran–Iraq war, explicitly citing Article 40, the Council demanded that the parties cease fire and withdraw to their respective territories.<sup>17</sup> This was viewed as imposing a legal obligation on the parties.<sup>18</sup>

When Iraq invaded Kuwait in 1990, the Council cited Article 40 to demand Iraq’s withdrawal.<sup>19</sup> Council members considered this demand to be binding.<sup>20</sup> The Council explicitly invoked Article 40 in resolution 1696 (2006) to demand that Iran suspend its nuclear programme. This was considered a binding demand.<sup>21</sup> Indeed, the final preambular paragraph made this clear: ‘*Acting* under Article 40 of Chapter VII of the Charter of the United Nations in order to make mandatory the suspension required by the IAEA.’ This was further evident when, in resolution 1737 (2006),<sup>22</sup> Iran was found to be in non-compliance with the requirements of resolution 1696

<sup>13</sup> S/PV.180, 12 August 1947, statement of Australia.

<sup>14</sup> S/RES/54, 15 July 1948, paras. 2, 5. <sup>15</sup> S/RES/59, 19 October 1948.

<sup>16</sup> S/RES/62, 16 November 1948, paras. 1–2.

<sup>17</sup> S/RES/598, 20 July 1987, preamble and para. 1.

<sup>18</sup> S/PV.2750, 20 July 1987, statement of the UK, p. 16, statement of the USA, p. 21, statement of Germany, p. 27, statement of Ghana, p. 41, statement of Argentina, pp. 46–7. Iraq also accepted the binding character of the resolution, see S/19045, 14 August 1987; see also Krisch, ‘Article 40’ (2012) MN 13, fn. 41, noting that Iran’s refusal to accept the resolution was based on its perceived bias according to Iran.

<sup>19</sup> S/RES/660, 2 August 1990.

<sup>20</sup> S/PV.2933, 6 August 1990, statement of France, p. 21, statement of Canada, pp. 23–5, statement of China, p. 28, statement of Zaire, pp. 34–5, statement of Ethiopia, p. 37; see also Chapter 1.

<sup>21</sup> S/RES/1696, 31 July 2006, para. 2; S/PV.5500, 31 July 2006, statement of the USA, p. 3, statement of the UK, p. 4, statement of China, p. 4; Joyner (2017); see also Chapter 2.

<sup>22</sup> S/RES/1737, 23 December 2006, sixth preambular para.

(2006) and was later ‘released’ from its ‘obligations’ under resolution 1696 (2006) by resolution 2231 (2015).<sup>23</sup>

Though Council practice seems clear, it is important to bear in mind that, even if provisional measures under Article 40 were not binding, the Security Council could decide on such measures under Article 41.

In addition, that the Council can ‘take account’ of non-compliance with its provisional measures is legally redundant due to its other Chapter VII powers, though it does provide a political justification for actions against states which may have otherwise not been considered antagonists by the Council before their non-compliance.<sup>24</sup>

Finally, while measures under Article 40 are to be ‘without prejudice to the rights, claims, or position of the parties concerned’, it became evident early on that practically any provisional measure adopted by the Council can arguably prejudice one of the parties to a conflict.<sup>25</sup>

### *5.1.2 Is a Determination under Article 39 a Necessary Prerequisite for Provisional Measures under Article 40?*

While a determination of a threat to the peace, breach of the peace, or act of aggression under Article 39 is a prerequisite for enforcement action under Articles 41 and 42, the Charter is silent with respect to provisional measures under Article 40. This raises the question as to the relationship between Articles 39 and 40. It has been suggested that the practice of the Council provides no firm answer.<sup>26</sup>

The drafters of the Charter intended that a determination under Article 39 should be made prior to any provisional measures being called for, as with measures under Articles 41 and 42.<sup>27</sup> At San Francisco, the Drafting Committee opined that the structure of Articles 39–42 was such that provisional measures would be adopted as responses to threats to the peace, and that resort to further

<sup>23</sup> S/RES/2231, 20 July 2015, para. 7(a). These examples also demonstrate that a Council ‘demand’ may be binding, see Chapter 2.

<sup>24</sup> Krisch, ‘Article 40’ (2012) MN 12.

<sup>25</sup> S/PV.381, 16 November 1948, statement of Syria; Krisch, ‘Article 40’ (2012) MN 10–12.

<sup>26</sup> Goodrich et al. (1969) 303. <sup>27</sup> Goodrich and Hambro (1946) 158.

measures under Articles 41 and 42 would be necessary in the case of an actual breach of the peace or act of aggression.<sup>28</sup>

This particular course of action was not followed in practice, yet it explains the structure of the Charter, in which Article 40 is placed after Article 39 and before Articles 41 and 42. It suggests that Article 40 was meant to follow a determination under Article 39. The views of member states reflect this contextual interpretation.

When the Council's Sub-Committee on the Spanish Question reported to the Council in 1946, it noted that 'the activities of the Franco regime do not at present constitute an existing threat to the peace within the meaning of Article 39 of the Charter and therefore the Security Council has no jurisdiction to direct or to authorize enforcement measures under Article 40 or 42'.<sup>29</sup> When the Indonesian question was discussed in 1947, Belgium took the view that 'the Council would not, under the Charter, be justified in applying Article 40 without first having determined the existence of a threat to the peace, a breach of the peace or an act of aggression, according to the actual terms of Article 39'.<sup>30</sup> Indeed, Council practice, on the whole, has been to make a determination under Article 39 before proceeding to adopt provisional measures under Article 40, albeit most often without explicitly referring to either article.<sup>31</sup> Writers also support the necessity of following these steps.<sup>32</sup> There have, however, been a few possible exceptions to this practice.

During the Indo-Pakistani War of 1965, the Council, without making a determination under Article 39, demanded that a ceasefire take place and that troops withdraw to their original positions.<sup>33</sup> Two years later, during the Six Day War, the Council demanded a ceasefire between Israel and its neighbours, again

<sup>28</sup> Ibid. <sup>29</sup> S/75, 1 June 1946, p. 10.

<sup>30</sup> S/PV.172, 1 August 1948, p. 1654; see also Greece's request for the Council to make a determination under Article 39 in order to proceed with adopting provisional measures, S/451, 31 July 1947.

<sup>31</sup> See, for example, S/RES/1199, 23 September 1998, referring to a threat to the peace and making demands for a ceasefire and other measures; Krisch, 'Article 40' (2012) MN 5.

<sup>32</sup> E.g., Higgins (1963) 236; Krisch, 'Article 40' (2012) MN 3-4; Higgins et al., (2017b) 27.36.

