

# **Guarantees of International Peace and Security: The Role of the UN Security Council in the Settlement of International Disputes\***

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## **Abstract**

This paper explores the guarantee of international peace and security provided by the United Nations and analyses the role of the Security Council in the resolution of international disputes. This is particularly relevant to Kuwait as in 2018, Kuwait became chair of the Security Council and so exercised a pivotal role in the drafting of Security Council resolutions. This paper argues that notwithstanding the use of force by some nations, international law has a critical role to play in the resolution of international disputes and that the Security Council is well served by its rotating system of leadership.

International law developed from the 17th century onwards as a system of ordering international relations, and articulating the rights and claims of states, without supra-national institutions of any kind. The Treaty of Westphalia envisaged a system of collective security for resolving disputes but it did not involve any new institutions and was never operative (see Treaty of Münster, 24 October 1648, Arts 123-124, 319 CTS 1, 354). The ultimate way in which international disputes were settled, if diplomacy failed, was by war, which Grotius compared to a lawsuit. In the 19th century an informal “Concert of Europe” operated in which the major powers exercised strong influence over major disputes, but again this was never embodied in any institutional form.

The development of public international arbitration in the modern period is usually said to date from the Jay Treaty of 1794: see A Stuyt, *A Survey of International Arbitrations 1794-1989* (1990). In fact arbitration of “inter-communal” disputes was common in ancient Greece and there are modern examples before 1794. But considerable impetus was given to the idea of inter-state arbitration as a result of the Alabama Arbitration (Great Britain v USA) (1872) Moore, 1 Int Arb 495. The first standing arbitral body was

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\* **Research has been presented at: the KILAW 5th Annual International Conference (9-10 May 2018), entitled: (Contemporary Challenges to Legal Guarantees in a Changing World)**

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the Permanent Court of Arbitration (1900), established as a result of the First Hague Peace Conference in 1899. The spectacular failure of the Concert of Europe to prevent the Great War led to the establishment of the first general political international organisation seeking to resolve international disputes and to keep the peace, the League of Nations (1919-1946), and the first standing international court, the Permanent Court of International Justice (1922-1946). After World War II the United Nations replaced the League of Nations in the former role, the International Court of Justice replaced the PCIJ in the latter. The period since 1945 has seen a proliferation of dispute settlement procedures and mechanisms. Some of these have not been used at all (e.g. OSCE) or only to a limited extent (e.g. ITLOS). Others have been or are being heavily used: e.g. the European human rights mechanisms, the WTO DSB, the Optional Protocol procedure under the ICCPR; the Inter-American human rights system; more recently ICSID arbitration, NAFTA arbitration. Note that most of these (with the exception of the WTO) are “mixed” procedures of one kind or another.

More recent developments have allowed individuals to be incorporated into international dispute settlement in cases where they are directly concerned or affected, at least to some degree. Briefly, they include:

- in the field of commercial disputes, allowing individuals access to mixed arbitration (Iran-US Claims Tribunal, ICSID), or extending international systems of recognition of enforcement of private arbitration to mixed cases (e.g. under the 1958 New York Convention);
- in the field of human rights, progressively allowing individuals standing to challenge state action, including action of their state of nationality;
- alternatives to diplomatic protection which do not involve judicial remedies (national claims commissions; UN Compensation Commission).

Despite these developments, it remains a question whether private individuals litigating at the international level do so as equals defending their own rights or as delegates of their States of nationality. There has been a gradual recognition that individual states may have a form of “public interest” standing in relation to certain fundamental obligations, though the modalities and extent of any such standing are still poorly articulated. This paper seeks to contribute to international law on guarantees by articulating the UN’s guarantees of international peace and security in the light of the unique current position of the GCC states.

## 1. Introduction

This paper explores the guarantee of international peace and security provided by the United Nations and analyses the role of the Security Council in the resolution of international disputes. This is particularly relevant to Kuwait as in 2018, Kuwait became chair of the Security Council and so exercised a pivotal role in the drafting of Security Council resolutions. This paper argues that notwithstanding the use of force by some nations, international law has a critical role to play in the resolution of international disputes and that the Security Council is well served by its rotating system of leadership.

