Two Crises of Confidence: Securing Non-Proliferation and the Rule of Law through Security Council Resolutions

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TWO CRISES OF CONFIDENCE:
SECURING NON-PROLIFERATION AND THE RULE OF LAW THROUGH
SECURITY COUNCIL RESOLUTIONS

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I. INTRODUCTION

The international law of the modern era is confronted by two opposing challenges: objections to its imperializing overreach on the one hand, and its impotence on the other. These challenges are heightened in relation to one of the greatest concerns of the modern era: the grave threats to our collective security posed by nuclear, biological and chemical (NBC) weapons and weapons of mass destruction. This paper investigates the United Nations Security Council’s proper role in regulating the proliferation of these weapons. Here, a genuine challenge for international law—developing means to regulate dangerous weapons—remains complicated by the various challenges toward international institutions and to the Security Council’s rapidly evolving role.

Two further developments suggest the urgency of this inquiry. The first development is the Security Council’s well-known involvement in recent proliferation crises involving North Korea, Iran, and counter-proliferation resolutions directed at non-state proliferation networks. The second development, known primarily to academics, is the visible increase in formal options available to the Council, including the exercise of “legislative” powers purporting to have direct legal effect on all states, as well as on named individuals. Recently, the legal literature has begun to recognize the “quasi-legislative” character of certain Council decisions under Chapter VII, in particular measures aimed at terrorism and proliferation. If support for such legislation can be found in the UN Charter, it has been argued, the Council would remain in its legal pedigree as well as its ultimate purpose a “creature of law.” It has even been suggested

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2 I will refer to NBC weapons and WMDs (weapons of mass destruction) interchangeably, the former in general and the latter when referring to a particular resolution or argument that uses this term.

3 By “crisis” here, I do not conclude the danger posed by the states, nor do I adopt any particular definition of dyadic crises, (e.g. databases), but episodic events. See Riesman, Charlesworth, A Discipline of Crisis, shorthand “crisis of confidence” denotes the need for confidence-building on both sides.


4 After the nineties, the “post-mortem” genre continued, see e.g., Michael J. Glennon, Why the Security Council Failed. Foreign Affairs, 2003, Vol. 82(3), while a tool for shaping policy and reconcile with the rule of law.

that compared to the painfully slow and hard-won achievements of multilateral non-proliferation regimes, the expediency of Security Council Resolutions would provide “a tantalizing short-cut to law.” Others conclude that an increased role for the Security Council in this area is a cure worse than the illness. Even if there is plenty of room for disagreement on policy perspectives —whether to strengthen or delimit the Security Council’s capabilities in the area of non-proliferation or simply to increase its legitimacy —we can only begin to imagine what that role might be.

This paper suggests that the legal architecture of the United Nations Security Council to generate formal, binding obligations on would-be proliferators is more secure than one might expect. This is true both of the Security Council’s formal UN Charter powers and its operational relationship with existing multilateral mechanisms, and their reliance on its authority. In order for the Security Council to build confidence in the legality and legitimacy of its actions, it is necessary not only that it acts within the boundaries set by the UN Charter, but also that these boundaries are clearly defined. The powers are not per se legal or extra-legal (either in the sense “legal vs. political” or “legal vs. illegal”) but they become so only if they are exercised outside the limits of the UN Charter. While we are used to thinking of the Security Council, its powers and failings in political terms (the power of the permanent five members, the veto power, and the role of political will in advancing or defeating action), political considerations do not end the inquiry. For all its formal power the Security Council is still bound by law and its competencies are framed in terms of international law, not pure political considerations (expediency or compromise).

Though in terms of capacity and involvement, the Security Council is a waking giant in the field of non-proliferation, promises and perils of this involvement have yet to be explored. Ultimately, it seems necessary to come to the recognition that a robust regime or set of mechanisms for handling WMD threats will have to rely on an institution empowered to act on contingent as well as formal bases, as well as among international organizations; the Security Council is uniquely constituted with both kinds of powers. Beyond its express and implied powers under the UN Charter, as well as powers granted by specific treaties, I argue in this paper that Security Council resolutions need not

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6 Austrian Initiative section III (“The Security Council as a Creature of Law”) and section IV (“The Security Council as Legislator”) The Council is a creature of law but there is no formal process for reviewing its decisions; the ultimate sanctions on its authority are political. These include challenges to the Council's authority through the General Assembly, or individual or collective refusal to comply with its decisions. It is in no one's interest to push these political limits. For its part, the Council should limit itself to using its extraordinary powers for extraordinary purposes. When it is necessary to pass resolutions of a legislative character, respect for them will be enhanced by a process that ensures transparency, participation, and accountability. When the Council contemplates judicial functions, it should draw on existing institutions of international law. See also Simon Chesterman, “An International Rule of Law?” . American Journal of Comparative Law, Vol. 56, No. 2, 2008. (iv).


8 While this paper pursues questions about legal authority, it is also true that critiques of the Security Council’s legitimacy do not begin and end with analyses of its legal powers. Some persistent legitimacy concerns — arguments for greater participation and democratization in the Security Council — are neither settled in fact nor are they really analytically severable from the core questions of this paper. Brian J. Foley Reforming the Security Council to Achieve Collective Security Russell Miller, and Rebecca Bratopie Progress in International Organization, published by Martinus Nijhoff.
simply address contingent crises, but should also help develop the Council’s own legal capacity to deal with larger systemic crises, such as the possibility of non-compliance in the future and withdrawal from non-proliferation regimes. This involves side-stepping the default responses of dealing with potential proliferation threats — deferral or escalation — and actively pursuing “lateral” strategies, creative and quasi-legislative resolutions aimed at developing this capacity.

Moreover, even as increasing attention has been given to questions about the Security Council’s lawmaking capacity, critical attention has drifted away from its use of contingent measures under the heading of “confidence-building.” The language of confidence-building is borrowed from the contiguous field of bilateral negotiation. Confidence-building measures include a broad range of activities, aimed at reducing military tensions, developing trust and communication, and demonstrating good faith between parties to a conflict. Such measures are commonly used during the negotiation of peace agreements or to govern complex humanitarian operations, in situations where the parties rely upon different sources of legitimacy, where there is a deep asymmetry between the parties. In standoffs between the Security Council and states suspected of proliferation, as with these other examples, a fuller appreciation confidence-building measures would introduce elements of reciprocity and good faith that would not be otherwise present.

There are two levels of confidence-building -- measures (1) so that the Security Council will be better positioned to anticipate and respond to emerging challenges to peace and security, and (2) so states can better predict and rely upon norms guiding Security Council action. The two, if used well, may complement each other and build confidence in the law-governed practice of the Council. It is hoped that these measures will better help all parties navigate or avoid complex proliferation crises. In the sense promoted by the Council itself, confidence-building involves transformation of voluntary undertakings into enforceable agreements and legal support for action. If we take, for example, the most recent resolution, 1803 (March 3, 2008) against Iran for suspected...

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9 They are not necessarily reactions to breaches of the Charter, especially in the case of “threats to the peace” which do not fall within the prohibitions laid out in Article 2 paragraph 4 of the UN Charter. The circumstances and modalities of their imposition thus fall entirely under the discretion of the Security Council, unfettered by considerations of law. The Council does not have to act within the legal parameters of a given situation; it can ignore, affect and even negate the rights of the parties concerned and can create new law in specific cases through its decisions. At the other end of the spectrum are lawyers such as Jean Combacau, who espouse a “legal” vision of sanctions and their functions. Sanctions would thus always represent reactions against violations of Charter-based obligations, to the point of constructing an implicit prohibition for UN member states to produce the situations proscribed in a general way by Article 39. The Security Council, even when acting as a policeman, could only intervene to protect international public order as defined under international law. The Council, as the organ of a subject of international law, would obviously be subject to the applicable rules of that legal system and could not conclusively affect or modify the rights of the parties concerned. Other scholars (e.g. Goulland Debbas, Bowett and Koskenniemi) have positioned themselves at various points between these two extremes.

10 The Public International Law & Policy Group The role of Political Accountability and Transparency in Confidence-Building Measures (September 2007)

11 The United Nations Security Council issued its fourth resolution against Iran in two years (see also Resolutions 1696, 1737, 1747) on March 3, 2008. In resolution 1803 the Security Council reaffirms its commitment to the Nuclear Non-Proliferation Treaty (NPT) and the need for all states parties to the NPT to comply with their treaty obligations pursuant to Articles I and II to perform research and use of nuclear energy for peaceful purposes. It notes with concern the reports of the International Atomic Energy Agency (IAEA) that Iran has not suspended its uranium enrichment and heavy water processing activities as previous Security Council Resolutions required it to do. Iran has further not resumed cooperation with the IAEA under the Additional Protocol. It emphasizes that China, France, Germany, the Russian Federation, and the United States are willing to explore an overarching strategy with Iran to address its nuclear issues based upon their June 2006 proposals. Acting pursuant to Article 41 of Chapter VII of the UN Charter, it requires Iran to take steps to ensure confidence in the peaceful nature of its nuclear program and comply with SCR 1737. It imposes a travel ban on specific individuals whom the Security Council has identified as being associated or supporting Iran’s proliferation sensitive activities, and authorizes...
development of a nuclear fuel cycle and possibly nuclear weapons, we will notice that the specific act being required of Iran is to “restore confidence” in its intentions. This has been a continuing theme in the various resolutions seeking to prevent North Korea from leaving the NPT and Iran from developing its own nuclear technology.\(^\text{12}\) For the Security Council, then, continuing controversies concerning Iran and North Korea are viewed as crises of “confidence” or “warning signals” rather than breaches of law. The inquiry, then, is whether particular “warning signals” (including non-compliance or withdrawal from particular treaties) taken as factual and not as legal matters contribute to a threat to international peace and security. By the terms of the Charter, he Security Council is legally empowered to make factual determinations which depart from the finding of unlawful acts. Among the characterizations it might use in finding a threat to peace and security are the non-legal thresholds of “warning signals” or “absence of confidence.”

In this paper, I expand the notion of “confidence-building” to apply not only to the requirements imposed upon states, but upon the demonstration of good faith and fidelity to the rule of law on the part of the Security Council in accordance with the UN Charter. Otherwise, a different kind of collective insecurity would pervade the international community: one that each and every member is vulnerable to arbitrary attack by some or all the others. In this sense the project of “confidence-building” must extend to the rule of law and to principles of reciprocity. If we expect countries posing proliferation concerns (such as Iran and North Korea) to act within the law — and as Members of the United Nations they are legally bound to “accept and carry out the decisions of the Security Council in accordance with” the UN Charter — we should also be clear on the standards for referral and the various kinds of resolutions under the law. If all states uphold — beyond raw sovereignty — even the most general commitment to law-governed behavior, then at least the parties are willing to meet on a common plane of principle. If the Security Council adopts legislative policies, or if it acts as a well-ordered security agency, its methods will receive little scrutiny. If it acts as a legislator that cannot be bound by any higher law, skepticism by states will be warranted. More particularly, the anxiety that the Security Council’s actions will be politically motivated, extra-legal, and subject to abuse; and worse, that a state acting in accordance with the law can nevertheless be vulnerable to punitive or discriminatory measures through the Security Council’s power prerogatives.

There are normative implications. In describing the legal status of the Security Council’s various powers, we should also seek to secure its place in the broader rule of law by taking into account the possible implications for inspections of Iran Air Cargo and Iran Shipping Line if there are reasonable grounds to believe that they are carrying prohibited goods.

It calls upon states to prevent Iran from obtaining goods used for prohibited activities, and for them to avoid financial transactions with Bank Melli and Bank Saderat that might help to promote proliferation sensitive nuclear activities.

\(^\text{12}\) In September 2005, the IAEA board of governors adopted a resolution declaring that Iran's many failures and breaches "constitute noncompliance in the context of Iran's" argued that the IAEA Board of Governors is legally obligated to refer the situation in Iran to the Security Council. argument \([6]\) centered on Article III of the IAEA's statute, which requires that "If, in connection with the activities of the agency, there should arise questions that are within the competence of the Security Council, the agency shall notify the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security." He interpreted Article III to say, in his words, "should there arise questions that are within the competence of the Security Council, whose area of responsibility is the maintenance of international peace and security, the Board shall notify the Security Council; mandatorily shall notify." His argument turns on whether, as a legal matter, a safeguards violation necessarily implicates international peace and security. If not, there would be some discretion left to the Board of Governors.
law. The question that must ultimately be answered is not whether the Security Council may legally exercise a legislative power, but whether it can do so in a principled way. Though the manner in which the rule of law may constrain the Security Council is different from the way it constrains States or even individuals, the common ground that all international actors must have confidence in is that their obligations will be treated in a predictable, consistent and law-governed manner and not according to the whims of powerful States and institutions. If it cannot, the imposition of obligations through legislation should cover every member of a legal community. Once distinctions are made scrutiny should be applied to the logic of those distinctions. In this case the Security Council is itself eroding confidence in the rule of law when it mixes a call for voluntary confidence-building with punitive enforcement measures or refers to them as binding obligations. These are the critiques that reflect anxieties about an expanded non-proliferation agenda of the Security Council that I will take up in the concluding section of this paper.

The Security Council has already begun to evolve in response to emerging challenges to peace and security, and it will continue to do so. The evolution of cooperation between members also offers an opportunity to secure confidence in its Security Council’s own constitution and operation. Based on the international consensus that has gathered around the development of a cooperative “web of prevention” around the proliferation of NBC materials, the Security Council may legitimately claim to expanding its powers while seeking to secure confidence in the rule of law. There are three examples of lateral, but law-governed strategies that the Security Council may pursue. The first is the generally applicable “legislative” measures aimed at developing the capacities of states in activities such as interdiction. The second is the generally applicable resolutions aimed at developing the Council’s own capacities to support and enforce multilateral commitments. (Examples include the 1540 and BWC). Finally, there are the strategies that it is appropriate to pursue, through Article VI voluntary agreements, to build confidence but which also include Clarification of factual triggers (crises of confidence) that may trigger “peace and security” concerns triggers for enforceability though Chapter VII. We will turn now to the fuller Charter framework that grounds all of the Council’s powers.

II. THE SECURITY COUNCIL’S COMPETENCE IN NON-PROLIFERATION

The non-proliferation system has developed against the background of the general framework for international peace and security embodied in the UN Charter. The Charter is a treaty, and as such, all parties are bound by it. Additionally, because of it is also the constitution of the crucial international organization with universal membership, it also has two other characteristics that distinguish it from all other treaties, and make it a kind of “super-treaty.” First, it can provide the legal basis for obligations for States that are not, not yet, or even no longer, members of the UN (art. 2.6). Second, it is claimed that the UN Charter trumps any other treaty that is in conflict with it. Thus, the Charter has a unique claim to represent the interests of the international community, and exercises unparalleled influence on subsequent multilateral treaty regimes.
The UN’s principal mission is the maintenance of peace and security (articles 1.1 and 1.2). The task of attaining this goal is shared by several UN organs, of which the Security Council is the one that has the primary responsibility. The Security Council also improvises within this constituent structure, not only to interpret its explicit responsibilities, but also implied powers, and those granted by specific treaties. It is thus with the Charter that any discussion of the Security Council’s proper role must begin.

A. Charter Powers

The United Nations Charter provides the framework for the Security Council’s legal powers on nuclear, biological and chemical (NBC) weapons proliferation. Under the Charter, the Security Council possesses certain powers and duties which are prior to and wholly independent of any particular non-proliferation regime. In particular, Article 24 of the Charter vests the Security Council with “primary responsibility for the maintenance of international peace and security.”

Much of this paper will interpret the issue of what is actually “in accordance with” the Charter and what kinds of decisions the Council is empowered to make in regulating proliferation. More broadly, the most important obligations in the Charter set out the Security Council’s role in governing collective security and self-defense. The provisions on collective security can be found in Chapters VI and VII. The provisions on self-defense can be found in Articles 2(4) and 51. In matters of collective security and lawful self-defense, the Security Council is the authorized referee that decides on the line between Articles 2(4) and 51. Therefore, in the UN collective security system, the Security Council has a primary role in managing definitions that are central to matters that would have traditionally been considered the protected prerogatives of state sovereignty and internal security.

B. The Council’s “Peace and Security” Mandate

13 UN Charter Article 24 (1) (providing that the specific powers given to the Security Council, inter alia, in Chapter VII are granted for the discharge of its duties under the responsibility for the maintenance of international peace and security).