<sup>33</sup> S/RES/211, 20 September 1965; see also S/RES/214, 27 September 1965 and S/RES/215, 5 November 1965.

without using any of the terms in Article 39 but rather describing the conflict as a ‘menacing situation’.<sup>34</sup>

In resolution 1696 (2006) on the Iranian nuclear programme, the Council explicitly invoked Article 40 without invoking Article 39 or its language, but rather stated that it was ‘[c]oncerned by the proliferation risks presented by the Iranian nuclear programme, mindful of its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security, and . . . determined to prevent an aggravation of the situation’.<sup>35</sup> The Council used similar language when it proceeded to adopt binding measures under Article 41 after Iran failed to comply with its earlier decisions, still without an explicit determination under Article 39.<sup>36</sup>

It is possible to argue that a determination under Article 39 was implicit in all these situations, or that at least the first two examples in fact involved measures not under Article 40 but under Chapter VI.<sup>37</sup> In any event, these examples notwithstanding, the Council can and should resort to measures under any provisions of Chapter VII, including under Article 40, only after making a determination under Article 39 of a threat to the peace, a breach of the peace, or an act of aggression.

### 5.1.3 *The Temporary Nature of Measures under Article 40*

Article 40 contains an implicit requirement that the measures are temporary in nature, aimed at preventing further aggravation of a situation rather than resolving it and restoring peace and security, without prejudicing the positions of the parties concerned. The measures that the Council has adopted under Article 40 in practice reflect this.

Most common are demands for the end of hostilities, a ceasefire, and/or the withdrawal of troops to their original positions.<sup>38</sup> Some argue that arms embargoes may be a form of provisional measure, the argument being that such action is a temporary stopgap prior to finding a solution to a situation.<sup>39</sup> While this view is not entirely unreasonable, it would render almost all measures decided by the Council, such as sanctions, arguably provisional. Article 41,

<sup>34</sup> S/RES/234, 7 June 1967. <sup>35</sup> S/RES/1696, 31 July 2006.

<sup>36</sup> S/RES/1737, 27 December 2006. <sup>37</sup> Krisch, ‘Article 40’ (2012) MN 6.

<sup>38</sup> Ibid., MN 8. <sup>39</sup> Nasu (2009) 104.

however, makes clear that disruptions of economic relations, that is, sanctions and embargoes, are measures under Article 41. It would thus seem that the provisional measures envisioned in Article 40 are narrower in space and time, and relate more to immediate and quick steps that can be taken as the Council deliberates its response. This is reflected in the jurisprudence of the ICTY which viewed measures under Article 40 as a ‘holding operation’, producing a ‘stand-still’ or ‘cooling-off effect’.<sup>40</sup>

The temporal element inherent in measures under Article 40 also stands in contrast with measures under Article 41, which the Charter does not indicate must be provisional in nature. Thus, while some have argued that Chapter VII measures taken by the Council cannot include permanent solutions to disputes, there is nothing in the Charter to support this assertion, except in respect of measures under Article 40.

Some – including former Secretary-General Boutros Boutros-Ghali – have taken the view that peacekeeping is a provisional measure under Article 40.<sup>41</sup> This is debatable, as classic peacekeeping operations operate with the consent of the host state and do not require the exercise of any specific Chapter VII powers, and are best considered recommendations under Chapter VI.<sup>42</sup> Furthermore, as with sanctions, peacekeeping operations, which may be deployed for years or even decades, go beyond the temporal scope envisaged in Article 40.

A more difficult question is the basis for Chapter VII authorizations for peacekeepers to use force – which are common for today’s peacekeeping operations<sup>43</sup> – and whether they fall under Article 40 or under Article 42. The better view is that, apart from the right of peacekeepers to use force in self-defence, any further authorizations to use force are made under Article 42, the only article in the

<sup>40</sup> *Prosecutor v. Tadić* (1995), para. 33.

<sup>41</sup> *An Agenda for Peace*, S/24111, 17 June 1992, para. 44; White (1996) 52–3; Nasu (2009).

<sup>42</sup> E.g., S/RES/1312, 31 July 2000; Higgins (1970) 25.

<sup>43</sup> Many missions include authorizations to use force to implement parts of the mandate, such as protection of civilians, e.g., S/RES/2502, 19 December 2019, para. 27. At times, peacekeeping operations are given an ‘enforcement’ mandate, to actively engage with armed groups, see the mandate of the UN Organization Stabilization Mission in the DRC (MONUSCO) through its Force Intervention Brigade in S/RES/2463, 29 March 2019, para. 29(d).



Charter which grants the Council the authority to decide on the use of force.<sup>44</sup>

### 5.1.4 *The Timing of Measures under Article 40*

The Charter envisaged the Council resorting to provisional measures as an initial response, a ‘holding pattern’, as it contemplated further action necessary under Articles 41 and 42. Article 40 would thus cease to be relevant once the Council had taken action under the latter articles.

In practice, however, measures under Articles 40, 41, and 42 may come at the same time or without any particular sequence.<sup>45</sup> For example, the Council may establish or renew the mandate of a peacekeeping operation with authorizations under Article 42, while also making demands to the parties to end hostilities under Article 40 in the same text.<sup>46</sup> Or it can demand under Article 40 that the parties lay down their arms while imposing sanctions under Article 41.<sup>47</sup>

## 5.2 Article 41: Sanctions and Other Measures Not Involving the Use of Armed Force

### 5.2.1 *The Legal Framework*

Article 41 of the Charter reads as follows:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.<sup>48</sup>

<sup>44</sup> Higgins et al., (2017b) 27.38; for an opposing view, see *An Agenda for Peace*, S/24111, 17 June 1992, para. 43.

<sup>45</sup> Goodrich et al. (1969) 303 recall that the inclusion of Article 40 at San Francisco ‘was approved on the understanding that the Council was not required to follow any fixed order and could, if necessary, call for the immediate application of enforcement measures’.

<sup>46</sup> E.g., S/RES/2502, 19 December 2019. <sup>47</sup> E.g., S/RES/2360, 21 June 2017.

<sup>48</sup> For recent writings, see Johnstone (2016); Eckert (2016); Cockayne et al. (2018).

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As opposed to the Council of the League of Nations, which did not possess the ability to impose binding enforcement measures,<sup>49</sup> when the Council determines ‘the existence of any threat to the peace, breach of the peace, or act of aggression’ under Article 39, it may impose ‘measures not involving the use of armed force’ under Article 41.