International law<sup>(1)</sup> developed from the 17th century onwards as a system of ordering international relations, and articulating the rights and claims of states, without supra-national institutions of any kind<sup>(2)</sup>. The Treaty of Westphalia envisaged a system of collective security for resolving disputes but it did not involve any new institutions and was never operative<sup>(3)</sup>. The ultimate way in which international disputes were settled, if diplomacy failed, was by war, which Grotius compared to a lawsuit. In the 19th century an informal “Concert of Europe” operated in which the major powers exercised strong influence over major disputes, but again this was never embodied in any institutional form.

The development of public international arbitration in the modern period is usually said to date from the Jay Treaty of 1794<sup>(4)</sup>. In fact arbitration of “inter-communal” disputes was common in ancient Greece and there are modern examples before 1794. But considerable impetus was given to the idea of inter-state arbitration as a result of the Alabama Arbitration (Great Britain v USA)<sup>(5)</sup>. The first standing arbitral body was the Permanent Court of Arbitration (1900), established as a result of the First Hague Peace Conference in 1899. The spectacular failure of the Concert of Europe to prevent the Great War led to the establishment of the first general political international

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(1) The first part of this paper is derived from the work of His Honour Judge James Crawford of the ICJ and Professor Marc Weller, both former Directors of the Lauterpacht Centre for International Law. Works which have been consulted and works on which this part of the paper relies include: Crawford, J. (ed), *Brownlie's Principles of International Law* 8<sup>th</sup> ed. (Oxford: Oxford University Press, 2012), Crawford, J., *The Creation of States in International Law* (Oxford: Oxford University Press, 2011), Crawford, J., *Chance, Order, Change: The Course of International Law* (Netherlands: Brill, 2014) and the Cambridge LL.M materials prepared by J. Crawford and M. Weller. The second part of this paper applies legal principles to current challenges in international peace and security.

(2) See generally M. Shaw, *International Law*, 8th ed, (Cambridge: Cambridge University Press, 2017), Chapter 1; M. Evans (ed.), *International Law*, 5th ed. (Oxford: Oxford University Press, 2018), Chapter 1.

(3) See Treaty of Münster, 24 October 1648, Articles 123-124, 319 CTS 1, 354.

(4) A. M. Stuyt, *A Survey of International Arbitrations 1794-1989*. 3<sup>rd</sup> ed. (Dordrecht, M. Nijhoff Publishers, 1990).

(5) (1872) Moore, 1 Int Arb 495.

organization seeking to resolve international disputes and to keep the peace, the League of Nations (1919-1946), and the first standing international court, the Permanent Court of International Justice (1922-1946). After World War II the United Nations replaced the League of Nations in the former role, the International Court of Justice replaced the PCIJ in the latter. The period since 1945 has seen a proliferation of dispute settlement procedures and mechanisms. Some of these have not been used at all (e.g. Organization for Security and Cooperation Within Europe) or only to a limited extent (e.g. International Tribunal for the Law of the Sea). Others have been or are being extensively used. These include the European human rights mechanisms, the World Trade Organization (WTO) Dispute Settlement Body, the Optional Protocol Procedure under the International Covenant on Civil and Political Rights; the Inter-American human rights system; more recently International Centre for Settlement of Investment Disputes (ICSID), North American Free Trade Association arbitration.

More recent developments have allowed individuals to be incorporated into international dispute settlement in cases where they are directly concerned or affected, at least to some degree. Briefly, they include in the field of commercial disputes, allowing individuals access to mixed arbitration (Iran-US Claims Tribunal, ICSID), or extending international systems of recognition of enforcement of private arbitration to mixed cases (e.g. under the 1958 New York Convention); in the field of human rights, progressively allowing individuals standing to challenge state action, including action of their state of nationality; alternatives to diplomatic protection which do not involve judicial remedies (national claims commissions; UN Compensation Commission).

Despite these developments, it remains a question whether private individuals litigating at the international level do so as equals defending their own rights or as delegates of their States of nationality. There has been a gradual recognition that individual states may have a form of “public interest” standing in relation to certain fundamental obligations, though the modalities and extent of any such standing are still poorly articulated. This paper seeks to contribute to international law on guarantees by articulating the UN’s guarantees of international peace and security in the light of the unique current position of the GCC states.