14 The issue has been debated what kind of Security Council resolutions are covered by this provision, in particular whether it only covered Security Council resolutions adopted under Chapter VII of the UN Charter (“Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”). The International Court of Justice determined in its 1971 ‘Namibia’ advisory opinion that the binding effect of Security Council decisions is not limited to resolutions adopted under this provision.

15 Article 51, states that “nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” The accepted meanings of the Charter’s principles on the recourse to force are shifting. Within the Charter the fundamental interpretive machinery consists in the tension between the Article 2(4) prohibition of the use of force (which is typically explained with reference to sovereignty, non-intervention, and preservation of a state's "territorial integrity") and the Article 51 exception for individual or collective self-defense (which is also typically explained with reference to sovereignty and preservation of a state's "territorial integrity"), which is allowed until the Security Council authorizes measures to restore peace and security.
The Council’s core competence is to identify and respond to threats to international “peace and security,” an intentionally general phrase which resembles various “police power” or “salus populi” provisions in national law. The phrase “peace and security” is not located in one provision of the charter, but disaggregated between Chapters VI and VII. The crucial difference between these two references lies in what the phrase “peace and security” authorizes the Council to do in each Chapter. Chapter VI governs the pacific settlement of disputes. It does not create legal obligations but instead exercises political influence to (under Article 34):

…investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”

In contrast Chapter VII, Article 39 empowers the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” to “make recommendations, or decide what measures shall be taken… to maintain or restore international peace and security.” These measures may include a mandatory embargo or authorizing the use of force to enforce a decision. Even if the line between the two Chapters is sometimes blurry, the invocation of one or the other can be crucial for perceptions of the mandatory character of a resolution.

Under the Charter, the Security Council has exclusive powers to make factual determinations, deciding whether international peace and security has been violated. The Security Council also has the power to decide a course of action. It does share with the International Court of Justice, the power to make legal determinations. Thus the characterization of proliferation activity as “illegal” rather than a “threat to peace and security” is significant. The text of the Charter gives the Security Council the power to police non-proliferation insofar as the Council’s Charter role is not solely to determine the legality of states actions, but more centrally to anticipate and address their security implications.

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16 As a “salus populi” provision, “peace and security” would be viewed as a global prerogative. Though traditionally the province of state and municipal government, several scholars have identified or promoted notions of “Salus populi (a broad “police power” protecting public safety, health, and morals, as well as collective security or self-preservation) at the global level. In the minimal sense, “peace and security” can be interpreted as a public order or necessity-based exception. There are resonances of this concept in policy proposals such as “human security” or “Responsibility to Protect.” Also, though few commentators would accuse the Security Council of engaging in overbroad “humanitarian” elaborations of peace and security (public health public security, and well-being), it could be a global “police power” in this different sense; This observation relies upon unpublished research by the author (on file with author) as well as, e.g., Ole Wæver, Peace and Security — two concepts and their relationship.

17 The status and identity of the legitimate user of counter-violence shifts between four images we can call “victim,” “vigilante,” “lawman,” and “lawmaker.” These are elaborations of Hart’s “gunman” problem, and specific grants of legitimacy, and slides across the scale of violation, exception, fiction, law enforcement, supreme law, or miracle. At the heart of the United Nations Charter are both “suprema lex” and a “splendid exception.” In particular, Article 24 vests the Security Council with “primary responsibility for the maintenance of international peace and security.”

18 Chapter VII, 39 states: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

19 Chapter VI governs the pacific settlement of disputes, do not create legal obligations but instead exercise political influence. Under Chapter VI Article 34: “The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”
The Charter itself limits the Chapter VII powers of the Council. Article 2(7) crucially says “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” Thus, an expanded non-proliferation agenda of the Security Council must be grounded in the Charter and guided by sensitivity to other multilateral commitments. More careful reference to the totality of the Charter may also help cure some of the perceived defects in its legitimacy.

Threats to collective security are not enumerated in the Charter, however, and can only be discovered in practice through the consideration of facts. At certain times even the exercise of legal rights by states—withdrawal from a treaty, cutting off negotiations, denying inspection and withholding cooperation, issuing threatening statements, or giving rise to evidence of nuclear testing—can be considered factual matters that signal a threat to peace and security and the Security Council can properly consider the matter.20

For the Security Council, then, continuing controversies concerning Iran21 and North Korea22—viewed through the lens of the Article 24 mandate—are viewed as “crises of confidence” or “warning signals” rather than breaches of law. The inquiry, then, is whether particular “warning signals” including non-compliance or withdrawal from particular treaties, taken as factual and not as legal matters contribute to a threat to international peace and security.

C. Security Council: Structural Issues

One can criticize the broad competence given to the Council by the Charter, if it is viewed as the institutional equivalent on the Council tends to reject any legal limits on its

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20 Hans Blix, “The Role of Inspection as a Part of the Effort to Prevent the Possession of Weapons of Mass Destruction,” Lecture at the fourth training course for future staff of UNMOVIC Ottawa 28 May 2001 available at http://www.un.org/Depts/unmovic/new/pages/exec_chairman/blix_ottawa.asp (last checked March 30, 2008). In the context of weapons inspections, for example according to Chairman of United Nations Monitoring Verification and Inspection Commission (UNMOVIC) Hans Blix: “It must be remembered that the government of the inspected state retains territorial control and can at any time deny inspectors access and withhold cooperation—but it can do so only at the price of sending warning signals to the world.”

21 The present dispute over Iran’s nuclear activities first emerged in September 2002, when an Iranian dissident group revealed the existence of two previously undisclosed nuclear facilities under construction, one at Natanz and the other at Arak. The United States subsequently published satellite pictures of the two facilities, in December 2002, and said the pictures supported its judgment that Iran was involved in an “across-the-board pursuit of weapons of mass destruction and missile capabilities. They have also pressed Iran to suspend all its work on uranium enrichment as a confidence-building measure and ratify an Additional Protocol, which would grant the IAEA considerably greater access to declared and suspected nuclear activities. In October 2003, Iran agreed to meet each of these demands. Andrew J. Grotto Iran, the IAEA and the UN ASIL Insight November 2004 http://www.asil.org/insights/2004/10/insight041105.htm These disputes continue at the time of this writing. BBC NEWS: http://news.bbc.co.uk/go/pr/fr/-/lha/world/middle_east/7345663.stm

22 Here is an example of the factual arguments as opposed to legal determinations the Security Council would consider in the case of North Korea, and the factual determinations it would have to make. Arguably a nuclear-armed North Korea could trigger: (1) a regional arms race in Asia: Japan, Taiwan, or South Korea might decide to their own nuclear weapons program, which would reverberate in China, India and Pakistan. (2) U.S. posture may harden in nuclear deterrence strategies in the region. (3) Danger of North Korea selling its plutonium, highly enriched uranium, or finished weapons to other countries (already ballistic missiles sold missiles to Iran, Yemen, Syria, and Pakistan), or terrorists. (Already prohibited by Resolution 1540) (4) Any number of countries could imitate North Korea’s moves and acquire the capacity to produce fissile materials and manufacture nuclear weapons under the guise of “peaceful” nuclear endeavors allowed by the NPT.
powers, placing itself above the law, but nonetheless translating its own resort to expediency into international legality. This is, of course, a dangerous self-image for any institution to hold and this view of the Security Council cannot be sustained. In his memoir *War or Peace* (1950), US Secretary of State John Foster Dulles wrote: “The Security Council is not a body that merely enforces agreed law. It is a law unto itself…. No principles of law are laid down to guide it; it can decide in accordance with what it thinks is expedient.”

Dulles’ alarming statement is simply a vulgarization of the legal principles that allow the Security Council, along with the other principle organs of the UN, to interpret its own mandate. Even today, when few would say the Council is a “law unto itself,” the legal norms that guide the Council’s action are rarely discussed, and the legal effect of its decisions is increasingly accepted.

However broad its competence may be, the Security Council must always craft resolutions that are guided by the UN Charter. States did not bargain away aspects of their sovereignty to an unrestrained super-sovereign Council but instead traded older security arrangements for the law-governed framework provided by the Charter. Thus it is understandable that states should seek assurance the Security Council is properly enabled or constrained by the Charter, and that some of the perceived defects in the Council’s legitimacy might be cured by more rigorous and careful reference to the totality of the Charter. In particular, if the Security Council draws its broad mandate from the Charter, it should also take seriously the Charter’s institutional design and the division of powers among UN bodies, coordination and comity with other Charter organs, particularly the General Assembly and ICJ.

It would be a mistake to equate the peremptory character of the Charter as a blank check for Security Council action. The division of powers among UN bodies is crucial to defining the extent of the Security Council’s powers in the area of non-proliferation. It is probably significant, for example, that the Charter’s only provision calling for the Security Council to be responsible “for formulating plans for the regulation of armaments” (Article 26) is mirrored by a grant of competence to the General Assembly which “may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments” (Article 11). This is an example of two Charter organs not only dealing with related questions, but supplementing each other on core areas of competence; the “peace and security” mandate is shared by General Assembly and insofar as Article 26 is justified as working toward the “least diversion for armaments of the world’s human and economic resources,” the Security Council is addressing issues of general welfare.

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24 the relatively unfulfilled and under-interpreted provision The institutional lacuna here.. with the assistance of the Military Staff Committee…The Military Staff Committee was never established and the Security Council has taken up part of this mandate only unevenly and reluctantly. So while the United Nations Charter provides for far-reaching functions of the Security Council in the area of peace and security, but until recently these powers have not been fully tested in the area of NBC weapons.
Nonetheless, this cooperation has the effect of disaggregating disarmament issues from the Security Council’s “peace and security” mandate.\(^{25}\) In one sense, the Charter’s provisions tend to marginalize these issues by disaggregating them from the core mandates of the General Assembly and the Council, but insofar as every degree of agonism aids the rule of law, it may be just as important that competence in these matters is not monopolized. Cooperation between the branches could help bolster the Council’s case that a broader consensus exists on a particular subject matter concerning “peace and security.”

In non-proliferation also, the practice of the two Charter organs should reflect the cooperative model suggested in the Charter. As a historical matter, insofar as disarmament and non-proliferation were topics for the UN to address, from the very beginning, the UN worked on disarmament through the General Assembly, which adopted resolutions that established certain principles of disarmament.\(^{26}\) As early as 1961, the General Assembly called for the negotiation of the treaty that became the NPT by 1968. The Security Council is a relatively new actor to defining NBC issues as a central concern, but it is not unwelcome. As a procedural matter, the Charter leaves some delimitation of competences to comity between the two bodies (for example, the Security Council is normally deemed competent to interpret the meaning of “dispute” under Chapter VI) but is also sometimes explicit (as in Article 12(1) which explicitly directs the Assembly to refrain from making recommendations while the Council is considering a matter).

There are also arguments for the availability of a kind of judicial review of the Security Council’s acts by the International Court of Justice, which is defined by the UN Charter as the “principal judicial organ” of the system. International lawyers and most member-states are generally supportive of both the “constitutional” character of the UN Charter and the role of the ICJ as the ultimate “umpire” of the system, at least in its technical competence.\(^{27}\) Just as the Security Council has some overlap in subject matter with the General Assembly in the resolution of disputes, instances of aggression tend to be automatically escalated to and adjudicated by the Security Council. The International Court does not enjoy a full separation of powers, with permanent members of the Security Council being able to veto enforcement of even cases to which they consented in advance to be bound.

In 1963, Professor Rosalyn Higgins – later appointed to the ICJ, and elected the Court’s President in 2006—reviewed the history of the UN Charter and offered a softer version of the Dulles thesis: “that at the San Francisco Conference the proposal to confer the point of preliminary determination [of each organ’s competence] upon the


26 The very first resolution of the General Assembly addressed disarmament and expressed the need to bring nuclear technology under control. The GA adopted several resolutions after that, including one which outlawed nuclear weapons. The GA also initiated disarmament efforts -- first through the 18-nation Disarmament Committee, then the CCD, and now the Committee on Disarmament in Geneva where negotiations continue on various disarmament conventions.

27 The court has many criticisms, which combine those against judiciaries (anti-democratic, lacking power, activist) United Nations as a whole(anti-democratic, lacking power, activist). Overbroad authority, advisory opinions (a process initiated by the court and non-binding). “Compulsory” jurisdiction is limited to cases where both parties have agreed to submit to its decision. Inter-state disputes and non-justiciability. Resolution of disputes
International Court of Justice was rejected. The view was preferred that each organ would interpret its own competence.\(^{28}\)

More recently, especially as the Security Council has emerged from the yoke of Cold War deadlock, and it has taken on more responsibility, legal opinion has gone the other way. In the influential article, “The Powers of Appreciation: Who is the Ultimate Guardian of UN Legality?”\(^{29}\) Professor Thomas M. Franck tracks the ICJ’s evolving powers of judicial review by comparing the *Lockerbie* (Libya v. U.S.) to the origin of judicial review in the foundational U.S. Supreme Court case *Marbury v. Madison*. In *Lockerbie*, the applicant asked the ICJ to find that the Security Council’s imposition of sanctions exceeded its Charter-delegated powers. As with the court in *Marbury*, the ICJ ostensibly accepted the broad discretionary power of the system’s “political branch”\(^{30}\) but by addressing the question on its merits, the court arrogated to itself an implicit right of judicial review, implying that under a different set of facts, the court could rule a Security Council action *ultra vires*.\(^{31}\)

Whereas Higgins takes recourse to history (the *Travaux Préparatoires*) to interpret the Charter, Franck’s approach is both structural and evolutionary, which is probably more appropriate for a longstanding multilateral treaty whose membership has multiplied over the years.\(^{32}\) Even if the possibility of an ICJ decision is unlikely to influence the crisis oriented decision-making and internal bargaining of the Security Council members, for any rule-based system to survive, it requires a safety valve to specify when proper authority has been exceeded. Under this theory, the Charter defines transgressions against peace and security as primarily a matter for Security Council, but this power can be checked against the other organs.\(^{33}\)

None of the above should suggest that Security Council has unlimited discretion and power under the UN Charter. These limits are most likely found in the “checks and balances” found in the Charter itself, which balances the Security Council’s powers against the ICJ’s jurisdiction over peaceful settlement of disputes, for example. In making recommendations under Chapter VI the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the

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31 Id. “both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter,” including the obligations imposed by Security Council Resolution 748. It concludes, further, that “the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.”


33 In terms of political acceptability, there might be further safeguards that would help ensure states that the Security Council would not abuse its powers. Another remedy for enhancing legitimacy would be the control of Council actions even in the absence of formal procedures of review. Such control could be exercised by the members of the Council through voting, and by the General Assembly, which, if bold enough, may sanction the Council for its decisions. There can also be incidental control of the Council’s actions’ legality by international tribunals. In the case of Tadic before the ICTY, the resolution-created tribunal reviewed the constitutionality of the acts establishing it.
International Court of Justice in accordance with the provisions of the Statute of the Court.\textsuperscript{34} If the Security Council violates the institutional restraints set out in the Charter, or oversteps its purpose, it would be acting ultra vires. Whether these legal restraints can be enforced against the Security Council is a separate matter.

If the Security Council oversteps the limits of the Charter, can this be enforced against the Council? The Security Council has exclusive powers to make factual determinations, deciding whether international peace and security has been violated. When it comes to deciding what to do, it is clearly the Security Council which shares with the ICJ the power to make legal determinations. Who then decides whether the UN charter limits have been overstepped: the Security Council itself, individual states, or the ICJ? The challenge is that the Charter does not give a clear answer to this.

Two significant problems remain. First, the ICJ has jurisdiction only in case of disputes between states. Hence should the Security Council act \textit{ultra vires} in a resolution against Iran, for example, Iran cannot bring a case before the ICJ against the Security Council. It might try to do that against each Security Council member, but then we have a second problem. For the court to exercise jurisdiction, the given states must have accepted it. Hence, out of the 15 states, chances are that the court will not be able to exercise jurisdiction against most of them. The alternative is a request of an advisory opinion but, an advisory opinion can be requested only by UN organs. Is there a chance the Security Council might ask an advisory opinion on the legality of its own actions? The General Assembly might do that, but political considerations make this unlikely. The second problem that arises is that advisory opinions are not binding. While the Charter provides legal constraints on the Council, the primary political constraints will be the perception of the Council’s legitimacy and its “compliance pull” (its continuing ability to convince states to enforce its resolutions).