Article 41 contains an open-ended list of potential measures and thus does not contain any built-in limitation as to the measures that the Council can adopt.<sup>50</sup> The Council’s resort to such measures was rare during the Cold War, but it has since utilized its power under Article 41 regularly in a variety of ways responding to different situations.<sup>51</sup>

As discussed in Chapter 1,<sup>52</sup> classifying Security Council action under rubrics such as ‘legislative’, ‘executive’, ‘judicial’, or ‘quasi-judicial’, terminology analogous to the branches of domestic legal systems and thus familiar to all lawyers, does not help one ascertain whether Security Council measures exceed the scope of its mandate.

This should be borne in mind when assessing the scope and legality of Council measures under Article 41. When the Security Council identifies a threat to the peace, breach of the peace, or act of aggression, it may decide upon ‘measures not involving the use of armed force’ to be carried out by, and binding on, the member states, to ‘remedy a conflict or an imminent threat to international peace and security’.<sup>53</sup> This the Council can legally do as long as it does not violate the limits of its authority found in the UN Charter or, according to a widely held view, *jus cogens*.

In any event, the Security Council enjoys a wide discretion as to the measures not involving the use of force that it chooses to adopt and when. As stated by the Appeals Chamber of the ICTY,

the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice . . . Article 39 leaves the choice of means and

<sup>49</sup> The Covenant of the League of Nations, Art. 16.

<sup>50</sup> *Prosecutor v. Tadić* (1995), para. 35; *Prosecutor v. Kanyabashi*, para. 27.

<sup>51</sup> Malone (2007); Eckert (2016) 413–27. <sup>52</sup> See Chapter 1.2.2.

<sup>53</sup> *Prosecutor v. Kanyabashi*, para. 27.

their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.<sup>54</sup>

The International Criminal Tribunal for Rwanda (ICTR) went further, declaring the Council's discretion on when to act and how as non-justiciable:

By their very nature, however, such discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by this Trial Chamber . . . [T]he question of whether or not the Security Council was justified in taking actions under Chapter VII when it did, is a matter to be determined by the Security Council itself.<sup>55</sup>

This is how Security Council measures under Article 41 are to be assessed. Their nature as 'legislative', 'judicial', or 'executive' is immaterial for that purpose.

The same can be said about classifying Security Council enforcement measures as temporary or permanent. As some of the examples that follow will demonstrate, the Council has imposed long-term, indefinite, and even seemingly permanent measures under Article 41, without challenge to their nature as such. With such minimal constraints, the Security Council has shown innovation and versatility in the measures short of use of force that it has adopted to date. The examples surveyed in this chapter demonstrate this very point.

### *5.2.2 Measures Not Involving the Use of Armed Force Adopted by the Council*

The measures most frequently adopted by the Council under Article 41 are what are commonly termed 'sanctions'.<sup>56</sup> The Council nowadays applies 'targeted' sanctions (as opposed to the more sweeping or general ones that it applied in the early 1990s, which resulted in dire effects on entire populations)<sup>57</sup> such as an

<sup>54</sup> *Prosecutor v. Tadić* (1995), paras. 31, 39; see also Chapter 3.

<sup>55</sup> *Prosecutor v. Kanyabashi*, paras. 21–6; see also Schabas (2014) 178–9.

<sup>56</sup> As of January 2022, there were fourteen Security Council imposed sanctions regimes. See [www.un.org/securitycouncil/](http://www.un.org/securitycouncil/).

<sup>57</sup> For a survey of the effects of 'general sanctions', see Reisman and Stevick (1998).

assets freeze and a travel ban on individuals and entities for a variety of reasons.<sup>58</sup> These may include human rights and international humanitarian law violations,<sup>59</sup> undermining peace and stability in a state,<sup>60</sup> and illicit trade in natural resources.<sup>61</sup>

Another measure often applied is an arms embargo, whether on a geographical region,<sup>62</sup> the territory of one state,<sup>63</sup> or against non-state actors within a state or region.<sup>64</sup> The embargo may be on all arms or just some, such as heavy weaponry.<sup>65</sup>

That the Council may impose sanctions as a measure short of the use of force is undisputed. But in one of the first cases after the Cold War, when the Council imposed an arms embargo on the whole territory of the former Yugoslavia during the war in the Balkans,<sup>66</sup> the Organization of the Islamic Conference (now the Organisation of Islamic Cooperation (OIC)) took the view that the arms embargo on 'Bosnia-Herzegovina is unjust, illegal and a major factor impeding the use of the right of self-defence' under Article 51.<sup>67</sup> Its member states, therefore, declared themselves unbound by the embargo and called upon other states to assist Bosnia and Herzegovina by supplying arms in violation of it.<sup>68</sup>

Interestingly, while calling the enforcement measure of the Council under Article 41 illegal as a violation of Article 51, the OIC also stated that if the Council did, in fact, intend to impose an arms embargo on Bosnia and Herzegovina, it could do so by passing another binding resolution for that purpose,<sup>69</sup> presumably

<sup>58</sup> E.g., S/RES/2399, 30 January 2018, on the CAR; S/RES/2293, 23 June 2016, on the DRC.

<sup>59</sup> E.g., S/RES/2399, 31 January 2018, on the CAR, para. 21(b)–(d), (f)–(g); S/RES/2293, 23 June 2016, on the DRC, para. 7(d)–(f), (i).

<sup>60</sup> E.g., S/RES/2293, 23 June 2016, on the DRC, para. 7.

<sup>61</sup> E.g., S/RES/2399, 30 January 2018, on the CAR, para. 21(e); S/RES/2293, 23 June 2016, on the DRC, para. 7(g).

<sup>62</sup> E.g., S/RES/1556, 30 July 2004, on Darfur, paras. 7–8.

<sup>63</sup> E.g., S/RES/2498, 15 November 2019, on Somalia, para. 6.

<sup>64</sup> E.g., S/RES/2293, 23 June 2016, on the DRC, para. 2.

<sup>65</sup> E.g., S/RES/2507, 31 January 2020, on the CAR, para. 1; S/RES/1718, 14 October 2006, on the DPRK, para. 8(a) (i)–(ii).

<sup>66</sup> S/RES/713, 25 September 1991, para. 6.

<sup>67</sup> Res No 6/22-P, 10–12 December 1994, preamble; Tzanakopoulos (2011) 126.

<sup>68</sup> OIC, Res. No. 7/21-P, 25–29 April 1993, para. 12; Res. No. 6/22-P, 10–12 December 1994, para. 7; Tzanakopoulos (2011) 126. See also Security Council Report (2011) 6–7.