## 2. Structure of the International Legal System

In order to analyse this topic more fully, it is helpful first to consider the structure of the international legal system. At present, the main components

of that system are the states (around 196 of them); the public international organizations (around 230 of them), in some cases at least exercising limited independent public powers (the Security Council, other powers “delegated” to international organizations and to certain other bodies); a number of international courts and tribunals (around 20, plus ad hoc bodies); international law, which is a decentralized body of legal rules, made by treaty<sup>(6)</sup>, through practice and (to some extent) by international organizations and courts.

The systems is characterized by concepts of sovereignty, territory, independence, equality, consent, responsibility, and arguably self-determination, although understandings of self-determination vary between states. All these standard ideas concern states, one way or another, not individuals, corporations or NGOS. But there are also a number of non-legal (or extra-legal) organizing ideas evident in the international system. These include hegemony, balance of power, coercion and sphere of influences. In fact, there are few systematic, institutionalized values or structures that characterize national (as against international) constitutions. Notions common on western legal systems, such as the separation of powers, inherent judicial power, legislation, democracy, accountability, basic human rights, judicial review, rule of law, do not apply in every legal system so they cannot be understood to be universal. Since 1918 and especially since 1945, there have been attempts to address some of these absences, with varying success.

There is no doubt that the system is developing. The International Criminal Court, for example, which was created by the 1998 Rome Statue of the International Criminal Court, became operative in 2002. But progress is often slow and often also depends on political factors, such as the role undertaken by the UN Security Council at any given time.

### **a. States**

The primary actors at the international level have always been states, collective territorial entities having certain characteristics of separateness and independence from other states. Historically, this resulted from the disappearance or weakening of “supra-state” actors such as the Holy Roman Empire and the Papacy, the development of nationalism, the consolidation

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(6) See generally A. E. Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48 *International and Comparative Law Quarterly* 901; C. M. Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 *International and Comparative Law Quarterly* 850; D. W. Greig, ‘Reciprocity, Proportionality, and the Law of Treaties’ (1994) 34 *Virginia Journal of International Law* 295; O. A. Hathaway, ‘The Cost of Commitment’ (2003) 55 *Stanford Law Review* 1821.

of many minor entities (e.g. small feudal states) into nation states (Italy, Germany), and the expansion of European empires elsewhere in the world, suppressing the independence of indigenous groups and peoples. These include the Portuguese, Spanish and subsequently Dutch, British, French, German and Italian empires. One consequence was an enormous fluctuation in the number of states, from around 60 in 1945, to just under 200 in 2018. There is no natural number of states.

As a result of such processes, and of theoretical developments which emphasized “sovereignty” as a key organizing idea, by the late 19th century it was generally thought that only states were and could be actors at the international level. “States only and exclusively are subjects of international law”<sup>(7)</sup>. As a consequence of this, non-state entities such as native peoples were often devalued or ignored.

Statehood remains a basic organizing idea. The main rules of international law revolve around the state<sup>(8)</sup>, and disputes over whether an entity is or should be a state continue to be significant cause of conflict and instability.

### **b. International Organizations**

International organizations may be defined as entities created by states (usually if not always by treaty) for specific purposes and having some form of separate existence<sup>(9)</sup>. There are marginal cases of treaty arrangements which consolidate into international organizations over time (e.g. the Antarctic Treaty 1959, the Commonwealth). Formal international organizations started to be established for technical purposes in the late 19th century (International Telegraphic Union (1865), Universal Postal Union (1874)). The first general international organization to be created, however, was the League of Nations (1919). When the Bank for International Settlements was established in 1930, doubts about its capacity to hold property and to contract were such that it was made a Swiss corporation under special arrangements; these remained unchanged until 1987 when a HQ agreement with Switzerland recognized the Bank as an international legal person.

The role formerly played by heads of states as individuals was greatly reduced with the growth of institutionalized governments as international law did not

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(7) Oppenheim L., *International Law*, Volume 1 (London: Longmans, 1905).

(8) See generally A. Aust, *Modern Treaty Law and Practice* 3<sup>rd</sup> ed. (Cambridge: Cambridge University Press, 2014).