The Security Council is also properly constrained by all relevant rules of customary international law.\textsuperscript{35} For example, states acting in an armed conflict under Security Council authorization must still follow the norms of humanitarian law. Because neither principles of international cooperation nor principles of sovereignty seem to support unrestrained and unlimited power, there must be some limit to the Security

\textsuperscript{34} Chapter VI Article 36: “The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.”

\textsuperscript{35} There are at least three substantive legal regimes applicable to NBC Weapons issues: (1) Use of Force (“Jus Ad Bellum”) doctrine, governing the legality of the threat or use of force, but not conduct of war or the extent of the development of these weapons. This area of law establishes legal justifications for the resort to force, including self-defense, but is silent on particular weapons. (2) International Humanitarian Law (“Jus in Bello”), governs the conduct of war, including the kinds of weapons that can be used in armed conflict. For example, the treaties and customary law developed in this area prohibit the use of weapons that cause superfluous injury, unnecessary suffering, and as a matter of custom, the use of chemical and biological. (3) The Arms Control Regime refers generally to those treaties and standards governing the actual development, rather than the justifications or the use of NBC WEAPONS. The major strands of the Arms Control Regime are deterrence and non-proliferation. International law on NBC WEAPONS can be further sub-divided by the specific source of law (treaties and custom) thus, composed of three different sets of rules for each NBC WEAPONS technology (nuclear, chemical, and biological weapons ). Finally, General rules of international law, two types of general international interpretation (secondary rules on law-making): the Law of Treaties (LoT) and the Law of State Responsibility (LSR). These canons of interpretation, construction, and obligation help demonstrate the binding nature of international sources (treaty and custom) even in the absence of a definitive hierarchy.
Council’s powers. So although the Charter provides legal constraints on the Council, the ultimate constraints will be political ones, including the long-term perception of the Council’s legitimacy and its “compliance pull”: its continuing ability to convince states to enforce its resolutions.\textsuperscript{36} Since the \textit{Namibia} case, it has been accepted that resolutions may in any event have operative effect – that is to say, the findings of fact, or applications of law within an organ’s own competence, are determinative.\textsuperscript{37}

In addition to the NPT, two other treaties— the BWC and the CWC— form this multilateral non-proliferation regime. These will be discussed following an exploration of the Security Council’s recent resolutions and their interaction with the NPT regime.

D. Implied Powers

The Security Council is involved in interpretation, enforcement, and legislation, but not all of these powers are directed at the same sources of law. It exercises an interpretive function when it acts to “give meaning to the Charter’s “open-textured provisions.”\textsuperscript{38} There are at least three categories of interpretation that are relevant to this discussion. First, the Security Council primary mandate, an interpretive act that we can expect in most cases is whether a situation fits within the ambit of peace and security attentive to the kinds of signals that threatens international peace and security, and implies what is enumerated in the Charter, and can only be discovered in practice. Here, the Council can take cues from advice from states, from statutory authority, and from the agendas of other Charter organs. Secondly, the Council may imply the nature and extent of its powers from other textual provisions in the Charter. For example, the Council may interpret the meaning of “dispute” under Chapter VI, which draws a line between its own competence in dispute settlement “situations” and that of the ICJ.\textsuperscript{39} Legal “disputes” should generally be referred by the parties to the International Court of Justice. The Council may also address the long evaded question of its shared responsibilities (with the General Assembly under Article 11) for regulating armaments under Article 26 of the Charter and examine how it can best fulfill these responsibilities.

Finally, there is the increasingly important debate over whether “law-making” powers can be implied among the Security Council’s powers. Chapter VII already

\begin{itemize}
\item \textsuperscript{36} Thomas M. Franck, The Power of Legitimacy Among Nations (1990) Legitimacy is the property of a rule or institution that exerts a "compliance pull" because the community believes that the rule or institution is the product of generally accepted principles of "right process." Thomas M. Franck, Legitimacy in the International System, 82 Am. J. Int’l L. 705,751 (1988).
\item \textsuperscript{37} International Court of Justice in the Namibia case ICJ Reports (1971) at para. 105.
\item \textsuperscript{39} In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."
\end{itemize}
provides for sweeping circumstances where the Council may require all states to adopt certain measures. The question is whether the Council may impose these obligations in a general, abstract, and binding resolution outside of its power to address particular situations (such as imposing universal sanctions on a regime practicing apartheid). As recently as in debates on Res. 1540, the dissenting view was the traditional one that multilateral agreements entered into by states as the primary mode of global lawmaking, with the General Assembly promoting this process by making recommendations (Art. 13),\(^\text{40}\) and that Security Council “legislation” even if readily and widely acceded to by states should be considered purely exceptional. When the framers of the Charter saw a role for a UN body in such development, this was usually explicit. However, the character of Resolutions, especially those that are almost universally supported (such as 1373 and 1540) that these powers are available to the Council. In the end, the proper test for implied powers is whether the Security Council respects institutional restraints set out in the Charter, and whether it is acting within its purpose.

E. Treaty-Based Powers

Multilateral treaty regimes are positioned between the Security Council and States.\(^\text{41}\) Until recently, the development of international law regulating NBC weapons

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\(^{40}\) Article 13 states that the General Assembly shall “make recommendations for the purpose of … encouraging the progressive development of international law and its codification.

has been almost entirely through the vehicle of multilateral treaty regimes, including the Nuclear Non-Proliferation Treaty (NPT), the Chemical Weapons Convention (CWC), and the Biological and Toxin Weapons Convention (BWC). The Council’s duties regarding these treaty regimes takes some guidance from the texts of these treaties, but is largely animated by its own Charter mandate. If the Security Council is invoking its Charter powers to promote non-proliferation, it must properly harmonize its efforts with these treaty regimes and other treaty-based and customary obligations under international law. In addition to defining the Article 25 obligations, of Members of the United Nations, to accept and carry out the decisions of the Security Council, the ICJ in the Lockerbie Case (1992)\(^\text{42}\) stated that “in accordance with Article 103 of the Charter, the [Charter] obligations of the Parties… prevail over their obligations under any other international agreement.”\(^\text{43}\) Thus, the UN Charter is a kind of “super-treaty” that overrides any ordinary hierarchy of norms suggested by Article 38 of the ICJ Statute.\(^\text{44}\)

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\(^{42}\) Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya / United Kingdom).

\(^{43}\) Id. Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3 [p. 15] 39. Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.

\(^{44}\) International law sets out a particular pedigree of legality and legitimacy based on sources. Article 38 of the Statute of the International Court of Justice (ICJ), the supreme judicial organ of the United Nations, enumerates a list which has come to be generally accepted as reflecting the prevailing international consensus as to what are the main sources of international law. Article 38 specifically refers to the following sources: (a) International conventions or treaties; (b) International custom; (c) The general principles of international law recognized by civilized nations; (d) Judicial decisions and the teachings of the most highly qualified publicists. These are the canonical sources of international law, but whether they are hierarchically ordered or an open question. Those who do recognize a hierarchy believe they are precisely in order of importance. One odd consequence of this view is that although these sources appear in the statute of a court, they would not give as much weight to judicial precedent as do domestic systems, particularly common law and constitutional courts do. Whatever the view on hierarchy, there is general agreement that treaties and custom are the primary source of law-making in international law, and the others are subsidiary sources. Security Council resolutions are not mentioned as “sources of international law” in the Statute of the International Court of Justice, which was adopted at the same time as the Charter. The ICJ necessarily accepts that the UN Charter is a kind of “super-treaty” that overrides the ordinary treaties under Article 38. The experience of the UN system shows that Article 38 sources do not exhaust the possibilities of sources of international law. Other sources, including General Assembly resolutions, are sometimes called “soft law.”
Instead, Security Council Resolutions have thus far supported and complemented existing treaty-based nonproliferation regimes in multiple ways. For example, the Security Council, when appropriate, can enforce the international law principle (articulated in the Vienna Convention on the Law of Treaties) that signatories to a treaty may not undermine its “object and purpose.” The broader case can be made that the enforcement provisions of these security-related treaties, among others, should be read in light of the Security Council’s legitimate mandate under the UN Charter. In Resolution 1540 it states that “The Security Council reaffirms its support for existing multilateral treaties and calls on states to renew their commitment to multilateral cooperation in the framework of the IAEA and other bodies.” Therein, the resolution is explicitly stating that it will not alter the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention, or the Biological and Toxin Weapons Convention. While it does not compel member states that are not party to those treaties to adopt them, it comes close to aligning the purposes of these treaties with the peace and security mandate. At the very least, the steps to be taken by states in accordance with 1540 do not affect or alter commitments made in connection with existing regimes.

The Treaty on the Non-Proliferation of Nuclear Weapons of 1970 (NPT) envisions a role for the Security Council drawing upon its purposes outlined in the UN Charter but specifying a particular role in the enforcement of the treaty. The nuclear nonproliferation system mandates some level of cooperation between the Security Council and International Atomic Energy Agency (IAEA). The IAEA monitors local technical requirements of states’ conformity with particular safeguards agreements, and in some cases the Security Council may be called upon to deliberate on the global security implications. The kinds of problems the Security Council will be expected to address are the security implications of breaches and options for enforcement in cases of withdrawal from the NPT or non-compliance with the treaty or IAEA safeguards. These are precisely the issues raised in the current controversies concerning North Korea (withdrawal) and Iran (non-compliance), and though this paper takes no view as to the outcome of these issues, or the merits of legal rights at stake, these examples are useful to demonstrate the potential range of Security Council responses.

The Security Council is given a role in the NPT in relation to the treaty’s withdrawal clause, where the Security Council is named as a required recipient of the notice of and the reasons for withdrawal. Article X of the Nuclear Nonproliferation

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45 Vienna Convention on the Law of Treaties

46 The IAEA has a number of legislative instruments in place to verify and facilitate states’ compliance with nuclear security undertakings, notably those of the Nuclear Non-Proliferation Treaty and of UNSCR 1540 in respect of non-state actors. These requirements include the safeguards agreements and their updates in the form of additional protocols, as well as the aforementioned CPPNM and the Code of Conduct on Safety and Security of RadioactiveSources. Safeguards Agreements and Their Additional Protocols: The IAEA safeguards system is designed to verify states’ fulfillment of their commitments not to use nuclear material to develop nuclear weapons or other nuclear explosive devices. The system contains a number of elements that include commitments relevant to states’ strengthening their control over nuclear material and nuclear-related material and activities. Olivia Bosch, (Editor). Global Non-Proliferation and Counter-Terrorism: The Impact of UNSCR 1540. Washington, DC, USA: Brookings Institution Press, 2005. p 88.

47 The NPT names the IAEA as an organization which was founded before the NPT was concluded, as the competent body to administer safeguards pursuant to Article III. These safeguards perform a double function: to provide assurances that States Party are complying with their obligations, while simultaneously providing the mechanism for States Party to demonstrate their compliance. The additional protocol allows the IAEA inspectors to inspect facilities wherever they find them in a country, on demand.
Treaty (NPT) provides that a state-party intending to withdraw from the treaty must give the Security Council three months’ notice of its intention and provide the Security Council with its reasons for withdrawal. It also added the requirement of “a statement of the extraordinary events [the withdrawing party] regards as having jeopardized its supreme interests.” IAEA practice reflects the regard for the Security Council to act as the final arbiter in maintaining international peace and security. Participants in the most recent NPT Review Conferences — the sole forum for collective monitoring of general compliance of NPT obligations — have been friendly to the expansion of the Security Council’s role, particularly regarding increased scrutiny for withdrawal, affirming that:

Given the importance of the Treaty on the Non-Proliferation of Nuclear Weapons for international peace and security, a withdrawal notification under article X, paragraph 1, should be qualified as being of immediate relevance to the Security Council. Request that any withdrawal notification under article X, paragraph 1, prompt the Security Council to consider this issue and its implications as a matter of urgency, including examination of the cause for the withdrawal, which according to the requirements of article X has to be “related to the subject matter of the Treaty”; Request that the Security Council further declare that, in case of withdrawal notification under article X, paragraph 1, its consideration will include the matter of a special IAEA inspection of the notifying party.

This is an interpretation in favor of the Security Council’s power to condition or prevent withdrawal through Article X. It can also be argued that such an action would be consistent with the duties of the council under the Charter. Whether or not article X was specifically intended to give the Security Council an opportunity to block any withdrawal that might produce a “threat to international peace and security,” certain factual

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48 Not as broad of a multilateral commitment, and therefore not Security Council, bilateral between the Cold War superpowers, United States has concluded that it must develop, test, and deploy anti-ballistic missile systems for the defense of its national territory, of its forces outside the United States, and of its friends and allies. Press Statement Richard Boucher, Spokesman Washington, DC December 14, 2001 The following is the text of diplomatic notes sent to Russia, Belarus, Kazakhstan, and Ukraine on December 13, 2001: The Embassy of the United States of America has the honor to refer to the Treaty between the United States of America and the Union of Soviet Socialist Republics (USSR) on the Limitation of Anti-Ballistic Missile Systems signed at Moscow May 26, 1972. Article XV, paragraph 2, gives each Party the right to withdraw from the Treaty if it decides that extraordinary events related to the subject matter of the treaty have jeopardized its supreme interests. The United States exercised this withdrawal a number of state and non-state entities have acquired or are actively seeking to acquire weapons of mass destruction. It is clear, and has recently been demonstrated, that some of these entities are prepared to employ these weapons against the United States. Moreover, a number of states are developing ballistic missiles, including long-range ballistic missiles, as a means of delivering weapons of mass destruction. These events pose a direct threat to the territory and security of the United States and jeopardize its supreme interests. Pursuant to Article XV, paragraph 2, the United States has decided that extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests. Therefore, in the exercise of the right to withdraw from the Treaty provided in Article XV, paragraph 2, the United States hereby gives notice of its withdrawal from the Treaty. In accordance with the terms of the Treaty, withdrawal will be effective six months from the date of this notice.

determinations may be made if the Security Council scrutinizes withdrawal under this mandate. These kinds of arguments can be rehearsed in application to North Korea, a currently relevant case study for the issue of withdrawal.\textsuperscript{51}

It is not surprising that the principal challenges to the legitimacy of the Security Council—critiques of opportunism and of the non-democratic character—reappear in the context of the NPT in three specific forms:

1. **Critique of nuclear oligopoly of the p-5.** Currently the permanent five members are the only nations permitted to possess nuclear weapons under the nuclear non-proliferation treaty. Though this nuclear status is not the result of their security council membership, the p-5’s military supremacy is the de facto result of the NPT.\textsuperscript{52}

2. **Critique of discriminatory treatment under the NPT.** If the Security Council overtakes and steers the NPT process, selective enforcement is probable. This introduces an element of discrimination in contravention of Article IV of the treaty, which guarantees that states may “develop research, production and use of nuclear energy for peaceful purposes without discrimination.”\textsuperscript{53}

3. **Critique of the non-proliferation agenda as an evasion of disarmament responsibilities.** Though the non-proliferation treaty also commits nuclear weapons states to move towards nuclear disarmament, this commitment has faded from active agenda of the NPT, and there is little incentive for the p-5 to pursue this agenda. Whether by default or design, an agenda promoting non-proliferation without disarmament simply freezes in place the military-technological gap that

\textsuperscript{50} Here is an example of the factual arguments the Security Council would consider in the case of North Korea, and the factual determinations it would have to make. Arguably a nuclear-armed North Korea could trigger: (1) a regional arms race in Asia: Japan, Taiwan, or South Korea might decide to their own nuclear weapons program, which would reverberate in China, India and Pakistan. (2) U.S. posture may harden in nuclear deterrence strategies in the region. (3) Danger of North Korea selling its plutonium, highly enriched uranium, or finished weapons to other countries (already ballistic missiles sold to Iran, Yemen, Syria, and Pakistan), or terrorists. (Already prohibited by Resolution 1540) (4) Any number of countries could imitate North Korea’s moves and acquire the capacity to produce fissile materials and manufacture nuclear weapons under the guise of “peaceful” nuclear endeavors allowed by the NPT. “

\textsuperscript{51} UN Security Council Resolution S/RES/825 (1993)

\textsuperscript{52} The current five members of the Security Council are the only nations permitted to possess nuclear weapons under the Nuclear Non-Proliferation Treaty, whose cut-off date coincided with the date the Treaty was concluded. Thus, nuclear status is not the result of their Security Council membership, though it is sometimes used as a modern-day justification for their continued presence on the body. De facto situation that the five permanent members of the Security Council are also the only states recognized by the NPT. The UN Security Council—permanent members were originally the victorious powers after World War II: the Republic of China, France, the Soviet Union, the United Kingdom, and the United States. With the exception of the non-nuclear Republic of China (Taiwan), which was in fact replaced by the nuclear People's Republic of China in the UN in 1971, the Security Council by the signing of the NPT was de facto composed of the states that together monopolized nuclear weaponry. Then came India, with its 1974 test, in 1991 the world learned that Iraq had an active nuclear weapons program in the 1980s. Then in 1998 India and Pakistan North Korea, India, Pakistan, Israel (allegedly; Israel has never admitted to nuclear weapons possession), and some other countries that are not permanent members of the UN Security Council do possess nuclear weapons outside of the anti-proliferation framework established by the Treaty. India, Pakistan, possibly North Korea and Israel (though Israel has never itself admitted to nuclear weapons possession) possess nuclear weapons outside of the anti-proliferation framework established by the Treaty.

allowed the great powers that emerged after the Second World War to steer the Security Council for the past five decades.