<sup>69</sup> Res. No. 6/22-P, 10–12 December 1994, para. 7.

accepting that the Council's enforcement measures apply notwithstanding Article 51.

This last statement in itself puts in doubt the position that the Council's powers to adopt enforcement measures are subject to the inherent right of self-defence recognized by Article 51. It is also debatable whether the arms embargo infringed on the right of self-defence of Bosnia and Herzegovina as a matter of fact. More importantly, Article 51 itself makes clear that the exercise of the right of self-defence by a member state exists 'until the Security Council has taken measures necessary to maintain international peace and security'<sup>70</sup> and, in any event, does not limit the Council's actions under Chapter VII.<sup>71</sup>

The Security Council may ban trade in particular commodities that fuel a particular conflict or fund activities of certain actors such as blood diamonds,<sup>72</sup> timber,<sup>73</sup> or coal.<sup>74</sup> It may also sanction trade in commodities that are unrelated to the conflict but dear to leaders, such as luxury goods, in order to incentivize them to alter their behaviour.<sup>75</sup>

The most active sanctions regime has been that imposed by resolution 1267.<sup>76</sup> Once a regime sanctioning individuals and entities related to the Taliban and then also to al-Qaida, today it lists those with ties to al-Qaida and the Islamic State of Iraq and the Levant (ISIL).<sup>77</sup> There have been legal challenges to sanctions measures under this regime, discussed in Chapter 4, based on due process considerations.<sup>78</sup> The consequent political pressure resulted in the Council establishing a Focal Point, where sanctioned individuals and entities may file their requests for delisting to the Council,<sup>79</sup> and ultimately the Office of the Ombudsperson for the

<sup>70</sup> Charter, Art. 51.

<sup>71</sup> See also Randelzhofer and Nolte, 'Article 51' (2012) MN 65.

<sup>72</sup> E.g., S/RES/1306, 5 July 2000, on Sierra Leone, para. 1; S/RES/1385, 19 December 2001, on Sierra Leone, para. 3.

<sup>73</sup> E.g., S/RES/1478, 6 May 2003, on Liberia, para. 17.

<sup>74</sup> E.g., S/RES/2498, 15 November 2019, on Somalia, para. 23.

<sup>75</sup> E.g., S/RES/1718, 14 October 2006, on the DPRK, para. 8(a)(iii); for a thorough list of various targeted sanctions, see table 20.1 in Eckert (2016) 416–18.

<sup>76</sup> See the sanctions list available at [www.un.org/securitycouncil/sanctions/1267/aq\\_sanctions\\_list](http://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list).

<sup>77</sup> The Taliban is now covered by the Afghanistan sanctions regime, see S/RES/1988, 17 June 2011.

<sup>78</sup> Chapter 1. <sup>79</sup> S/RES/1730, 19 December 2006.

1267 sanctions regime.<sup>80</sup> These challenges have been expanded to other sanctions regimes in recent years.<sup>81</sup>

Aside from sanctions, the Council has acted and adopted a variety of coercive measures in different situations. Going beyond the recommendations it can make to states on settling their disputes peacefully under Chapter VI, the Security Council has adopted coercive measures to induce states to settle their disputes. For instance, in the last few days of the 1973 war between Israel, and Egypt and Syria, the Security Council imposed an obligation on the parties to immediately commence negotiations towards a peace agreement.<sup>82</sup> And in an attempt to push Eritrea to engage with Djibouti to resolve their boundary dispute, the Council imposed sanctions on Eritrean individuals hampering this effort.<sup>83</sup>

The Security Council has gone further than incentivizing, too. In the case of Bosnia and Herzegovina, the Council condemned the Bosnian Serbs for not accepting a proposed territorial settlement accepted by the other Bosnian parties and imposed sanctions on them ‘as a means towards the end of producing a negotiated settlement to the conflict’.<sup>84</sup> In the case of Kosovo in 1999, it decided to make obligatory ‘principles on the political solution to the Kosovo crisis’ adopted by the Group of Eight (G8) foreign ministers, containing content similar to that of the Rambouillet Agreement, which the Federal Republic of Yugoslavia (FRY) had refused to sign.<sup>85</sup> In this case and others, the Security Council also took it upon itself to administer the sovereign territory of a state temporarily, and to carry out the different functions of sovereign governments.<sup>86</sup>

In 2014, a draft resolution containing binding ‘parameters’ for the final settlement of the Israel–Palestine issue was put to a vote.<sup>87</sup> The resolution failed as it received only eight affirmative votes. It is

<sup>80</sup> S/RES/1904, 17 December 2009; S/RES/1989, 17 June 2011; S/RES/2368, 27 June 2018.

<sup>81</sup> See Cockayne et al. (2018), particularly Annex I.

<sup>82</sup> S/RES/338, 22 October 1973, para. 2.

<sup>83</sup> S/RES/1907, 23 December 2009, para. 15(c), with S/RES/1862, 14 January 2009.

<sup>84</sup> S/RES/943, 23 September 1994; Krisch, ‘Introduction to Chapter VII: The General Framework’ (2012) MN 29.

<sup>85</sup> S/RES/1244, 10 June 1999, para. 1, Annexes 1–2.

<sup>86</sup> S/RES/1244, 10 June 1999, on Kosovo; S/RES/1272, 25 October 1999, on East Timor.

<sup>87</sup> S/2014/916, 30 December 2014, para. 2.

important to note, however, that none of the fifteen Council members publicly expressed doubt as to the ability of the Council to dictate to the parties a binding framework for a permanent peace agreement.<sup>88</sup>

In other contexts, the Council adopted measures to settle the underlying dispute between states with finality. Some of these disputes went to issues at the core of state sovereignty such as exercising jurisdiction or boundary disputes. For instance, the Security Council utilized its enforcement powers to settle a dispute between member states in 1992, after two Libyan officials were identified as suspects in the downing of Pan Am flight 103 over Lockerbie, United Kingdom, which resulted in the death of all 243 passengers and 16 crew members, as well as 11 civilians on the ground. Libya refused to adhere to requests from the United Kingdom and the United States demanding extradition of the accused, relying on its obligations under the Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation.<sup>89</sup> The Security Council then adopted a binding resolution, asserting its authority under Article 41, deciding that Libya must extradite the individuals.<sup>90</sup> The resolution also imposed a set of sanctions on Libya, including a flight ban, unless a flight was approved on humanitarian grounds by the Security Council, an arms embargo, and an assets freeze.<sup>91</sup>

Libya refused, however, to extradite the two individuals. After a few years of pushback against the sanctions from African and Arab states, due in part to the grave humanitarian situation in Libya, the Organisation of African Unity (OAU, the predecessor of the AU) issued an ultimatum to the Council, when it decided in June 1998 that if the United Kingdom and the United States refused to allow the suspects to be tried in a third country – to which Libya was willing to agree – its members would cease to comply with the sanctions regime.<sup>92</sup> It also decided ‘on moral and religious grounds’ that, with immediate effect, it would not comply with the sanctions imposed ‘related to religious obligations, providing humanitarian emergencies or fulfilling OAU statutory obligations’.<sup>93</sup> In the end, the two permanent members agreed to the trial of the

<sup>88</sup> S/PV.7354, 30 December 2014.