(9) See generally C. C. Joyner (editor), *The United Nations and International Law* Cambridge: Cambridge University Press, 1997.

concern itself directly with the position of private persons. (At that time, there was no system of general human rights at the international level.) Protection of the person and property occurred through diplomatic protection: the state represented the persons and property of its nationals. During the 20th century this position has changed but there is still no clear answer as to the extent to which persons and property protected per se by international law? In some regions and at some periods of time, international law has provided compensation for loss or damage to personal property. The United Nations Compensation Commission, which adjudicated on compensation following the Iraqi invasion of Kuwait, is an interesting example. But the provision of compensation following loss or damage is not the same as protection from loss or damage.

The idea that only states could be legal persons in international law was finally rejected by the International Court in the Reparations Case (1949). At the same time the Court rejected the argument that the existence of a legal person in international law was “subjective”, dependent on the recognition of that entity as such by the state concerned. The United Nations, it held, has “objective” legal personality, which could be relied on as against a third party, Israel, which at that time, was not a member of the UN). The Court left open the question whether this characteristic of the UN was limited to major multilateral organizations or would be applied to public international organizations generally. Later, objective legal personality was attributed to public international organizations more generally, including the multilateral development banks and the European Union.

In some cases international organizations, particularly the UN Security Council, wield public power over states and individuals. Recent examples include Iraq (1990 to the present), the Lockerbie affair and the International Criminal Tribunals for Yugoslavia and Rwanda. But there is a huge spectrum of organizations. Some operate very much like states (e.g. European Union). Some exercise major influence in specific fields (e.g. International Monetary Fund, International Bank for Reconstruction and Development). Some are essentially symbolic (e.g. Commonwealth), some have an important role in representing and articulating international law for groups of smaller states (e.g. GCC) and some are coordinators of state activity on a widespread basis (UN). In fact, many are partnerships of states but the rules for accountability, immunity and responsibility of international organizations are very different from the rules for states.



### c. The Role of International Law

International law is the set of rules applied between states and other international legal persons. It is made by treaty, through practice and (to some extent) by courts. International law developed from the 17th century onwards as a system of ordering international relations, and articulating the rights and claims of states, without supra-national institutions of any kind. The Treaty of Münster (1648) had envisaged a system of collective security for resolving disputes but it was never operative. The ultimate way in which international disputes were settled, if diplomacy failed, was by war.

Following the conflicts of the first half of the 20<sup>th</sup> century, greater reliance has been put on the peaceful settlement of international disputes and there is now a huge volume and range of modern international law, as compared with the situation in 1919. Areas substantially developed since 1919 include the law of international organizations, international aviation law, international economic law, international human rights, international criminal law, and international environmental law.

### d. International Courts and Tribunals

The development of public international arbitration in the modern period is usually said to date from the Jay Treaty of 1794. Considerable impetus was given to the idea of inter-state arbitration as a result of the Alabama Arbitration (Great Britain v USA) (1872)<sup>(10)</sup>, especially when Great Britain complied with the very substantial damages award (\$15.5 m) against it. Thereafter bilateral arbitration by agreement became quite common.

The period since 1945 has seen a proliferation of dispute settlement procedures and mechanisms, many of which are mentioned above<sup>(11)</sup>. An important development has allowed individuals to be incorporated into international dispute settlement in cases where they are directly concerned or affected, at least to some degree. They include in the field of commercial disputes, allowing individuals access to mixed arbitration (Iran-US Claims Tribunal, ICSID), or extending international systems of recognition of enforcement of private arbitration to mixed cases (e.g. under the 1958 New York Convention); in the field of human rights, progressively allowing individuals standing to challenge state action, including action of their state of nationality; alternatives to diplomatic protection which do not involve judicial remedies (national

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(10) (1872) Moore, 1 Int Arb 495.

(11) See Blokker, N. and H. G. Schermers (editors), *Proliferation of International Organizations: Legal Issues* London: Kluwer Law International, 2001.



claims commissions; UN Compensation Commission). In addition, there has been a gradual recognition that individual states may have a form of “public interest” standing in relation to certain fundamental obligations. There have been examples of espousal of claims in the public interest by third states, e.g. through interstate claims in regional human rights bodies.

Despite these changes, the general principle in relation to international disputes remains that states are free to resolve their disputes by peaceful means in any way they wish<sup>(12)</sup>. Consequently, some have characterized the international system as little more than a voluntary association or society, a loose confederation with few binding rules and little real prospect of enforcement.