The Security Council’s potential enforcement role is probably clearer in terms of two other treaties—the convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction of 1972 (BWC) and the convention on the prohibition of the development, production, stockpiling, and use of chemical weapons and on their destruction of 1993 chemical weapons (CWC). These treaties, unlike the NPT, are comprehensive and apply equally to all UN member states. Also, in these treaties, breaches of the peace are less ambiguous since each treaty prohibits entire categories of weapons that have “no peaceful purposes.” By banning an entire class of weapons, rather than drawing technical lines between permissible and impermissible uses of technologies (as in the NPT), there is a more immediate nexus to the Security Council’s peace and security mandate. More specifically, Article 6 of the BWC directs to refer compliance matters to the UN Security Council, though this has never been used. In 1988, the Security Council endorsed the UN Secretary-General’s fact-finding mechanism, making it applicable to all UN member states. More recently, after two decades of building international consensus, the CWC was passed restricting the development and possession of chemical weapons in a similar manner. The groundwork for norm-setting on both of these conventions was already in place by the time the conventions were drafted. The preamble to the BWC mentioned the “urgency of eliminating from the arsenals of states” chemical as well as biological agents, and both treaties build on longstanding treaties and customary international law, including the 1925 protocol for the Prohibition Of The Use In War Of Asphyxiating, Poisonous Or Other Gases, And Of Bacteriological Methods of Warfare (Geneva protocol) which bans the use of an earlier generation of chemical and biological weapons (“CBW”) as a means of warfare.

Especially in light of the level of international consensus, the Security Council can go further in its use of resolutions to harmonize its own capacities with the purposes of the BWC and CWC and develop appropriate enforcement mechanisms. In time, this may be less complicated with the NPT as well. A model for this kind of action is resolution 1540, which directs states to implement legislation prohibiting the misuse of NBC materials, particularly to safeguard these from non-state actors. Even outside

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54 The problem of the dual-use nature of NBC WEAPONS prohibits relevant technologies from being used to produce weapons but allows the same technologies to be employed for peaceful purposes.

55 There is still room for verification of use and misuse of types and quantities Article I, paragraph 1 of the BWC prohibits, for example, the “development, production, stockpiling, acquisition or retention of microbial or other biological agents of types and quantities that have no justification for prophylactic, protective, or other peaceful purposes.”

56 Although under Article 6, states parties may refer compliance matters to the UN Security Council, No other alleged violation of the BWC has been brought to the Councils’ attention. Article 5 of the BWC provides for bilateral and/or multilateral consultations between states parties should a non-compliance allegation occur. In 1997, Cuba alleged that US aircraft had caused a crop disease outbreak involving thrips palmi, invoking Article 5 and not Article 6 and thus no such matter has been referred to the Security Council as a threat to international peace and security.

57 Res. 1540 makes clear that all individuals must be prohibited from developing, weaponizing, and employing biological agents for harmful purposes, and states must now implement domestic laws criminalizing the possession, processing, or weaponization of biological materials.
specific compliance frameworks, states may bring these matters to the attention of the UN Security Council as a threat to international peace and security. In each case, if the internal mechanism in the treaties will be best equipped to make the distinction between a minor and a material breach, fact-finding should be left to these bodies. However, where there are gaps, the council is competent to act. Another virtue of the independence of the Security Council’s mandate is the ability to address security concerns outside of the NPT framework, concerning nuclear non-members, such as India, Pakistan, and Israel, or potentially, a fully withdrawn North Korea. In the final analysis, while it should not undercut multilateral treaty frameworks, the Security Council need not rely on the text of particular treaties in following its mandate. For example, it may well be that Iran comes into compliance with technical (record-keeping and inspections), but that suspicions about undeclared nuclear weapons activities remain and give rise to security concerns with safeguards noncompliance. Factual matters that signal a threat to peace and security—whether these are non-compliance with safeguards, withdrawal from a treaty, cutting off negotiations, issuing threatening statements, or nuclear testing, for example—may or may not be prohibited in the text of a particular non-proliferation treaty, but ultimately, the security council must interpret these incidents through the lens of its charter mandate.

F. Security Council Practice Based on Non-Proliferation Instruments and Resolutions

The subject of non-proliferation is not explicitly mentioned in the UN Charter, both because relevant threats are not enumerated in the Charter and because the Charter was drafted before the destructive potential of modern NBC’s first became salient to all states party to the San Francisco Convention. The bombing of Hiroshima took place two months after the Charter was signed by the major powers and four months before the first meeting of the Council. Therefore, while the text of the Charter could not be expected to give the Security Council the express duty to police non-proliferation, this role has evolved through a series of statements and resolutions. There has been an evolution of these concerns in recent years with the Security Council bringing non-proliferation concerns more squarely onto its agenda. In 1992, national leaders of the members of the Security Council met and issued a statement that the spread of nuclear and other weapons of mass destruction constituted a “threat to international peace and security” within the meaning of Chapter VII. Though this statement itself did not have the same legal effect as a Security Council resolution, subsequent resolutions have built on this. In 1995, Resolution 687 was the first to identify proliferation is a threat, followed by Resolution


59 I have tended to view the 687 regime as sui generis, but for different reasons. My previous view was that 687 simply imposed a thoroughly traditional disarmament of conventional weapons on a defeated state in an armed conflict, and though it represented a significant stride in the “threat to peace and security” by WMDs (http://www.fas.org/news/un/iraq/res/sres0687.htm), peace and security in “the area” (the region of the Middle East) and did not define proliferation in itself as such a threat. My current view is that an analysis of 687 is absolutely crucial to the study I am undertaking, but precisely because of its unusual structural features: (1) As a “mixed” resolution, adopted under Chapter VII but aimed at the resolution of disputes, including “legal disputes” (others would say it is yet another sub-category of the erosion of the distinction between VI and VII); (2) As a peculiar instance of “law-making,” creating new legal obligations on a particular state by its standing authority (and delegating these to IAEA and UNSCOM). Jose Alvarez International Organizations as Law-makers (OUP 2006) at pp. 420-21
984 (1995) which sought to facilitate cooperation with the Nuclear Non-Proliferation Treaty (NPT), promote security assurances for non-nuclear weapon states and encourage states to pursue negotiations in good faith. This resolution significantly contains the language “in accordance with the relevant provisions of the Charter of the United Nations, any aggression with the use of nuclear weapons would endanger international peace and security,” though this falls short of defining proliferation in itself as “aggression” (already a notoriously ambiguous term in international law).

The Security Council’s involvement in the topic of non-proliferation has grown in tandem with its elaboration of legislative powers, a repertoire of contingent “confidence-building” requirements, and with the growth of the notion of the nexus between nuclear weapons and terrorism as constituting a common global threat. Both developments have their roots in the resolution against Iraq after the invasion of Kuwait, Resolution 687 (April 3, 1990). Resolution 687 demanded that Iraq “… shall unconditionally accept the destruction…” of biological and chemical weapons and certain ballistic missile systems, and “… unconditionally undertake not to use, develop, construct or acquire… or develop nuclear weapons”.

This kind of measure was not unusual in the context of a collective security action against an aggressor. When it was suspected that Iraq was not in compliance with Resolution 687 more than a decade later, however, this provided a justification for a more far-reaching measures contained in Resolution 1373. The topics of counter-terrorism and non-proliferation have merged and entered the Security Council’s purview since (1) the terrorist attacks of September 11, 2001 spurred the activism of the United States in securing international cooperation against terror networks, and (2) the discovery of the A.Q. Kahn black market for WMD proliferation. More recently there have been concerns about North Korea and Iran violating the Non-Proliferation Treaty, which have led to a series of resolutions attempting to contain or dissuade these state from nuclear activities. Resolution 1373, initially built on Resolution 687, along with its successor 1540, were the first properly “legislative” resolutions directly imposing general obligations on Member States to prevent proliferation through the enactment of national civil and criminal legislation aimed at terrorism or proliferation.


62 ] Such a creation of concrete legal obligations of the targeted State in order to maintain international peace and security is within the limits of Articles 39 and 41 of the Charter. However, there is some criticism of such definite determination of rights and obligations as these may constitute comprehensive dispute settlement rather than temporary measures during an imminent crisis.


64 Calling upon all Member States to enact national legislation criminalizing the development, acquisition, manufacturing, possession, transport or transfer of nuclear, chemical and biological weapons and their means of delivery by a non-state actor.
1. Recent resolutions concerning NPT Withdrawal or Non-compliance

As of this writing, the Security Council has issued a series of resolutions concerning North Korea (the Democratic People’s Republic of Korea, or DPRK) and Iran, alleging threats to peace and security posed by the ambiguous conduct and status of each state in relation to the NPT. To date, neither situation has involved a clear violation of the NPT or international law, but each can be characterized as crisis driven by a lack of confidence in each regime’s motivations. To date, all efforts at solving the nuclear crises in the Middle East and Northeast Asia have not yielded.

The progression of resolutions (three for North Korea between 1993 and 2006, and three concerning Iran) has been event-driven, in response to a particular crisis event, and has escalated from urging cooperation to imposition of targeted sanctions and is evidenced by the use of “peace and security” language and the chapter VII application of sanctions to North Korea, in light of the country’s claim that it has developed nuclear weapons. The western powers on the P-5 also suspect that Iran, which admits to pursuing a full nuclear cycle for peaceful purposes, has the intention of developing nuclear weapons. They are concerned about the peace and stability in the Middle East if nuclear capacity is developed by a state outside the NPT framework. Neither Iran nor North Korea enjoy normal diplomatic relations with the United States, and are considered hostile regimes. Demands will not be legislated therefore, with dissuasion diplomatic talks faltering, military action unpalatable and the effectiveness of UN sanctions debatable.⁶⁵

i. Responses to Withdrawal by North Korea

North Korea has developed nuclear capacity, and three events have acted as “warning signals”— withdrawal from the NPT, testing ballistic missiles, and testing a nuclear device— which have caused responses by a Security Council resolution. Goals, policy goals are therefore to achieve “full dismantlement” of North Korea’s nuclear weapons program, acceptance of IAEA inspections and the country’s return to the NPT. The resolution affirmed that such launches jeopardize peace, stability and security in the region and beyond, particularly Resolution 825. The latter consisted of an unsuccessful attempt to block withdrawal from the NPT.⁶⁶ UN Security Council resolution s/res/825 (1993) urged the DPRK to cooperate with the IAEA and to implement the 1992 North-South Denuclearization statement. The resolution does not invoke Chapter VII of the UN Charter per request of China and Russia. It also urged all member states to encourage North Korea respond positively to this resolution and to facilitate a solution to the nuclear issue. Under the Charter, though only ambiguously in the NPT itself, the Security Council can reject the withdrawal or block unjustified withdrawal until peace and security considerations are satisfied.

⁶⁵ Nicholas R., Burns, (2006) U.S. Policy Toward North Korea, Washington D.C., 16 November 2006 DPRK’s pursuit of nuclear weapons and their means of delivery represents a “clear threat to international peace and security

SC Res. 825 (1993) did not contain any reference to Chapter VII and only called upon North Korea to reconsider its decision to withdraw from the NPT. In light of the country’s claim that it has developed nuclear weapon, and the fact that their means of delivery represents a “clear threat to international peace and security” the Security Council responded with the unanimous adoption of SC resolution 1695 (2006), which contained a clause “strongly urging” North Korea’s return to the NPT and to IAEA safeguards. In this measure, the Security Council condemned North Korea’s missile launches and demanded suspension of all related ballistic missile activity. In addition, acting “under its special responsibility for the maintenance of international peace and security” the resolution required all member states to prevent the transfer of missile and missile-related items, including materials, goods and technology, to North Korea’s missile or weapons of mass destruction programmes, as well as procurement of such items and technology from that country. It also addressed the transfer of financial resources in relation to those programmes.

Finally, the Security Council unanimously adopted SC resolution 1718 (2006), reacting to the announcement on October 9, 2006, by North Korea that it had conducted an underground nuclear weapon test. The Council condemned the nuclear weapon test, and imposed sanctions on North Korea, calling for it to return immediately to multilateral (six party) talks on the issue. The resolution contains several uncommon provisions that warrant closer inspection from a legal perspective, in particular regarding their conformity with UN Charter law and the limits (if any) on the competences of the Security Council.

Sanctions within Resolution 1718 prevent a range of goods from entering or leaving the North Korea and impose an asset freeze and travel ban on persons related to the nuclear-weapon program. Through its decision, the Council prohibited the provision of large-scale arms, nuclear technology and related training to North Korea, as well as luxury goods, calling upon all states to take cooperative action, including through inspection of cargo, in accordance with their respective national laws. The Council stressed that such inspections should aim to prevent illicit trafficking in nuclear, chemical or biological weapons, as well as their means of delivery and related materials. The resolution also strongly urged the country to return immediately to the six-party talks without precondition, to work towards expeditious implementation of the September 2005 joint statement and return to the treaty on the non-proliferation of nuclear weapons (NPT) and international atomic energy agency (IAEA) safeguards. The resolution’s source of authority and scope of limitations are not explicit for some of these provisions. Since the return to the six party talks is intended to lead to a comprehensive settlement, some authors argue that dispute settlement is excluded from a binding Chapter VII action and is instead dealt with in the possibly less binding Chapter VI. In addition, even if implemented, the measures contained in sc resolution 1718 deal with a concrete threat to international security and are aimed at the prevention of an arms race in the region.


68 Under Chapter VI Article 37 states may “refer their dispute to the Security Council, who will assess whether the dispute endangers the maintenance of international peace and security”.

ii. Responses to Alleged Non-compliance by Iran

A second scenario involves not withdrawal, but non-compliance. Non-compliance refers to the failure of a state to comply with obligations under the NPT and also individual safeguards agreements required by the NPT and concluded between states and the international atomic energy agency (IAEA), and in many cases, an additional protocol. The western powers on the P-5 also suspect that Iran, which admits to pursuing a full nuclear cycle for peaceful purposes, has the intention of developing nuclear weapons. They are concerned about the peace and stability in the Middle East if nuclear capacity is developed by a state outside the NPT framework.

Article xii(c) of the IAEA statute provides the legal basis for reporting to the Security Council and the UN General Assembly. Under the IAEA’s instruments, key findings of failures and breaches will oblige the board, triggering them to send the matter referral to the UN Security Council; this provides objective architecture based on breach of obligations. We have already seen one model of pursuing non-compliance as grounds for Security Council involvement. As witnessed with Iran in 2006, this included (1) referral by IAEA based on non-compliance with safeguards agreements, grounds (2) deferral of timing of referral and demands for the transgressor to remedy the noncompliance, and (3) more active Security Council involvement, reinforce the IAEA’s authority, and ultimately enforcement of corrective actions.