<sup>89</sup> See, generally, *Lockerbie* Preliminary Objections.

<sup>90</sup> S/RES/748, 31 March 1992, para. 1.

<sup>91</sup> *Ibid.*, paras. 4–5; S/RES/883, 11 November 1993, para. 3.

<sup>92</sup> AHG/Dec.127 (XXXIV), 8–10 June 1998, para. 2. <sup>93</sup> *Ibid.*, para. 3.

suspects before a Scottish court in The Netherlands, and the sanctions were lifted when the suspects were produced by Libya.<sup>94</sup>

The Security Council settled certain disputes with finality in the aftermath of the Gulf War in 1990–1991, after the establishment by the Secretary-General of a commission to demarcate the land and maritime boundary between Iraq and Kuwait, in accordance with resolution 687.<sup>95</sup> Initially, Iraq refused to accept the conclusions of the Commission, stating that ‘the Security Council has imposed a specific position with regard to the Iraqi–Kuwaiti boundary, whereas the custom in law is that boundary questions are left to an agreement between States, because this is the sole basis that can guarantee the principle of stability in boundaries’.<sup>96</sup> In response, the Security Council affirmed that the decisions of the Commission were final,<sup>97</sup> demanded that both parties respect the boundary as demarcated by the Commission,<sup>98</sup> and conveyed its intention to ensure the inviolability of the boundary,<sup>99</sup> presumably by taking further enforcement action if needed. Ultimately, that proved unnecessary as Iraq accepted the boundary as determined by the Commission, and did so in expressing its desire ‘for respect for the Charter of the United Nations and international law, in keeping with its commitment to comply fully with all relevant resolutions of the United Nations Security Council’.<sup>100</sup> According to some authors, determining the permanent boundary was *ultra vires* as a violation of the sovereign equality of states.<sup>101</sup> Some support for this may be found in the disclaimer made by the Council itself at the time, that, by enforcing the conclusions of the Commission, it was not reallocating territorial rights but rather carrying out a ‘technical exercise’ of marking the boundary, in accordance with Agreed Minutes from 1963, determining the boundary.<sup>102</sup> Nevertheless, this explanation seems quite strained considering that Iraq had not accepted the 1963 Agreed Minutes as binding.<sup>103</sup>

Also in resolution 687, the Security Council determined that Iraq was ‘liable under international law for any direct loss, damage – including environmental damage and the depletion of natural resources – or

<sup>94</sup> S/RES/1192, 27 August 1998, para. 8. <sup>95</sup> S/RES/687, 3 April 1991, para. 3.

<sup>96</sup> S/22558, 2 May 1991, p. 5. <sup>97</sup> S/RES/833, 27 May 1993, para. 4.

<sup>98</sup> *Ibid.*, para. 5. <sup>99</sup> *Ibid.*, para. 6.

<sup>100</sup> S/1994/1288, 14 November 1994, p. 2. <sup>101</sup> De Wet (2004) 362–66.

<sup>102</sup> S/RES/83, 27 May 1993, preamble; de Wet (2004) 365.

<sup>103</sup> See the Report of the Commission in S/25811, 23 May 1991; de Wet (2004) 364; Johnstone (2016) 778; Mendelson and Hulton (1993) 144–50, 178–85, 192–3.



injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait'.<sup>104</sup> It then decided to establish a compensation fund and a compensation commission for that purpose.<sup>105</sup> Funded by proceeds of Iraqi oil sales,<sup>106</sup> the Commission has paid a total of about USD 52.4 billion to individuals and corporations for death, injury, loss of or damage to property, commercial claims, and claims for environmental damage.<sup>107</sup>

The Security Council has also utilized its enforcement powers to bypass the requirement of state consent to be bound (or unbound) by treaties, another fundamental principle underpinning international law.<sup>108</sup>

Despite the DPRK's express will to renounce and not be bound by the NPT, the Security Council demanded that it retract its announcement of withdrawal and implement the NPT and the International Atomic Energy Agency (IAEA) safeguards agreement.<sup>109</sup>

After the assassination of former Lebanese Prime Minister Rafik Hariri along with twenty-two other casualties, the Security Council requested that the Secretary-General negotiate an agreement to establish a tribunal to adjudicate this and related events.<sup>110</sup> The agreement was signed by the Secretary-General and the Lebanese government, but four months later, Lebanese Prime Minister Fouad Siniora informed the Secretary-General that while the agreement enjoyed majority support in the parliament, due to internal political processes Lebanon would not be able to ratify the agreement.<sup>111</sup> He then asked that the Security Council establish the tribunal through a binding decision.<sup>112</sup> Recognizing that terrorist acts constitute a threat to international peace and security, the Council then adopted resolution 1757 (2007), deciding that the provisions of the document annexed to the resolution (the agreement on the establishment of the Special Tribunal for Lebanon) would enter into force eleven days later.<sup>113</sup>

Thus, the Council saw fit to intervene in the domestic affairs of Lebanon and bring into force the provisions of a treaty, circumventing the requirement of Lebanese consent to be bound by ratification of

<sup>104</sup> S/RES/687, 3 April 1991, para. 16. <sup>105</sup> *Ibid.*, para. 18.

<sup>106</sup> S/RES/1483, para. 21; see also the United Nations Compensation Commission (UNCC) website, available at <https://uncc.ch/home>.

<sup>107</sup> UNCC, <https://uncc.ch/home>. <sup>108</sup> Wood (2011).

<sup>109</sup> S/RES/1718, 14 October 2006; S/RES/1874, 12 June 2009.

<sup>110</sup> S/RES/1664, 29 March 2006. <sup>111</sup> S/2007/281, 15 May 2007. <sup>112</sup> *Ibid.*

<sup>113</sup> S/RES/1757, 30 May 2007, para. 1; see Wood (2011) 250; Schoeger (2016) 513–14.

the Treaty. This is a prime example of how measures the Council adopts under Chapter VII in order to maintain international peace and security may override any considerations of non-intervention, as foreseen under Article 2(7) of the UN Charter.

More generally, the Council has taken several enforcement measures relating to international criminal law. It has established commissions of inquiry to assess individual responsibility for violations of international criminal law.<sup>114</sup> It established the ICTY as well as the ICTR, both of which operated for more than two decades, and handed down long prison sentences.<sup>115</sup> The ICTY Appeals Chamber explained that, in doing so, the Council was exercising ‘its own principal function of maintenance of peace and security’.<sup>116</sup> When the ICTY and the ICTR were established, one or two Council members questioned the Council’s authority to establish a criminal tribunal, but ultimately they voted to establish the tribunals, and member states have not challenged the legality of the measures since.<sup>117</sup>

The Security Council established the Residual Mechanism for the ICTY and the ICTR to deal with outstanding issues like prosecuting remaining fugitives and other issues that may arise as the convicted serve their sentences.<sup>118</sup> While not necessarily a permanent institution, the Residual Mechanism will presumably function for many years. The territorial administrations established by the Council in Timor-Leste and Kosovo established judicial bodies to try perpetrators of war crimes as well.<sup>119</sup>

The Council has twice referred situations to the ICC, acting in accordance with a provision in the Rome Statute and granting the Court jurisdiction in situations in which it would otherwise not be able to exercise it.<sup>120</sup> On these occasions, and in other resolutions,

<sup>114</sup> E.g., S/RES/1564, 18 September 2004, on Sudan, para. 12; S/RES/2235, 7 August 2015, para. 5 with S/RES/2118, 27 September 2013, on Syria; S/RES/2127, 5 December 2013, on the CAR, para. 24; the Security Council may also establish such commissions under Article 34 of the UN Charter.

<sup>115</sup> S/RES/827, 25 May 1993 establishing the ICTY; S/RES/955, 8 November 1994, establishing the ICTR.

<sup>116</sup> *Prosecutor v. Tadić* (1995), para. 38.

<sup>117</sup> S/PV.3217, 25 May 1993, in which resolution 827 was adopted unanimously, see statement of China, p. 33; S/25540, 6 April 1993 from Brazil on the formation of the *ad hoc* tribunals; see also Stθοeger (2016) 507.

<sup>118</sup> S/RES/1966, 22 December 2010; Stθοeger (2016) 512.

<sup>119</sup> Schabas (2014) 186.

<sup>120</sup> S/RES/1593, 31 March 2005, on Sudan; S/RES/1970, 26 February 2011, on Libya.

the Council adopted a clause excluding personnel from a state not party to the Rome Statute, acting under authorization of the Council, from the jurisdiction of the ICC.<sup>121</sup> These clauses arguably contradict the language of the Rome Statute, by discriminating between parties to the same conflict.<sup>122</sup>

The Security Council has also adopted measures imposing legal obligations on states with respect to non-state actors in the field of terrorism and proliferation of weapons of mass destruction. A few days after the events of 11 September 2001, the Security Council adopted resolution 1373, obliging states to refrain from supporting terrorist acts, to criminalize participation in and financing of terrorist acts, and to freeze assets relating to terrorist activities, among other things.<sup>123</sup> The regime imposes strict reporting requirements on states, and a highly active subsidiary body, the Counterterrorism Committee, was established in order to monitor compliance with the regime and assist states in building up their capacities.

Over the years, the Council has added to these obligations by adopting additional measures, for example relating to incitement to commit terrorist acts.<sup>124</sup> The Council has also adopted measures imposing obligations on states with respect to ‘foreign terrorist fighters’, that is, individuals travelling to foreign countries to participate in terrorist activities.<sup>125</sup> States are now obliged to deny and criminalize such travel through their territory or assistance to it within their domestic systems.<sup>126</sup> The Council added to this regime, obligating states to take measures against foreign terrorist fighters returning to their country of origin and their families.<sup>127</sup>

### 5.2.3 *What Are the Limits of Article 41?*

There are several conclusions that can be drawn as to the nature of Council measures short of the use of force and their legal boundaries.

<sup>121</sup> Resolution 1593, 31 March 2005; Resolution 1970, 26 February 2011; S/RES/1422, 12 July 2002; S/RES/1483, 22 May 2003.

<sup>122</sup> Sthoeger (2016) 517–18, 522. For more on the binding nature of these measures, see Chapter 2.

<sup>123</sup> S/RES/1373, 28 September 2001. <sup>124</sup> S/RES/1624, 14 September 2005.

<sup>125</sup> S/RES/2178, 24 September 2014. <sup>126</sup> *Ibid.*

<sup>127</sup> S/RES/2396, 21 December 2017.

*First*, Council decisions that have been qualified as ‘legislative’, generally applicable and not related to any specific situation, while indefinite in time, have led to much discussion by writers about the Council’s prerogatives. As has already been explained,<sup>128</sup> such decisions may be needed to address peace and security challenges the world is facing today and there is nothing in the Charter that imposes a limited case-by-case approach to meet these challenges.<sup>129</sup> When and in what context the Council may act in this way depends on whether the matter in question has been determined to be a threat to the peace, breach of the peace, or act of aggression, and it is not unreasonable for the Council to identify terrorism, for example, as a constant threat to the peace, global in nature and unrelated to one specific country or region.<sup>130</sup>

In fact, and although some have at times expressed the general view that it is not for the Council to act as a ‘world legislator’,<sup>131</sup> states have not challenged the legality of the Council’s ‘legislative’ resolutions and the requirements therein, though they have often complained about the burdens they impose.<sup>132</sup> For example, during the negotiations over resolution 2396 (2017) on returning foreign terrorist fighters, the disagreements that arose revolved around the technological requirements and the consequent financial burden that deploying sophisticated border controls imposed on developing countries in order to meet their obligations under the resolution, as well as the exact terms for criminalizing certain forms of assistance to foreign terrorist fighters.<sup>133</sup> Whether or not the Council can legally impose such obligations was not raised but, rather, assumed.

Such ‘regulatory’ measures are still rare due to the political limits imposed by the member states. For example, just as in the case of anti-terrorism ‘legislation’ by the Council, the controversy surrounding Council action on environmental issues such as climate

<sup>128</sup> See Chapter 1. <sup>129</sup> See also Johnstone (2016) 777. <sup>130</sup> *Ibid.*

<sup>131</sup> Eg., S/PV.5059, 19 October 2004, statement of Brazil, p. 11; S/PV.5059 (Resumption 1), 19 October 2004, statement of Costa Rica, p. 20; Conforti and Focarelli (2016) 263–4.