However, the breach of obligations is only one factor the Security Council must consider in a totality of circumstances pointing to whether or not there is a threat to security. The Council must take care to respect the non-proliferation framework, and balance between not infringing on “inalienable rights of all the parties to the treaty to develop research, production and use of nuclear energy for peaceful purposes,” prohibiting “the manufacture or acquisition of nuclear weapons, or nuclear explosive devices by non-nuclear weapons states.” In some cases, this might border on finding subjective determinations of intent, but these must be supported by more facts provided by the IAEA and other available intelligence. The Security Council seeks to maintain its own legitimacy by resolutions as supplemental to separate processes of multilateral dissuasion diplomacy. In the cases of Iran and North Korea, the objective would be to persuade Iran to co-operate with UN demands to halt uranium enrichment, and for North

70 For example, the In September 2005, the IAEA board of governors adopted a resolution declaring that Iran's many failures and breaches “constitute noncompliance in the context of Iran’s The board Finds also that the history of concealment of nuclear activities exclusively for peaceful purposes have given rise to “absence of confidence” that Iran’s nuclear program is “exclusively for peaceful purposes “Iran’s policy of concealment has resulted in many breaches of its obligation to comply with its Safeguards Agreement.”


72 Treaty on the Non-proliferation of Nuclear Weapons, http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc140.pdf The NPT Article II prohibits the manufacture or acquisition of nuclear weapons or nuclear explosive devices by non-nuclear weapons states, but in Article IV directs that: Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.
Korea relinquish its nuclear weapons programme and return to the NPT, maintaining consensus statements, formally among the P-5, and ideologically among all member-states.

Finally, what seems clear is that the Council itself, like any other actor in the international system, must exercise self-restraint in the exercise of its powers. Just as states must exercise restraint in acceding to multilateral regimes, including the UN Charter, the Security Council must similarly respect the object and purpose of multilateral treaty regimes. At minimum, it must not frustrate these purposes, and in some cases, where multilateral consensus is particularly strong, it is under duty to bolster these goals.

III. A “SCRIPT” OF SECURITY COUNCIL RESOLUTIONS: REFERRAL, DEFERRAL, AND ESCALATION

There is no fixed course for the Security Council to follow in confronting proliferation threats, but the UN Charter and other legal instruments provide a series of options. Ostensibly, the Charter appears to draw a path of escalation, from less to more serious enforcement measures set out in Chapters VI and VII, ranging from milder to stronger forms of censure, then economic sanctions, and ultimately military force. This is certainly one way to read the Charter, because Chapter VI comes before Chapter VII and the description of “levels” below also seems to follow this route. The order in the Charter roughly corresponds to the rhetoric of escalation that is implied when the Security Council wishes to communicate that a full range of credible threats are “on the table.” The Security Council can make binding decisions outside Chapter VII invoke its power to take a course of enforcement action that constitutes a legally binding commitment. Ironically, though political expediency and the formal structure of the Charter seem to agree on graduated measures, the practice of the Council has never quite reflected this. Chapter VI has not been as much a prelude as an alternative to Chapter VII.

The Security Council does not always identify under which Chapter of the Charter it is acting, but even where the Charter serves as a less formal operational code for Security Council action, and specific provisions are not evoked, a “shadow distinction” remains between the settlement of disputes and peace-keeping on the one hand, and enforcement on the other, falling under either: recommendations or decisions. Even

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73 Diplomatic overtures initiated by the EU-3 as early as June 2003 and by the permanent five members of the UN Security Council plus Germany (P5+1), have failed to persuade Iran to co-operate with UN demands to halt uranium enrichment. Furthermore, discussions within the framework of the Six-Party Talks between the US, North Korea and other regional powers have not convinced the North to relinquish its nuclear weapons programme and return to the NPT.

74 There is an analogy that can be drawn here at the level of state implementation of Council resolutions. It is well documented that despite the plenary power given to the Security Council through international law, and even though complied with, the status of these Resolutions is far from paramount under most constitutions and domestic systems.

75 Most authorities do not consider resolutions under Chapter VI (Pacific Settlement of Disputes) to be legally binding. The International Court of Justice suggested in the Namibia case that resolutions other than those made under Chapter VII can also be binding. The ICJ’s advisory opinion on the “Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276,” 1971 ICJ Rep.4-345 (1970), indicates that a range of factors may point to the intention to bind member states of the U.N., and that the Chapter under...
where the Security Council obscures what section of the Charter it is drawing on for its authority, making no reference to Chapter VI or VII, it will continue to use the Charter as a less formal operational code, and debates over the shape of Resolutions tend to fall under this familiar dichotomy of “recommendations” or “decisions”. It is helpful to group these in the following categories:

(A) “Recommendations”:
- Chapter VI –type language
- “Soft power”
- Dispute settlement model
- Non-forcible measures or declarations
- Consent model: to be implemented through voluntary means
- Facilitating diplomacy
- Sovereignty and consent-based solutions,
- Security Council as a impartial broker
- UN as forum for negotiation
- Investigation as Research
- Recommendation of procedures and terms

(B) “Decisions”:
- Chapter VII –type language (citing responsibility for the maintenance of international peace and security)
- “Hard power”
- Law enforcement model: threats to the peace, breaches of the peace, and acts of aggression
- Implemented through forcible and non-forcible coercive means
- Cutting off diplomacy
- Peremptory norms and binding legal solutions
- Security Council as enforcer of collective security guarding legitimacy of international norms
- UN as collective will of world community
- Investigation as law enforcement
- Determinative decisions on procedures and terms with firm deadlines and consequences

which it is passed is not definitive of the binding nature of a resolution. It is beyond doubt however that those resolutions made outside these two Chapters dealing with the internal governance of the organization (such as the admission of new Member States) are legally binding, where the Charter gives the Security Council power to make them… The binding nature of decisions is not determined by whether they are taken under Chapter VI or Chapter VII, but by whether they were intended to bind all member states. Prof. Rosalyn Higgins states that the Charter offers no support for the view that Article 25 applies only to measures under Chapter VII, but rather applies to “all decisions of the Security Council adopted in accordance with the Charter.” In any case Article VI’s primary appeal to legitimacy is not its purported binding character, but rather its link with pre-Charter notions of “consent” and “sovereignty” that most States believe ground their participation in the Charter framework. Chapter VI also provides a default mechanism to keep Chapter VII the exception.
As applied to non-proliferation crises, the first issue here is the question of characterization. Should non-proliferation crises be characterized as actual threats to peace and security, or should they be considered as a phase in the peaceful settlement of disputes? Should the implementation of recommendations be viewed as voluntary “confidence-building” measures, and their breach be viewed as a legal breach? The proper formal framing of non-proliferation crises remains open on these questions. Another issue is that these under imperatives (decides, directs, requires) addresses the specific desired conduct to different actors, including the targeted state (which poses a threat) and other states (who are presumably threatened). Thus, the mandatory force of the resolution can seemingly differ where the “recommendations” are directed at the targeted states and the “decisions” impose requirements on other states, or vice versa.

Even with the invocation of Chapter VII, the formal framing of non-proliferation crises, such as those posed by a potential North Korea or Iran resolution is thus far ambiguous. In both cases what is at hand is a multi-party dispute that happens to involve many of the permanent members of the Security Council, but also a link to a hypothetical threat to the community at large.

Over the past few years, in confronting crises in North Korea and Iran, proponents of Security Council action seemed perplexed and exhausted by their options before they have been tried. The pitfalls of censure (as potentially ineffective), sanctions (as potentially counter-productive), and military force (as potentially disastrous) have been addressed more often than concrete proposals for action. Once resolutions were adopted, they were viewed as half-way measures rather than paths to collective enforcement.

Part of this “ramping up” of Council resolutions without a clear idea of workable options is due to a failure to give credit to the Charter’s capacity for flexibility, and the repertoire of tools available to improve and expand the relevant legal architecture even while engaging with marginal transgressors and rogue states. Escalation also fails to set institutional precedents and strategies that can transcend a particular situation. In the legal framework of the Charter, there is nothing that compels automatic progress from one “level” of enforcement to another. Therefore, political will is required throughout the process just to remain in a legal framework. Enforcement in this context does not provide a remedy or permanent solution, but influences an eventual political settlement. Non-proliferation crises demand intensification of pressure without escalation of resolutions from censure to sanctions to force. Another option is for the Security Council to sidestep such escalation is to attempt to gain consensus on a general “legislative” resolution, which promotes measures (and imposes obligations) for all states to undertake. This will be discussed in a concluding section on alternatives to escalation referred to as “lateral” strategies.

A. Level One: Referral (and Deferral), Provisional Measures

Formally, referral to the Security Council is little more than a petition to place a matter on the Council’s agenda, and is typically viewed as a prelude to all necessary fact-finding, deliberation before deciding upon an enforcement action such as censure, sanctions, or the use of force. In a practical context, however, referral is more than a procedural step, but a kind of enforcement measure in itself. Just as censure, sanctions, or force are each preceded by a threat, we have seen attempts by states as well as the
IAEA to “threaten” referral and expose non-compliant states to international scrutiny and its uncertain consequences. Interpreted as a coercive measure, a referral carries a range of implications, the most serious of which is the eventual, but not necessary, threat of force.\textsuperscript{76} For this reason, in proliferation crises, the act of referral is sometimes interpreted by a targeted state as a hostile act, rather than a step in dispute resolution. When the IAEA referred Iran’s controversial nuclear program to the Security Council,\textsuperscript{77} even as the Europeans insisted that “the diplomatic path is not closed,”\textsuperscript{78} Iran characterized the referral alternatively as the “end of diplomacy,” as an infringement of its legal rights, or more dismissively as a mere threat to “hold meetings.” Two years earlier, during its withdrawal crisis, North Korea indicated that any resolution from the Security Council would be an “act of war.”\textsuperscript{79}

If targeted states are uncertain about what referral will entail, members of the Security Council could be every bit as perplexed about where it might lead, and in some ways, there is a studied ambiguity at work so that the rhetoric of escalation in itself is meant to enforce compliance. In the post-Cold War period, members of the P-5 are active in setting the Council’s agenda by holding closed-door meetings before important referrals and votes on resolution. This coordination accounts for their unprecedented success passing resolutions and avoiding vetoes in this period. However, this record does not account for the number of issues that P-5 consultation has kept out of the forum of the Security Council in the first place.

In confronting proliferation crises, similar to those with North Korea (consultation effectively kept away from the Security Council) and Iran (which at least made it to the referral stage), the political will of the P-5 must be measured. This might well involve delaying a referral to do the patient work of identifying facts that meet a threshold for referral, at which point the Security Council’s “peace and security” competence might apply. A threat of referral may be delayed to facilitate diplomatic efforts.\textsuperscript{80} (A recent example is EU-3’s 2004 Paris Agreement calling for greater Iranian transparency) in practice, and even when a referral is made, it may be a “referral with a deferral” to gain

\textsuperscript{76} The content of a resolution can differ greatly, but the very fact of a resolution can also be given a variable symbolic importance. North Korea states that it would consider any resolution as an act of war. Diplomacy by parties that are favored by the P-5 and other members of the Security Council. In the area of enforcement of non-proliferation, the possibility of referral to the Security Council is taken as a threat, first as a step in the direction of economic and political sanctions, and possibly military force

\textsuperscript{77} That these powers did not wait to meet in the forum of Security Council itself signaled both the need for coordinated action and that the powers were giving diplomatic and not legal effect to its decisions. The London meeting was attended by the foreign ministers of the permanent members of the Security Council - Britain, U.S., France, China and Russia plus the German Foreign Minister (“Group of 5+1”) and the high representative of the European Union, Javier Solana – a joint statement by the powers urged Iran to suspend all uranium enrichment activities.

\textsuperscript{78} For us, the diplomatic path is not closed,” French Foreign Ministry spokesman Jean-Baptiste Mattei said in Paris. The process of taking Tehran to the Security Council is “reversible, too, if Iran makes the gestures we’re waiting for.” The EU foreign policy chief, Javier Solana, insisted that talk of sanctions was premature. “We are in a diplomatic channel,” he said. But U.S. Ambassador John Bolton called the decision to report Iran to the Security Council a “major step forward.”

\textsuperscript{79} Reported twice, North Korea’s nuclear program has been denounced by Security Council though the body has never had the votes to punish it.

\textsuperscript{80} spearheaded by the EU-3, Britain, France and Germany, including the 2004 Paris Agreement calling for greater Iranian transparency,
more leverage in negotiations.\textsuperscript{81} (An example is the IAEA’s February 2006 referral of Iran to the Security Council, which included a one month deferral in an attempt to gain cooperation from Iran and halt the escalation implied by the Security Council becoming seized of the matter). For referral to be meaningful, both a political and legal threshold must be met. First, there must be political will to refer a matter to the Council, and secondly, there must be a general sense that the matter falls within the Council’s competence.

As we see in the referral of Iran to the Security Council, in situations of non-compliance there are at least two legal bases for referral to the Security Council: the UN Charter and the IAEA Statute.\textsuperscript{82} Under Chapter VI, Article 37, states may “refer their dispute to the Security Council, who will assess whether the dispute endangers the maintenance of international peace and security”\textsuperscript{83}. In terms of the IAEA’s mandate, in the context of the NPT, referral by the IAEA is an advanced stage of its mandate Statute Article XII.C which directs that as a matter of course safeguards noncompliance is to be reported to the (when appropriate) Security Council as well as the (annually) UN General Assembly.\textsuperscript{84} Key findings triggering sending the matter to the Council involve breaches of its obligation to comply with the provisions of its Safeguards Agreement, but also a general sense that the “peace and security” questions are at stake that exceed the competence of the IAEA.\textsuperscript{85} As such, there are two independent justifications possible for

\textsuperscript{81} An open timetable “referral with a deferral” has certain merits. In diplomacy, there will be stalling tactics on both sides… European powers delays in referral can be used to strengthen the factual record, to discover ongoing concealment and deception In both cases, deferral of some sort is a rational step. With North Korea, the Security Council’s relative inaction (by default or design) preserved diplomatic channels.

\textsuperscript{82} The International Atomic Energy Agency (IAEA) Board of Governors on Sept. 24, 2005, adopted findings of Iranian safeguards noncompliance, as well as the existence of questions impacting international peace and security. Each finding triggers UN Security Council referral under the Statute of the IAEA. The board resolution instead, while acknowledging such referral was required, left open the issue of timing.

\textsuperscript{83} Chapter VI governs the pacific settlement of disputes, do not create legal obligations but instead exercise political influence. Under Chapter VI Article 34: “The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.” Chapter VI Article 35: “Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.” According to Chapter VI Article 36: “The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.”

\textsuperscript{84} Steven C. Welsh, IAEA on Iran: recent and pending action and legal parameters, Center for Defense Information, Feb. 2, 2006 available at: http://www.cdi.org/news/law/iran-iaea-020206.cfm. The meaning of “referral” and “reporting” is blurred however; while the former connotes pushing the issue up one level; and the latter seems softer and suited to diplomatic solutions and confidence-building measures.

\textsuperscript{85} Article XII, Statute of the IAEA, Article III, section B, paragraph 4. Submit reports on its activities annually to the General Assembly of the United Nations and, when appropriate, to the Security Council: if in connection with the activities of the Agency there should arise questions that are within the competence of the Security Council, the Agency shall notify the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security, and may also take the measures open to it under this Statute, including those provided in paragraph C of Article XII; Statute of the IAEA, Article III, section B, paragraph 4, (emphasis added) http://www.iaea.org/About/statute_text.html#A1.3; Article XII, section C, (emphasis added) http://www.iaea.org/About/statute_text.html#A1.12. The IAEA must notify the Security Council, according to article III.B.4 of the
Security Council referral, the first based on international security concerns and the second based on safeguards noncompliance. In 2005, the US and the EU-3 took a hybrid approach by agreeing with Russia and China that the appropriate trigger for referral of Iran to the Security Council would be the resumption of uranium enrichment, but also channeling actual referral through the IAEA referral procedure. This is probably because of the IAEA's reputation as a “neutral” institution, with a more heterogeneous membership and more representative procedures than the Council itself (no veto and a majority, secured by a series of bilateral negotiations). These include factual findings of safeguards noncompliance, and particularly any questions that arise within the Security Council’s broader mandate. In this case the IAEA cited both non-compliance with the safeguards framework and also declared that it is not in a position to determine whether Iran's nuclear program is for civilian purposes, a question which falls under the Security Council’s competence. Both are sufficient in themselves, even if the other justification is missing. An IAEA resolution is not a necessary requirement for the Council to take up the issue, and an IAEA resolution does not automatically put the issue on the Security Council's agenda. There have been IAEA referrals in the past where the Council declined taking up the question. It still requires a deliberate decision by the Council. However, in this case, the negotiations by the P-5 guaranteed its acceptance onto the Security Council agenda in advance. The involvement of the IAEA Board of Governors applies more multilateral pressure even as the de facto engineers of the referral—the US, the UK and France—will now press the issue in the Council.