<sup>132</sup> See, for example, S/PV.8018, 3 August 2018, statement of Tayé-Brook Zerihoun, Assistant Secretary-General for Political Affairs, p. 3; statement of the UK, p. 4.

<sup>133</sup> See What’s in Blue, Foreign Terrorist Fighters: Resolution, 20 December 2017, available at [www.whatsinblue.org/2017/12/foreign-terrorist-fighters-resolution.php](http://www.whatsinblue.org/2017/12/foreign-terrorist-fighters-resolution.php).

change (and assuming a link between climate change and peace and security can be established) concerns what the Council *can* or *should* do as a matter of policy, not whether it *can legally act*.

*Second*, the Council's authority to settle disputes can be based on its powers under Chapter VII and does not need to be based on its peaceful settlement of disputes functions under Chapter VI. When the Council determines that a dispute is a threat to the peace, breach of the peace, or act of aggression, it can take measures to settle that dispute under Article 41 and is not limited to its recommendatory powers under Chapter VI.

States have not challenged the Council's authority to settle disputes without state consent, whether by making legal determinations or by adopting measures under Chapter VII. Quite the opposite, the establishment of the ICTY and the ICTR is an example of the Council exercising its functions by establishing a criminal court, a subsidiary organ conclusively determining criminal liability. As the ICTY has said, its establishment

does not signify . . . that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter.<sup>134</sup>

The ICTY then noted that the Council opted to create a 'judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security'.<sup>135</sup> This, in essence, is reflective of the unique position of the Council in the international system: measures such as establishing a criminal tribunal are within the powers of the Security Council under Article 41 to address situations that trigger Chapter VII action, and are entirely independent of whether the Council is a judicial body and enjoys adjudicative functions.<sup>136</sup>

<sup>134</sup> *Prosecutor v. Tadić* (1995), para. 38; see also *Effect of Awards Advisory Opinion*, at pp. 61–2.

<sup>135</sup> *Prosecutor v. Tadić* (1995), para. 38.

<sup>136</sup> *Prosecutor v. Kanyabashi*, para. 27. In *Kanyabashi*, the Tribunal also pointed out that, similarly, the Council may take enforcement measures to address human rights violations, even though it is not the UN organ entrusted with competence with respect to human rights as such, see paras. 28–9.

## 5 The Security Council and Measures Not Involving the Use of Force

That is also why, in theory, the Security Council could utilize its powers under Article 41 to obligate two states to settle a dispute that threatens international peace and security before the ICJ, even though it can only recommend such action under Chapter VI. The Council could do so not because it has a judicial function but because it is a measure to maintain international peace and security under Chapter VII.<sup>137</sup>

The Council is not bound to respect the statutes of other courts and tribunals, as its relationship with the ICC demonstrates. While the ICC Statute lays down the confines of referrals and deferrals, if the Council steps outside of these boundaries in a binding resolution acting under Article 41, as it arguably has when it referred the situations in Darfur and Libya to the Court by excluding certain nationals from the Court's jurisdiction, as UN members, states party to the Rome Statute are still legally obligated to comply with the Council's decision, notwithstanding their obligations under the Statute.<sup>138</sup>

*Third*, several of the decisions discussed here demonstrate that the Security Council has, in practice, imposed long-term measures and legally binding solutions, and has made permanent determinations to settle disputes. There is nothing in the UN Charter that negates this practice. Only Article 40 speaks of 'provisional measures'. Article 41 does not contain a temporal element, and, whether it was envisaged by the drafters or not, it allows the Council to take measures to maintain international peace and security, temporary or permanent if need be.

It is important to stress in this regard that while some would equate Council powers with 'police powers',<sup>139</sup> responding to unfolding events and putting out fires as it were, that is not what the UN Charter says. What the Charter does grant the Council are extensive powers, but confined to the cases identified in Article 39.

Some have challenged the ability of the Council to adopt permanent measures. In his dissenting opinion in the *Namibia Advisory Opinion*, Judge Fitzmaurice opined: '*Even when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration.*'<sup>140</sup>

<sup>137</sup> See Chapter 8.   <sup>138</sup> See Chapter 2.

<sup>139</sup> See, for example, Krisch, 'Introduction to Chapter VII' (2012).

<sup>140</sup> *Namibia Advisory Opinion*, p. 294, para. 115.

Accordingly, he concluded that the Security Council did not have the power to revoke South Africa's Mandate.<sup>141</sup> However, the majority reached the opposite conclusion, accepting the Council's ability to make binding decisions of a permanent nature over the legality of the administration of a territory.

In the case of the Iraq–Kuwait boundary dispute, it seems that the Council's decisions and Iraq's acceptance of them confirm that very conclusion with respect to sovereignty over territory itself. Ultimately, neither Iraq nor any other country challenged the legality of the Security Council's decision. The Council's attempt to present its actions as a 'technical exercise' in the preamble to its decision speaks to the political sensitivities over such actions, but does not change their legal nature.<sup>142</sup>

The Security Council failed to adopt a resolution on parameters for the final peace agreement between Israel and Palestine. Here, at most some Council members expressed their view as to the futility of such action for bringing about peace, not that such a resolution would have been *ultra vires*.<sup>143</sup>

*Fourth*, some writers find that there can be legal justification for states deciding not to comply with binding measures, such as sanctions regimes.<sup>144</sup> Certainly in the case of the arms embargo on the former Yugoslavia, some states made legal arguments to that effect.<sup>145</sup> With respect to the 1267 sanctions regime, courts appear to have come close to reaching the same conclusion.<sup>146</sup>

The Security Council itself has expressed 'the need to ensure that sanctions are carefully targeted in support of clear objectives and designed carefully so as to minimize possible adverse consequences',<sup>147</sup> as well as its commitment 'to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for

<sup>141</sup> Ibid., p. 295, para. 117.

<sup>142</sup> De Wet has argued that the Council's decision provided for a provisional boundary that was made permanent based on the agreement of the parties; thus they would be free to alter the boundary if they so choose, see de Wet (2004) 367. However, that is true of any boundary and, presumably, at the very least implicit with respect to a boundary determined by the Security Council itself.

<sup>143</sup> S/PV.7354, 30 December 2014, statement of the USA, p. 3, statement of Australia, p. 7.

<sup>144</sup> Tzanakopoulos (2011). <sup>145</sup> See Chapter 4, Section 4.4.

<sup>146</sup> *Kadi v. Council* (2008).

<sup>147</sup> S/PRST/2012/1, 19 January 2012; S/PRST/2011/10, 29 June 2011; S/RES/1325, 31 October 2000, para. 16.

removing them'.<sup>148</sup> These and similar statements have been said to acknowledge the legal confines of the Council's measures.<sup>149</sup> Nevertheless, these are not expressions of conditions for the legality of a particular measure; put differently, states cannot quote the absence of such guarantees, in their view, as a legal justification under international law for not complying with binding Security Council measures.

Accordingly, there are no *legal* justifications for non-compliance with binding Security Council measures under Article 41 in those cases, as the analysis of the limits imposed on Security Council actions, including under Article 41, demonstrates.<sup>150</sup> Rather, the Security Council's adaptation of its binding measures in order to meet the demands of states threatening non-compliance concerns policy, legitimacy, and effectiveness.

When the Security Council shifted from wide-ranging sanctions to targeted sanctions in the mid-1990s, it did so because of the realization that such measures were causing significant hardships – and not necessarily for the decision-makers that were in a position to adjust their policies to alleviate these hardships, thus proving to be of little benefit in terms of effectiveness.<sup>151</sup> The permanent members made that evident when they published a policy paper reflective of this view.<sup>152</sup>

But this policy shift was not a legal imperative any more than are other measures that the Council has taken over time to ease the humanitarian impact of sanctions. These are rather reflective of policy decisions in an attempt to avoid certain consequences that caused harm and contributed little to the effective execution of the Council's mandate. When the Security Council lifted sanctions over Libya after two of its permanent members accepted the Libyan proposal on trying the two individuals suspected of being responsible for the Lockerbie incident, it did so because of political pressure and its dependency on member states to enforce its decisions.<sup>153</sup>

<sup>148</sup> S/PRST/2012/1, 19 January 2012; S/RES/1730, 19 December 2006.

<sup>149</sup> Krisch, 'Introduction to Chapter VII' (2012) MN 43; Krisch, 'Article 41' (2012) MN 19–23.

<sup>150</sup> See Chapter 4 and earlier in this chapter.

<sup>151</sup> On this point, see, for example, S/PV.8018, 3 August 2018, statement of Ethiopia, p. 7, statement of Kazakhstan, p. 5, statement of France, p. 12.

<sup>152</sup> See S/1995/300, 13 April 1995; see also Reisman and Stevick (1998) 126–7.

<sup>153</sup> While some states argued before the Security Council that Libya had abided by its international commitments, they refrained from explicitly calling the measures imposed by the Council illegal. See S/PV.3864, 20 March 1998.



The same goes for the establishment of the Office of the Ombudsperson for the 1267 sanctions regime in response to pressure from member states facing domestic and regional challenges over compliance with due process requirements. The legal obligation of member states under international law was that of compliance with measures imposed by the Council, regardless of domestic or other international obligations, under Article 103 of the UN Charter.<sup>154</sup> Indeed, even the CJEU in the *Kadi* case did not dispute the existence of such an obligation imposed on members outside of European law, choosing instead to focus exclusively on the position under EU law.<sup>155</sup> It acted like a court in a dualist legal system where cases may be decided based on domestic law, notwithstanding existing international obligations and without prejudice to them.<sup>156</sup> And while the jurisprudence of the ECtHR – or the Canadian courts in *Abdelrazik*<sup>157</sup> – has stretched this basic legal understanding to its limit by way of interpretation of the relevant resolutions, it has not challenged the basic structure of the UN system.<sup>158</sup>

Member states' legal views, including those advocating for expanding due process rights afforded to individuals sanctioned by the Council, reflect this understanding. The Non-Aligned Movement (NAM) has regularly criticized the Council's practice in terms of when and how it imposes sanctions, but has not denied their binding nature.<sup>159</sup> The members of 'the Group of Like-Minded States on Targeted Sanctions'<sup>160</sup> remain 'strongly committed' to the sanctions measures imposed by the Council, while pushing for expanding the Office of the Ombudsperson in order to further procedural guarantees.<sup>161</sup> They argue that effective implementation will be hindered, for 'as long as national and regional courts consider that

<sup>154</sup> See Chapter 1; see also Johnstone (2016) 777.

<sup>155</sup> '[A]ny judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law', see *Kadi v. Council* (2008), para. 288; Lenaerts (2014) 711.

<sup>156</sup> See, for example, *Medellín v. Texas*, opinion of Justice Roberts.

<sup>157</sup> *Abdelrazik v. Canada*.<sup>158</sup> See Chapter 1.

<sup>159</sup> See, for example, the Final Document of the 17th Summit of Heads of State and Government of the Non-Aligned Movement, 17–18 September 2016, para. 98.5.

<sup>160</sup> Austria, Belgium, Chile, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden, and Switzerland.

<sup>161</sup> S/2018/1094, 11 December 2018, pp. 1, 3.

United Nations sanctions imposed on individuals fall short of minimum standards of due process, national authorities may find themselves legally unable to implement those sanctions fully at the national level'.<sup>162</sup> While the argument here refers to legal challenges on the *domestic* level, there is no challenge to the binding nature of Council measures under international law.

Implementing more due process considerations in the 1267 sanctions regime was a result of a political process achieved 'through a pattern of defiance, threats, and ultimately negotiation between the Security Council and States, pushed on by their courts, primarily, and also by public opinion or relevant engaged interest groups'.<sup>163</sup> These cases demonstrate the most important check or limit on the powers of the Security Council, including measures under Article 41, which is the Council's dependency on member states to carry out its decisions. As stated in the Council by the United Kingdom, '[f]or such measures to be truly effective, it is absolutely essential that all States implement them fully. It is not good enough just for the majority of countries to do so. A chain is only as strong as its weakest link'.<sup>164</sup> Aware of this reality, the Council's most (politically) controversial measures have been taken in light of extreme security and political realities. But when Council practice is without perceived legitimacy, member states will not carry out the measures, notwithstanding their legal obligations. Without compliance, the Security Council will be ineffective. This, practice has shown, is an effective restraint on the powers of the Security Council.<sup>165</sup>

<sup>162</sup> Ibid.; see also S/2017/534, 23 June 2017, containing the report of the assessment of the High-Level Review of United Nations Sanctions initiated by Australia.

<sup>163</sup> Tzanakopoulos (2016) 6; Cockayne et al. (2018).

<sup>164</sup> S/PV.8018, 3 August 2018, statement of the UK, p. 4.

<sup>165</sup> See also Chapter 4.