Although the IAEA discussions are already guided by legal considerations, interpreting the letter of the NPT, referral to the Security Council is meant to mark more fully the transubstantiation of mere politics or expediency of diplomacy into an enforceable legal framework. Yet from a practical standpoint, referral to the Security Council simply plays a role in structuring the progression of further diplomacy and

IAEA statute, "if in connection with the activities of the Agency there should arise questions that are within the competence of the Security Council.” In addition, under article XII.C of the statute, "The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations.”


87 In September 2005, the IAEA board of governors adopted a resolution declaring that Iran's many failures and breaches "constitute noncompliance in the context of Article XII.C of the Agency's Statute

88The IAEA Board of Governors declared Iraq in violation of its safeguards agreement at a special session on 18 July 1991. In accordance with its Statute, the IAEA transmitted its conclusions to the Security Council. A month later, the Council adopted resolution 707 (1991), demanding that Iraq halt all nuclear activity, provide full disclosure of its weapons programs, and provide UNSCOM and IAEA inspectors access to all sites. In April 1993, the Board adopted a resolution concluding that North Korea was in non-compliance with its safeguards agreement and referred it to the Council. Subsequently, the Council passed resolution 825 (1993) urging North Korea to reconsider its announcement to withdraw from the NPT and abide by its international obligations. In 2003, facing a new crisis whereby North Korea refused to comply with its safeguards agreement, the IAEA Board decided to report once again to the Council. However, the Council, after extensive discussion took no action, leaving the issue to be pursued through diplomacy outside the Council. In March 2004, the Board passed a resolution welcoming the Libyan decision to eliminate all materials leading to the production of nuclear weapons and reported the matter to the Council "for information purposes only." The Council took note of this resolution in a presidential statement (S/PRST/2004/10).

89 Security Council Report Iran February 2006. Available at: http://www.securitycouncilreport.org/site/c.glKWLeMTtsGb.1387817k.9975/Feb2006BRIran.htm
information gathering (both the “facts on the ground” and scientific, technical and legal briefings associated with nuclear technology). Consideration of a matter and provisional measures to determination and taking a position is also a time for formulating temporary measures that would stabilize the situation, such as providing a window of opportunity for compliance (probably including an expanded mandate for inspections and a new deadline for compliance) before censure and further enforcement actions. These diverse options provided or implied in the UN Charter can be used by default, as a stalling tactic for diplomacy or more favorable conditions, or they can be used more decisively and instrumentally.

B. Level Two: Promotion, Declarations and Censure

A second stage, both in time and gravity, usually involves the move from consideration of a matter and provisional measures taken only to stabilize a situation to proper resolutions based on debates and determinations. These resolutions will probably take the form of (1) statements promoting negotiation, (2) declarations of concern and understanding of legal rights, or finally (3) a censure of non-compliance. What effects does censure have on the subsequent exercise of the right of self-defense by certain states? Since censure is an ambiguous result, unlikely to achieve anything beyond an assertion of Security Council unanimity, it is worth attempting promotion of arbitration or diplomacy under Article 33 as another stopgap on the way to censure.\(^\text{90}\) These could include facilitation of negotiations on specified issues encouraging resumed negotiations between a state and the IAEA, and providing general support for the IAEA by tracking progress, setting a timetable, and requesting regular reports.

Related to this promotion function is the power to label the acts of states as “legal or illegal,” and declare whether they are in conformity with international obligations. Prof. Steven Ratner calls the Security Council’s “utterance of legal principles and findings” its “declarative function.” Examples of declaration can range from expressions of concern in the forms of a presidential statement to declarations of the illegality of activities and requesting compliance. Declarations of legality actually constitute “legality” in a political rather than a legal sense because they are not being enforced through a Chapter VII binding resolution, but a Chapter VI resolution. Examples of this function in practice include power to declare an “illegal regime” (Rhodesia in 1965)\(^\text{91}\), an “illegal occupation” (South Africa in Namibia in 1970),\(^\text{92}\) liability for damages caused by an “illegal invasion” (Iraq’s invasion of Kuwait in 1991)\(^\text{93}\), and declaring elections “free

\(^{90}\) Chapter VI Article 33: “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.”

\(^{91}\) A resolution declaring independent Rhodesia an “illegal racist minority regime” (Resolution 216 in 1965).

\(^{92}\) A resolution declaring South Africa’s occupation of Namibia as illegal. (Resolution 276 in 1970).

\(^{93}\) A resolution declaring Iraq’s liability under international law for any damage to any party as a result of its invasion of Kuwait. (resolution 687 in 1991)
and fair” (Cambodia in 1993). The Security Council has also defined legality in terms of the violation of particular obligations undertaken by states, such as the use of chemical weapons in the Iran-Iraq War. One situation where a declaration of legality or illegality might not attend to the ultimate issue is one where a targeted state is acting in conformity with its formal obligations, but is nonetheless causing concerns for peace and security. In this case, a declaration would recommend a moratorium on the exercise of rights until appropriate cooperation has restored the confidence of the international community.

The final step in this phase of escalation is censure: a statement condemning non-compliance with international obligations, requesting cooperation, and urging the cessation of certain activities. Resolutions that order compliance or censure instances of non-compliance might buy time where more coercive actions can be too costly, or where consensus has not been reached on pursuing sanctions or military force. In recent years, the IAEA has indicated Iraq, North Korea, Libya and Romania as candidates for censure, based on non-compliance alone, but every step towards censure has been controversial. Whereas the Chinese blocked even censure in the case of North Korea, with Iran it seems the only likely outcome.

For Security Council members diplomatically and economically engaged with the targeted state, censure is an attractive alternative to Chapter VII actions, because it can be secured by consensus rather than requiring a vote on the record. However, if censure is the end result of Security Council involvement, it is likely that little has been gained but perhaps some half-hearted wrist slapping or bad publicity. Normative de-legitimation of a regime is rarely effective in applying continual pressure unless it damages domestic popularity or does tangible damage to diplomatic or economic relations. In short, if dissuasion is a goal, censure must translate into further action. This result is more easily achieved with the application of mandatory measures under Article VII instead of a recommendation. Even if is a terminal action for the Council, there must be some assurance of peace and security before the Council leaves behind its responsibility, whether this means alternative channels of diplomacy, a stable deterrence regime, effective voluntary sanctions, or other forms of remediation such as those provided in the IAEA Statute.

C. Level Three: Economic Sanctions

If censure, inspections, and related provisional measures under Chapter VI are not successful in dissuading suspected proliferation activities, the next step is to pursue economic sanctions. The move to Chapter VII is perhaps the least trivial of enforcement issues. Chapter VII empowers the Security Council with the “force of law”; decisions in accordance with this Chapter are mandatory and binding on Members of the United Nations, who must take measures that give effect to its decisions. If after Chapter VI measures fail to remedy noncompliance or to secure peace and security, the Council will

94 A resolution endorsing the findings of a “free and fair” election in Cambodia, by Secretary-general’s special representative. Resolution 835 (1993)

95 A resolution declaring the use of chemical weapons in the Iran-Iraq War as “contrary to obligations under the 1925 Geneva Conventions (Resolution 598 in 1987). The last example, from Resolution 598 (1987) is significant because it interprets legality under Geneva Conventions generally (much of which has crossed the threshold to become custom), but a particular (optional) protocol undertaken by states syntax. This is analogous in some ways to interpreting legality under the NPT, and the withdrawal clause.
likely consider punitive measures, beginning with non-forcible measures. Article 41 governs the Security Council’s power to decide on non-forcible measures, economic sanctions and embargoes, and severance of diplomatic relations.\textsuperscript{96} Though measures contained in Chapter VII, Article 41 fall short of the use of force—they explicitly exclude naval blockades and other forms of military enforcement which must be pursued under Article 42\textsuperscript{97}—they are undoubtedly coercive measures, and a clear departure from Article VI.\textsuperscript{98}

The difference between a mandatory embargo under Chapter VII and a mere “recommendation” under Chapter VI can be crucial both for perceptions of legality and overall efficacy of a resolution. A possible model for this is Security Council Resolution 418 declaring arms trade with South Africa (but not apartheid per se) a “threat to peace” under Article 39 and making the arms embargo mandatory in 1977.\textsuperscript{99} A counter-example might be Resolution 217 (1965) directing states not to recognize the “illegal authority” of Rhodesia in diplomatic or other relations. Because it was not passed under Chapter VII, the Rhodesia Resolution proved to be a relatively toothless “recommendation”; three years later, it had to be followed up with a resolution under Article 41 adding mandatory boycotts.\textsuperscript{100} The use of Chapter VII sanctions multiplied during the 1990s, including innovations such as the creation of international tribunals, but it has never been applied to

\textsuperscript{96} Chapter VII, 41 states: “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.”

\textsuperscript{97} Except arguably in the case of enforcing Article 41 sanctions against third states.

\textsuperscript{98} Iran would likely treat sanctions as a hostile act, just as Gil Yon, North Korea's ambassador to the United Nations suggests, "Any kind of sanctions to be taken by the Security Council or anywhere we will consider it a declaration of war against the DPRK." http://www.cnn.com/2003/WORLD/asiapcf/east/01/22/koreas.un/index.html "They have said they would take such punitive action by the Security Council as a declaration of war," said Maurice Strong, U.N. special adviser on North Korea, following a visit to Pyongyang. The sanctions were imposed by former President Bill Clinton in 1995 and renewed by Bush in 2001. retained the ability to modify or end them. The sanctions, imposed under the International Emergency Economic Powers Act, mainly affect US petroleum companies, barring them from investing in Iran's energy sector.

\textsuperscript{99} The Council acted by adopting by consensus resolution 591 (1986), the text of which had been recommended by its Committee on sanctions against South Africa, formally known as the "Security Council Committee established by resolution 421 (1977) concerning the question of South Africa"(The Council imposed the mandatory arms embargo against South Africa in its resolution 418 of 4 November 1977. Under resolution 421 of 9 December 1977, the Council established a committee consisting of all Council members to study ways by which that embargo could be made more effective and to make recommendations to the Council.)In resolution 591, States were called on to prohibit the export of spare parts for embargoed aircraft and other military equipment belonging to South Africa and any official involvement in the maintenance and service of such equipment. Security Council resolution 919 (1994) on termination of the arms embargo and other restrictions related to South Africa imposed by resolution 418 (1977) Rhodesia was placed under the first UN Security Council-authorized sanctions, which began in 1965 and remained until its independence as Zimbabwe in 1980 1977 South Africa referred to Security Council program? IRAQ Economic sanctions were imposed by the UN after the 1990 invasion of Kuwait. A compromise was agreed in 1995 with the Security Council that became the now infamous Oil-for-Food program. US has applied an economic, commercial and financial embargo in CUBA since 1962, despite UN condemnation SOUTH AFRICA In 1962 the UN General Assembly passed Resolution 1761 condemning apartheid policies. In 1976 a UN convention came into force allowing member states legally to apply sanctions to urge South Africa to change its apartheid policy. The sanctions hit hard in the 1980s, causing the rand to collapse and a state of emergency was declared in 1985, lasting for five years. RHODESIA Ian Smith declared the country independent from Britain in 1965, but faced international condemnation.

\textsuperscript{100} (Res. 252, May 29, 1968)
a non-proliferation crisis.\textsuperscript{101} From a practical standpoint, since the permanent members will typically communicate before bringing an important resolution to a vote, a resolution imposing sanctions will not be introduced if it is likely to be vetoed.\textsuperscript{102} In confronting proliferation crises, similar to those with North Korea (where consultation effectively blocked a Security Council resolution) and Iran (which at least made it to the referral stage), the political will of the P-5 members must be measured. Threats of sanctions have a relatively low cost, unless they provoke retaliation, but the actual imposition can be costly to all concerned. Security Council, once it has accepted a referral has a responsibility and determined a threat to “make recommendations, or decide what measures shall be taken... to maintain or restore international peace and security.”\textsuperscript{103} Chapter VII, Article 39 empowers the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and also gives it the power to The difference between a mandatory embargo under Chapter VII and a mere “recommendation” under Chapter VI can be crucial for perceptions of legality and overall efficacy of a resolution.\textsuperscript{104}

Again, the ongoing case of Iran gives us a range of considerations in proliferation crises. In the event good faith negotiations fail,\textsuperscript{105} and a threat is determined, the temptation to rule out Article VII sanctions in advance of the facts should be resisted. So far, pessimism about sanctions—unlike cynicism about censure or apprehension about military force—rests largely on narrow prudential arguments (e.g., whether the price of

\textsuperscript{101} In the 1990s, Article 41 sanctions were imposed on Iraq (Resolution 661 in August 6, 1990), Yugoslavia (Resolution 713 if September 25, 1991), Somalia (January 23, 1992 Res. 733), and a high point in number of 1993, when sanctions were added against Libya, Liberia, Haiti, and Angola. The most dramatic improvisation of Article 41 has been the creation of ICTY of May 25, 1993, prosecuting and halting violations.

\textsuperscript{102} "Iranians are not used to bullying and will not also surrender to bullying," state-run Islamic Republic News Agency quoted Iranian President Mahmoud Ahmadinejad as saying. "The Iranian nation has just one slogan: ‘Nuclear energy is the Iranian nation’s inalienable right.’ "Certain powers think that by holding meetings they can force the Iranian nation to capitulate. But the era of bullying has passed and real power is in the hands of nations.

\textsuperscript{103} Chapter VII, 39 states: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

\textsuperscript{104} Chapter VI governs the pacific settlement of disputes, do not create legal obligations but instead exercise political influence. Under Chapter VI Article 34: “The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”

\textsuperscript{105} Paris Framework and a Russian plan that would enable Iran to carry out its wish to enrich uranium, but to do so on Russian territory have been rejected by Tehran. Russia, which has been building a nuclear power station for Iran at Bushehr, has made an offer to co-operate with the Iranians in producing the uranium they require enriched to the level required for energy-generation purposes (as opposed to weapons quality) but on Russian soil. Optimistically the inevitability of this scenario can be resisted with creative application of provisional measures and diplomacy. For example, Russia could choose this moment to renew the offer of agreement for offsite (reprocessing) uranium enrichment that would ensure Iran’s nuclear capacity for civilian purposes, and the IAEA could commend Iran’s compliance with its safeguard agreement, and declare its confidence in Iran’s principled stand on developing indigenous energy sources without destabilizing the region. So far, this kind of offer has not succeeded. However, this might be more effective at a time when (1) the threat of general sanctions is imminent; (2) Russia is in the position to veto any further resolutions on sanctions, and (3) it seems that Russia is perfectly willing to go along with further resolutions if not satisfied with Iran’s safeguards. Any sanctions would be mainly economic. Their effect is questionable. And there are several stages to be gone through before they could be imposed. And what if sanctions do not work? But sooner or later, Military action might then get onto the agenda.
oil is $30 or $100 a barrel)\textsuperscript{106} rather than principled arguments, or even the likelihood of success. This does not change the legal basis in non-proliferation, or peace and security for imposing sanctions; it only weakens the will to do so. However, rather than ruling out sanctions, Security Council members might and negotiate the scope to maximize effectiveness.

The P-5 member should identify an appropriate basis that would properly trigger sanctions, negotiate the possible scope of the sanctions being proposed, and assess their effectiveness against their costs. If any veto-wielding member remains hostile to this option, the alternative would be for sanctions to be pursued by regional or interest-based blocs of states without the imprimatur of Security Council authorization. One alternative to abandoning the Article VII framework altogether, might be to combine 39 and 41, making mandatory a limited boycott while recommending a much more sweeping set of voluntary sanctions. The core sanctions from the point of view of the “peace and security” mandate are not those that would bleed the Iranian regime dry (gas and oil revenue) and send shockwaves into the global energy market, but those aimed at a principled incapacitation of the threat. These would begin with targeted sanctions against dual-use technologies (analogous to pre-emptive 'surgical strikes’ on nuclear facilities).\textsuperscript{107} While the US currently has these sanctions in place, the EU does not. This would be the priority of where to start. If the P-5 countries are convinced this issue is in any way actionable by the Security Council, this is a modest compromise to comprehensive sanctions or forcible measures. From here, other political and diplomatic privileges can be revoked to signal isolation from benefits of multilateral engagement, and its benefits. Not all of these need even be enforced through a Security Council Resolution. For example, Iran is also currently at an early stage applying for membership of the World Trade Organization (WTO), so this application could be blocked. There are also enforcement provisions particular to Article XIX of the IAEA Statute that are aimed isolating non-complying states from the benefits of this multilateral regime. The Board may impose one or both of the following “sanctions”: “Direct curtailment or suspension of assistance being provided by the Agency or by a member, suspension of assistance provided by the IAEA or an IAEA member.” This would prohibit Russia from providing nuclear technology and compel the return of relevant materials and equipment, though it would leave untouched material centrifuges and other materials provided by Pakistan outside the NPT framework. Secondly, the IAEA could suspend any non-complying

\textsuperscript{106} Prudential considerations over economic sanctions—particularly a gas and oil embargo would impose burdens on the EU, Russia, and China. According to the WTO Europe stands to be hurt by gas and oil embargo. November 2004, it reached a major agreement with Iran to buy its oil and gas in a deal valued by the Chinese at $70bn. Thus, for the sanctions to be politically viable, they would have to be both effective and “targeted” either subject matter of armaments, or to most productive sector for trade are by far Iran's largest exports Oil and gas and mining products account for 86% of Iranian exports. If there is reference to the Security Council does that mean that there will be tough economic sanctions against international investment the Iranian regime to develop its resources. Thus the sanctions proposed must be convincing to Europe, stands to be hurt by, with oil prices as they are --- Russia, and China. But sanctions against the world's fourth largest oil-producer could be. Among the P-5, US has the least to lose from this measure, since it has had a longstanding embargo, but also some leverage Since US has already imposed sanctions, both because it would be least affected by sanctions, and also stymied by the status quo, there is little it can do unilaterally at this level in terms of threatening sanctions. On the other hand, the US does hold more “carrots” than the Europeans if it is willing to consider normalizing relations with Iran. This kind of dilemma reappears in the case of the use of force, though this is where the U.S. can apply added pressure by leaving open unilateral option.

\textsuperscript{107} The ‘break-out’ capability used to enrich uranium for fuel can also be used to enrich it further for a nuclear weapon.
member from the “exercise of the privileges and rights of membership.” 108 The most sweeping of these are potentially any “rights” enumerated in the NPT to permissible uses of nuclear energy. However, the particular value of Article VII sanctions, once authorized, is their universal and uniform character, and consensus on tough sanctions might be essential to the Security Council’s power to enforce non-proliferation.

D. Level Four: The Use of Force

i. Self-Defense and Collective Security within the Charter

Once these have other measures have been exhausted, if creative lateral possibilities and diplomatic channels are closed, and sanctions have proven ineffective or inappropriate, or else if the suspected proliferant takes hostile action, then the Council may contemplate authorizing the use of force conferred under Chapter VII. Chapter VII, Article 39 empowers the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and also gives it the power to “make recommendations, or decide what measures shall be taken… to maintain or restore international peace and security.” 109 The powers to determine a threat and decide the measures to be taken are—taken together—as close to the traditional “sovereign” functions of protection and enforcement as exist in an international organization. Therefore, in the UN collective security system, the Security Council has a primary role in managing definitions that are central to matters that would have traditionally been considered the protected prerogatives of state sovereignty and internal security. The Charter also attempts to both permit and tame the traditional area of self-defense, but only provisionally and in anticipation of Council authorization. In this narrow instance only, to act independently of the Security Council is not to act outside the Charter.

If the Security Council does succeed in authorizing the use of force, then one cost might be the possibility of diplomatic engagement, a “soft approach”—to resolve issues through diplomacy. 110 However, Security Council authorization of the use of force against a suspected proliferant is not easy either from a political or doctrinal point of view, and as threat of force materializes into the use of force, support for these actions decreases. 111 The UN’s collective security system has never successfully responded with Chapter VII in a proliferation crisis. The Security Council is unlikely to be able to gather


109 Chapter VII, 39 states: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

110 Even here, it is worth contemplating whether to continue inducements “carrots.” These would be cut off in situation of war, and would probably be prohibited in sanctions. Engagement can be divisive, and also mismanaged (Iraq Oil for Food scandal offers one kind of warning).

the collective will to authorize preventative strikes to slow progress. Low intensity actions such as naval blockades and other forms of military enforcement, which must be pursued under Article 42.\footnote{Article 42 states: “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.” call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.” There is a great deal of discretion in this section, and the threat of force is implied where the Security Council may “duly take account of failure to comply with such provisional measures.” Article 42 allows the Security Council to move beyond or bypass Article 41 where it is deemed insufficient and authorizes the Security Council to take forcible measures, 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.”} Enforcement of boycott measures against third states can be pursued under Article 41 or 42. In addition, an often overlooked section pertaining to these issues is Chapter VII Article 40 which empowers the Security Council to take an undefined range of provisional measures prevention and compulsion in the face of a threat to peace and international security.

ii. Self-Defense and Collective Enforcement Exceeding the Charter

Though the theory of the UN Charter channels the use of force through the exclusive authorization of the Security Council, state practice has developed more vigorously around the self-defense exception by individual states or states acting collectively independently from an explicit authorization by the Security Council. The recent situations that have been vigorously debated in this regard are the NATO intervention in Kosovo and the US invasion of Iraq. In principle, and by the Charter’s own terms, to respond to an armed attack in self-defense (or as in Kosovo “collective self-defense”) and act temporarily without Security Council approval is not to act outside the Charter, and NATO’s actions have been approved by the Council ex post facto. However, the Iraq situation poses a more ambiguous precedent for the Council. Either the U.S. failed to respect the factual determinations of the Council and acted unilaterally in defiance of the Council, or it acted properly in enforcing the Council’s resolutions, even if the factual argument (involving WMDs) was incorrect. What does this mean for the Security Council’s future ability to enforce non-proliferation norms? Despite the robust legal framework provided by the Charter and treaty regimes, the Security Council still acts in accordance with concrete situations and imperfect data, and its relationship to its own past actions is ambiguous.

Even more centrally, the manner in which the Iran crisis has arisen in the Council today is like looking in a cracked mirror of a situation more than 25 years ago. Security Council Resolution 487 of 19 June 1981 concerned the only precedent for a successful preventive strike against a fledgling nuclear program. At this time, however, to support the NPT and IAEA framework, the Security Council condemned the destruction of the nuclear reactor and defended the aspiring proliferant’s “sovereign right” to pursue peaceful nuclear program in conformity with the NPT. This was the Council’s resolution condemning Israel’s unilateral strikes in 1981 targeting of the Osirak reactor in Iraq. It appears in retrospect that the Security Council and IAEA’s threat assessment and reading of Iraq’s intentions was factually incorrect, although their doctrinal support against
unilateral strikes may still hold. Today, as priorities have shifted, and confidence-measures fall apart, the question of a surgical strike to prevent proliferation appears from time to time once again.

Yet this time, the question posed in the Resolution is reversed. Under the collective security system, can the Security Council authorize a military strike (or any lesser forcible measure) against a proliferation threat? This possibility is preserved as a legal option, even by the Resolution on Osirak. Yet almost nobody expects this to happen. Slightly more likely is a military strike by Israel or the United States. Yet the recourse to unilateral “surgical strikes” is all the more complicated both in fact and at law. Leaving aside the risks that Israel would risk destabilizing the region if it acted similarly today in Iran, it is probably not possible to reproduce the earlier military success. It is instructed by the lesson of the Osirak strike that Iranians have dispersed their nuclear sites throughout the country, and likely underground. The potential impact of a U.S. unilateral strike following disappointing results at the Security Council would carry the shadow of the more recent Iraq War experience (which again cast doubt on the accuracy of WMD threat assessments). These two precedents put the Security Council in an ambiguous position in terms of its own practice and how this would be interpreted in enforcing non-proliferation norms.

If the Charter is regarded as a potentially dynamic instrument, it cannot only be so for the Security Council alone, but we must also recognize consistent state practice. If we look at the text and purposes of the charter without discarding 60 years of institutional and state practice, the same openness in the text of the Charter that gives the Council such a wide margin of discretion, also gives some dynamic possibility to state practice. Thus the Charter itself may not have contemplated anticipatory self-defense or humanitarian intervention (“the responsibility to protect”); the same way it might not have conceived of the Security Council’s powers as “legislative” or added non-proliferation to the Security Council’s portfolio. For Thomas Franck, while the ‘literal’ text of the UN Charter does not allow for anticipatory self-defense, the spirit rather than the letter of the Charter can be followed faithfully in the practice of the UN’s principal organs and by members through state practice.113 Franck argues that the Charter has been adapted to allow for a much broader reading of the right of self-defense to encompass anticipatory self-defense or the rescue of a state’s nationals abroad, and for an approach to humanitarian intervention that would treat it as excusable if illegal. Though the mainstream legal position on preemptive self-defense has remained the same over the years, state practice is ambiguous: (1) the U.S. used Resolutions as well as a questionable theory of customary law of anticipatory self-defense to justify its military action in Iraq, and (2) Australian, Spanish, and British justification for military action was premised entirely on the enforcement of Security Council Resolutions 678, 687, and 1441. Thus any future Resolution could be bent to the service of a unilateral strike, leading back to a near replay of Osirak, with the Security Council in an uncertain position. The best way for the Security Council to take control of these uncertain doctrines and their role in non-proliferation is to draw a line in the sand on which kinds of threats may properly lead to military action under the UN system, and what fact-finding will support such an action.

Finally, there is the question of how to characterize capability for interdiction of nuclear suppliers. Under the Chapter VII resolutions, UN Security Council Resolutions 1718 (regarding North Korea) and 1737 (regarding Iran) the question remains whether they have legislated (indirectly or directly) what is necessary, which is to bolster the legal capacity to Security Council Resolution.

Resolution 1718 does provide a legal basis for preventing the supply of nuclear- and missile-related items to North Korea. However, the resolution does not sanction the use of force in order to intercept suspect cargo and no explicit legal basis for interdiction exists in the case of Iran, despite the provisions of Security Council Resolution 1737. Resolutions 1718 and 1737 do provide some degree of legality as they call on member states to take the ‘necessary measures’ to prevent the supply or transfer of nuclear and missile related hardware to Iran and North Korea. But, neither resolution offers an explicit legal basis for PSI operations against either country. Moreover, both resolutions invoke Article 41 of Chapter VII of the UN Charter limiting efforts to prevent procurement or proliferation by Iran and North Korea strictly to non-military means. This is likely to impede PSI participants’ efforts to intercept suspect vehicles, aircraft and shipping in the event that force is required to carry out interdiction and inspection.114 Moreover, developing effective national and international legal authorities to freeze financial transactions and seize assets, as proposed at the HLPM, would provide legality for interdiction. Although, in the case of North Korea, Security Council Resolution 1718 already obliges UN member states to immediately freeze the financial assets of those involved in the North’s proliferation activities.

IV. CAN LATERAL AND LEGISLATIVE RESOLUTIONS BUILD CONFIDENCE IN THE RULE OF LAW?

A. Beyond Deferral and Escalation: Lateral Strategies

As this paper has already suggested, the sources of Security Council authority and the measures open to it, should be viewed as subjects not of insecurity, but of confidence-building. Insofar as it can, the Security Council should seek a procedural model based on the rule of law.

In the Charter a pattern of escalation graduated “levels” of enforcement shapes the unwritten script of Security Council practice, but it is only one possible reading of the UN Charter and Security Council practice. However, it would be a failure of imagination to think that these escalating measures provide the Security Council the only effective alternative to inaction. The weakness of escalation—a unidirectional strategy of censure, sanctions and force (each punctuated with deferral, diplomacy and threats)—is in its poverty of choices and results. Each stage can be foiled by the dangers of failure, inaction, or overreaction. Of Iran, for example, the International Crisis Group says:

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February 2007. NUMBER 54 Present at the Creation: U.S. Perspectives on the Origins and Future Direction of the Proliferation Security Initiative By Ian Davis, David Isenberg and Katherine Miller
EU-led diplomacy so far has failed to persuade Iran to forego its fuel cycle ambitions; the UN Security Council seems unlikely to agree on sanctions strong enough to force it to do so; and preventive military force is both a dangerous and unproductive option.\textsuperscript{115}

This pessimism is also evident in proposals for provisional options provided or implied in the UN Charter. By presuming the chain of options in terms of escalation, every option provided by the Charter appears reactive—as a stalling tactic for diplomacy or more favorable conditions—rather than decisive and instrumental. Escalation also fails to set institutional precedents and strategies that can transcend a particular situation.

The alternatives to escalation can be called lateral strategies. The characteristic of a lateral strategy is to strengthen capacity rather than escalate threats. This includes the controversial capacity to pursue “legislative” options that may be general, abstract and binding on all parties under Chapter VII. These strategies can be used as confidence-building measures reassuring a “targeted” state that the international community is shooting more broadly, and that it is not being singled out or necessarily accused of bad faith. For example, it is well known that the Security Council Res. 1540 was prompted by a specific threat—the discovery of Pakistani scientist A.Q. Khan’s notorious proliferation network—yet it was phrased in broader terms, and took up a directly “legislative” role by calling upon all Member States to enact national legislation criminalizing the development, acquisition, manufacturing, possession, transport or transfer of nuclear, chemical and biological weapons and their means of delivery by a non-state actor. Though it also recognized that the specific actors in the Khan network were a small part of a more widespread threat, the more systemic problem that was addressed by this resolution was to fill a gap in the existing non-proliferation regime, which did not address WMD acquisition by non-state actors.

In a similar manner, any future resolutions that contemplates the threats posed by nuclear Iran or North Korea need not be narrowly tailored or confined to these specific crises, but could address a systemic problem. These situations may appear \textit{sui generis} today but they might also anticipate a troubling pattern, which immediate-past UN Secretary-General Kofi Annan has called a potential “cascade of proliferation.”\textsuperscript{117} This kind of proposal goes back to Hans Kelsen’s \textit{Law of the United Nations} (1951), which links the Security Council’s powers under Article 26 to make plans for the regulation of armaments, with its power to interpret threats under Article 39. The general idea of the Kelsen proposal is for the Security Council to pro-actively formulate concrete plans for the regulation of armaments (which originally connoted either an increase or decrease in armaments, according to security needs but more recently has become tied to disarmament and non-proliferation) under Article 26 and then interpret any non-compliance with these plans as a threat to peace and security under Article 39, which also makes the Article 26 obligation binding.\textsuperscript{118} Article 26 has never been put to use, there is

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\textsuperscript{115} Sanctions can only be effective if they affect Iran’s oil industry, but this outs as much pressure on countries that consume oil as it does on Iran. \\
\textsuperscript{116} International Crisis Group Report. \\
\textsuperscript{117} Cite to Kofi Annan High Level Panel Report. \\
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little or no practice worth speaking of. It would only take a carefully formulated resolution by the Security Council to resurrect this provision and make it useful in the new security environment. The Kelsenian proposal is legalistic in intent, and must be distinguished from the kind of trap-setting escalation that is becoming the script for Iran, draw a “line in the sand” which, if Iran crosses it, would represent a violation of international law, one more definitively and publicly established than, for example, whether Iran is, in fact, currently working on nuclear warheads. Violation of a legally binding UNSC resolution must clarify existing standards and understandings of what constitutes a threat to peace and security, one which is being established through recent resolutions.

This seems theoretically sound, but more circuitous than the evolutionary approach taken through recent resolutions, including 1373 and 1540 taking up a directly “legislative” role in each case explicitly “acting under Chapter VII.” However, even where the Security Council does not identify under which section of the Charter it is acting, there are certain signals in the texts of a resolution that the Security Council is undertaking a law-making function. First, the Council may “call upon” states to take particular actions “in accordance with their national legal authorities and legislation and consistent with international law.” Second, the Council will express the intention to “monitor closely” the implementation of the resolution. Third, the Council will state its decision to “remain seized of the matter.” In Resolution 1540 and 1373, these steps were accompanied by the creation of subsidiary organs which would monitor States’ progress in meeting these obligations.119

In any proposed resolution creating binding non-proliferation obligations on states, we could expect to see a similarly close level of involvement and an emphasis on capacity-building. In recent writings and statements, examples of generic and binding resolutions have been offered by non-proliferation experts such as the IAEA’s Director-General ElBaradei, Pierre Goldschmidt, former head of the IAEA’s safeguards department, and George Perkovich of the Carnegie Endowment for International Peace.

Proposals for these “legislative” resolutions addressed to strengthening the non-proliferation regime have diverged in character. The first is a proposal for a resolution setting a “universal moratorium in any new enrichment and reprocessing facilities” wherein Iran cannot claim it is being discriminatorily targeted.120 What is significant about ElBaradei’s proposal is that it combines the “universality” of law-making with the temporariness of a moratorium, or legislation with a sunset clause. ElBaradei, as IAEA’s

119 The Security Council’s Power to create Subsidiary Organs: One development to encourage enforcement of the Resolutions has been the creation of specific subsidiary organs such as those created under 1540 and 1373. Security Council also has established various standing committees and ad hoc bodies. Article 29 of the Charter empowers the Council to establish ‘such subsidiary organs as it deems necessary for the performance of its functions’. Some of these have been given tasks related to one issue and are terminated when the mandate has been fulfilled: others have a long-term existence and are activated when there is work to be done. A subsidiary organ may be one person or a committee, a peace-keeping force or a tribunal; it can be established either by the Security Council or by the President of the Council and/or the Secretary-General pursuant to a decision of the Council; it can conduct its operations at UN Headquarters or in the field; it can be given an ad hoc assignment or a continuing responsibility. The only Rule of Procedure governing the appointment of subsidiary organs is Rule 28, which simply states that the Council may appoint a commission or committee or a rapporteur for a specified question.

Director-General is probably not even being particularly Machiavellian or instrumentalist about the enactment of such “legislation” which the Agency would want to apply universally. The end is not tied to the empowerment of Security Council in this area, but to the revitalization of the existing NBC-weapon treaty regimes. Yet even here the near-term means is clearly and unavoidably located in the current powers of the Security Council.

Separately, but similarly, Pierre Goldschmidt, former head of the IAEA's safeguards department, and George Perkovich of the Carnegie Endowment for International Peace have recommended the following proposed resolutions:

1. A resolution establishing, independently of any specific case, UN Security Council would automatically grant Chapter VII the IAEA broader authority to conduct more intrusive inspections in cases of safeguards noncompliance (Perkovich).

2. A resolution wherein a state has been found by the IAEA to be in noncompliance with its safeguards agreement, the agency's verification authority would automatically widen until the state's declarations are accounted for. (Goldschmidt).

3. A resolution wherein inspectors would be given “immediate access to relevant locations, to individuals at their working place and to original documents where they are normally used or stored.” (Goldschmidt). 121

4. A resolution wherein a noncompliant state would be required “within 60 days to conclude with the IAEA an INFCIRC/66-type safeguards agreement for all nuclear facilities.” This would “block a noncompliant state from withdrawing from the nonproliferation treaty and claiming the right to do whatever it wants with its nuclear material and equipment, as North Korea did and Iran threatens to do.” (Goldschmidt).

5. A resolution wherein a noncompliant state would be required to “suspend sensitive nuclear fuel cycle-related activities for 10 years.” (Perkovich). 123

While the relative merits of particular proposals can be debated, their common characteristic is that they involve side-stepping the default responses—deferral or escalation—and actively pursuing creative and durable resolutions aimed at developing long term legal and operational capacity, and supporting the non-proliferation framework. What is emphasized is strengthening the capacity of the IAEA to engage in a more proactive investigative role with a legal framework to back it up, perhaps with the weight of the UN Security Council to compel cooperation with IAEA efforts more robust than traditional safeguards. This process has begun with the Additional Protocol, and with its first referral to the Security Council. There can be other suggestions of this sort, including the creation of a permanent nonproliferation commission under the Security Council (similar to UNSCOM or UNMOVIC but with a universal mandate, and which would have to take care to coordinate with and not undercut the IAEA), or a streamlining of

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122 Id.

123 Id.
approval by the Security Council of the Secretary General in invoking his existing inspection authority. This avoids the problem of “surrogating” of Council functions by competing and uncoordinated means.124

One suggestion is that Security Council resolutions need not simply address contingent crises, but should also help develop the Council’s own legal capacity to deal with larger systemic crises, such as the possibility of non-compliance in the future and withdrawal from non-proliferation regimes. The development over time of a practice related to peace and security would give more force and consistency to the possibility of Council intervention.

Even outside specific compliance frameworks, states may bring these matters to the attention of the UN Security Council as a threat to international peace and security. In each case, if the internal mechanism in the treaties will be best equipped to make the distinction between a minor and a material breach, fact-finding should be left to these bodies. However, where there are gaps, the Council is competent to act. In the final analysis, while it should not undercut multilateral treaty frameworks, the Security Council need not rely on the text of particular treaties in following its mandate. Factual matters that signal a threat to peace and security—whether these are non-compliance with safeguards, withdrawal from a treaty, cutting off negotiations, issuing threatening statements, or nuclear testing, for example—may or may not carry a legal meaning, but ultimately, the Security Council need not rely on the text of particular treaties in interpreting and following its mandate. It may well be that Iran comes into compliance with technical (record-keeping and inspections), but that suspicions about undeclared nuclear weapons activities remain and give rise to security concerns safeguards noncompliance.

The Security Council could also link various statutory inspection schemes through its Article 34 authority to investigate and authorize investigations, the only provision in the Charter that grants a body this competence.125 To add value to the nonproliferation compliance system, legislative resolutions need not be outcome-determinative, but they

124 There can be unilateral or multilateral surrogating of peace and security functions. See Barry Carter and Phillip Trimble, International Law, Aspen Law & Business, New York, 1999, 1223-1224 stating, “The Uniting for Peace Resolution may contradict the UN Charter.” To address this problem of Security Council deadlock, the United States pushed the UN General Assembly to pass the “Uniting for Peace Resolution.” The resolution said that where a threat of international peace and security arises and the Security Council fails to act, the General Assembly can authorize a response, even the use of force. Although the legality of the Uniting for Peace Resolution is dubious, and though it has fallen into disuse since 1960, the United States used it to pass additional resolutions in the General Assembly and get “legal” backing for many actions which the Soviets would have blocked, particularly during the Korean War. Examples of U.S. “surrogation” of Security Council functions continues to the current day, including the “coalition of the willing” in Iraq, which (lacking formal Security Council authorization nonetheless claimed authority both inside and outside the Security Council framework. Unilateral actions of powerful states “surrogate” the functions of the Security Council, and this could be seen to erode the legitimacy and efficacy of the Council. In the vacuum of authority left by the Security Council during the Cold War, the General Assembly also passed a series of “law making” resolutions on issues related to the use of force. Important among these have been the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (General Assembly Resolution 2625) and the 1974 Definition of Aggression (General Assembly Resolution 3314). An example of how the internal politics of the Security Council and the external, institutional politics might affect each other, consider the obscure example of the “Uniting for Peace Resolution.” Other examples of “surrogation” include the use of regional organizations to authorize force when the Security Council fails to act. It is sometimes claimed that the UN Charter allows regional organizations to authorize force when the Security Council fails to act. In the Cuban Missile Crisis, the United States used this argument to stop Soviet ships, relying on authorization from the Organization of American States (OAS).

125 UN Charter Article 34. UN Charter Commentary (Simma) by Schweisfurth. At 516.
should at least create appropriate background conditions for facilitating dissuasion diplomacy, and authorizing new coercive and persuasive measures (such as additional agency-based “sanctions”) available to the IAEA and other inspection agencies. Other proposals addressing institutional gaps might involve the revitalization of the long-defunct Military Staff Committee, the only subsidiary organ created under the UN Charter, detailed in Article 47 and given advisory functions on questions of armaments under Article 26. More practical lessons could be applied from the experiences in recent proliferation crises to get out of the cycle of escalation and deferral, and develop deeper and more general remedies.

B. Strictly Exceptional: Law-Making between Formalism and Contingency

Lateral strategies also move the goalposts on familiar legitimacy debates. As George Perkovich has noted, “The Security Council can make these vital reforms without eroding state sovereignty or development.”\(^\text{126}\) Countries such as Iran can no longer claim they are being singled out as a matter of international concern. It also helps reconcile two important aspects of the NPT, which are non-discrimination in the development of nuclear energy for peaceful purposes\(^\text{127}\) and prohibition of the manufacture or acquisition of nuclear weapons or nuclear explosive devices by non-nuclear weapons states. However, as mentioned in the section on implied powers, there are also serious qualms about the legitimacy of these legislative powers closely linked to ongoing challenges to the ill-defined and expansive powers of the Security Council.

This is precisely what was at stake in an exchange between Spanish Ambassador Inocencio Arias and Algerian Ambassador Abdullah Baali regarding Resolution 1540. In Baali’s view, approving this resolution would mean the council is “acting in an exceptional manner since, clearly, the Charter does not confer to it a mandate to legislate on behalf of the international community.” Arias called the initiative “part of the global struggle against terrorism,” therefore “this council is competent to act.”\(^\text{128}\) Compare the statement of the Chinese representative over the resolution: “Preventing the proliferation of weapons of mass destruction and their means of delivery is conducive to the maintenance of international peace and security,”\(^\text{129}\) to the statement of the representative of Pakistan: “there are grave implications to this effort by the Security Council to impose obligations on States, which their Governments and sovereign legislatures have not freely accepted, especially when some of these obligations could impinge on matters relating to their national security and to their right of self-defense.”

Both India and Pakistan, for example, accepted only as an “exceptional” measure and not as a proper “legislative” act authorized by the Charter. However, this is not the same as criticizing the Council for acting in an arbitrary manner outside of stable and


public law. Instead, critics insist on its extra-legal and exceptional character, and claim that states have come to rely on a role for the Council that is explicitly discretionary, and delimited only by the requirements of a crisis. This critique flips the script on the Charter-based critique, the problem is not that the Council dictates by fiat and in a discriminatory manner but that its effects would be overbroad and remain in force for an indefinite period of time. In terms of output, two critiques arise, and point in different directions:

1) **Critique of Contingency:** Since the Security Council’s powers are inherently discretionary and tailored to particular crises, the concrete actions will often seem inconsistent, unprincipled, or discriminatory.

2) **Critique of Formalism:** If the Security Council reaches toward consistency, and the development of background standards, this “legislative” activity will be seen as overreaching and imperial.

Formalism and contingency are merely techniques in the peace and security mandate. This paper has argued that the Charter provides the Security Council’s proper legal capacity to address proliferation of NBC weapons, including its express and implied powers under the UN Charter as well as powers granted by specific treaties, and de facto “legislative” powers. I also argue that one area where the legal dimension is increasingly important is the development of norms in the area of non-proliferation. For these reasons (as with 1373 and 1540), the Council’s enactment of “legislation” will likely be limited to politically favorable issues at opportune moments.

Finally, a different kind of misgiving is the concern that if a targeted state does not respect current legal obligations, why would it respect a more elaborated set of obligations? It is also questionable whether such a measure would actually reassure a country such as Iran that it is not being singled out or accused of bad faith, or if it would instead mobilize resentment against the Security Council as an instrument of Western hegemony. Thus all the same pitfalls—hypocrisy, futility, opportunism—might return, only slightly transfigured.

Yet, if for no other reason, these measures can be recommended as a way to prompt both the Security Council and countries of concern to uphold the language of legality, and meet and engage with evolving expectations on a common plane of principle. The importance of taking up a proactive and legalistic model of Security Council options is to provide an alternative to a completely reactive posture to political contingencies and to help guide this evolution in a way that is rational, incremental and principled. The desired effect is twofold: (1), so that the Security Council will be better positioned to anticipate and respond to emerging challenges to peace and security, and (2) so states can better predict and rely upon norms guiding Security Council action. It is hoped that these background conditions will better help all parties navigate or avoid

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130 Tuesday, March 14, 2006, New York Times reported that Iran had officially stopped all diplomatic bargains to try to evade Security Council scrutiny and welcomed taking their dossier to the Council head on. This suggests that those who are in control of the facts and the relevant law will be able to weather the storm. Even as reports of nuclear warheads surfaced and the IAEA sent the matter to the Security Council, IAEA noted that "Iran has continued to facilitate access under its safeguard agreement as requested by the agency, and to act as if the Additional Protocol is in force, including by providing in a timely manner the requisite declarations and access to locations."
complex proliferation crises. Here both prudence and principle suggest that the Security Council must be a vehicle and not an obstacle to the development of multilateralism and the rule of law.

C. Beyond Technique: Securing Confidence in the Rule of Law

With this in mind, we can return briefly to the kinds of legitimacy critiques that do not emphasize legal authority. These are two common critiques that reflect anxieties about an expanded non-proliferation agenda of the Security Council:

1. Critique of Opportunism. To finally take up the cause of non-proliferation under Charter responsibilities may seem opportunistic. In this view the politics of “great powers” are seen to set priorities and force revision, development or enforcement of international norms only when a great power is also a stake-holder in a crisis.

2. Critique of Non-Democratic Character of the Security Council. The Security Council’s powers deviate from the traditional concept of sovereign equality through the influence of each of the permanent five members and their power of veto. This is tangentially related to the non-representative character of the P-5 in terms of current realities of power and regional blocs, which is usually a centerpiece of Security Council reform proposals. In either case, a more inclusive multilateral approach would lean towards the increased involvement of General Assembly or specific treaty organs. But in the proclaimed pursuit of such general interests (action possible only when the general interest coincides with the subjective interests of Security Council Members), the Security Council has adopted measures that may not always appear compatible with basic principles such as the rule of law which is presumed as underpinning both the international and domestic legal orders. For at the same time as their express objectives concern, inter alia, the promotion of human rights as part and parcel of international peace and security, sanctions inevitably affect the rights of populations in the sanctioned entity and call on implementing States to circumscribe constitutionally protected rights of individuals in their territories. This process is exacerbated by the creeping extension of the powers of the Security Council 131

These are precisely the kinds of critiques that appear beside the point when we focus on the Security Council’s powers in terms of obligations to the international community as a whole. In some ways, the legitimacy of the Security Council could increase Security Council resolutions need not simply address contingent crises, but should also help develop the Council’s own legal capacity to deal with larger systemic crises such as future possible non-compliance and withdrawal from non-proliferation

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regimes. This involves side-stepping the default responses— deferral or escalation—and actively pursuing “lateral” strategies, creative and quasi-legislative resolutions aimed at developing this capacity. As for the broader legitimacy concerns, these are just as likely to be resolved through more legitimate process and output\textsuperscript{132} acting in a manner that is principled and general—than any scheme for greater representation on the Council.

IV. CONCLUDING OBSERATIONS

The Security Council has already begun to evolve in response to emerging challenges to peace and security, and it will continue to do so. The evolution of cooperation between members also offers an opportunity to secure confidence in its Security Council’s own constitution and operation. Based on the international consensus that has gathered around the development of a cooperative “web of prevention” around the proliferation of NBC materials, the Security Council may claim legitimate claim to expanding its powers while seeking to secure confidence in the rule of law. This paper has given three examples of lateral, but law-governed strategies that the Security Council may pursue. First, it has shown the way in which the Council deploys generally applicable “legislative” measures aimed at developing the capacities of states in activities such as interdiction. Second, it discussed generally applicable resolutions aimed at developing the Council’s own capacities to support and enforce multilateral commitments. (Examples include the 1540 and BWC). And thirdly, it indicated the authority to pursue, through Article VI voluntary agreements, to confidence-building, which would also include factual triggers (crises of confidence) that may trigger “peace and security” concerns triggers for enforceability though Chapter VII.

Beyond its express and implied powers under the UN Charter, as well as powers granted by specific treaties, this paper has argued that Security Council resolutions need not simply address contingent crises, but should also help develop the Council’s capacity to deal with systemic crises. At present, a robust regime or set of mechanisms for handling WMD threats will have to rely on an institution empowered to act within a framework that has already secured agreement among the states and peoples in the world. This is not a choice between power politics and law, between contingency and formalism, or between deferral and escalation. It is necessary to recognize that among international organizations, the Security Council is uniquely empowered to ensure “peace and security” with contingent as well as formal measures. Both kinds of measures could be translated to the proliferation context in a law-governed manner.

\textsuperscript{132} If the Security Council enters the activity of legislation, an “extraordinary” step of prescribing durable obligations upon the international community at large, it is appropriate that these actions should correspond closely to categories of pre-existing obligations: those that are non-derogable (jus cogens) and/or owed to the community at large (erga omnes).