### **e. Settlement of International Disputes**

The primary general principle in relation to international disputes is that states are free to resolve their disputes by peaceful means in any way they choose. Although the UN Charter contains provisions for compulsory measures against states (i.e. sanctions)<sup>(13)</sup>, in general it does not require or allow for states to be subject to compulsory forms of adjudication<sup>(14)</sup>. It is interesting to consider whether this principle has been infringed in some more recent Security Council actions: e.g. the delimitation of the Kuwait-Iraq maritime boundary<sup>(15)</sup> and the role of the UN Compensation Commission.

At the level of political settlement, the international dispute settlement principle allows for a wide range of possibilities, including collective self defence, use of regional organizations (subject to Article 53 of the UN Charter) and mediation. At the level of judicial settlement the principle is similarly one of voluntarism, and the ICJ continues to recognise and apply that principle, despite some aberrations<sup>(16)</sup>.

In the field of mixed disputes (between a state and a private party) the position is different. This is because the private party will be subject to the jurisdiction of some national court or tribunal (even if only in the state or its residence or domicile), whereas the state party may at least be able to be sued before its own courts, and possibly (if the case falls within a recognized exception to state immunity) before the courts of another state. But international arbitration

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(12) UN Charter, Article 33.

(13) UN Charter, Article 41.

(14) See UN Charter, Article 36 (3) and the *Corfu Channel case (Preliminary Objections)* ICJ Rep 1947 at 15.

(15) See (1993) 94 ILR 1.

(16) See, for example, *Military and Paramilitary Activity in and against Nicaragua (Preliminary Objections)* ICJ Reports 1984 at 392; *(Merits)* ICJ Reports 1986 p.12; *Spain/Canada (Preliminary Objection)*, ICJ Reports 1998 at 432.

is always consensual, and the jurisdiction of an international arbitrator only exists within the limits laid down by the parties<sup>(17)</sup>.

### **f. Resolution of Disputes by Political and Diplomatic Means**

Not all disputes are resolved by legal means. An important point is that the first, the major and often the only way of resolving disputes is by what are termed “political means”, which cover a very wide range of approaches including direct negotiations, “diplomatic channels”, informal mediation by third parties (states or sometimes private individuals), involvement, formal or informal, of international organisations and good offices of the Secretary-General or some other public official. Only if these means fail is it likely that judicial procedures of some kind may be contemplated and even then there may be some other reason for not seeking judicial settlement.

Forms of negotiation and consultation are the normal way in which international disagreements are resolved, or at least managed. Often agreements provide for prior consultation or notification e.g. in the field of antitrust regulation. From a legal point of view there is not much to be said about these processes. If the parties to a negotiation are the only relevant parties, they can compromise their rights or achieve a settlement on whatever terms they may choose, enter into trade-offs for advantages in other areas.

The legal issues really concern the relationship between negotiation and other procedures, especially those involving third party settlement. First, although some minimum level of communication may be necessary in order for a dispute to arise, courts have never imposed a high threshold in this regard<sup>(18)</sup>. Second, there is a strong presumption against preempting third party dispute settlement provisions by reference to clauses providing for consultation, negotiations. If one of the parties is dissatisfied with the outcome, an international tribunal will not say that further negotiations are a precondition to compulsory settlement<sup>(19)</sup>. Third, it appears to be the case that

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(17) See, for example, International Chamber of Commerce Rules (1998), Article 6; International Convention on the Settlement of Investment Disputes (1965), Article 25 (1); United Nations Commission on International Trade Law Arbitration Law, Articles 1, 21.

(18) Nicaragua Case (Preliminary Objections) ICJ Reports 1984 at 392; Cameroon/Nigeria (Preliminary Objections) ICJ Reports 1998 at 275.

(19) Nicaragua/Honduras (Preliminary Objections) ICJ Reports 1988 at 69; Cameroon/Nigeria (Preliminary Objections) ICJ Rep 1998 at 275; Southern Bluefin Tuna case, ITLOS, 29 August 1999, 117 ILR 148, 162 (para 60) (“a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted”). The subsequent arbitral tribunal dismissed the claim on jurisdictional grounds but agreed with ITLOS on this point: decision of 4 August 2000, 119 ILR 508.

communications between two disputants with a view to settling the dispute are not protected from subsequent disclosure unless they are made under cover of an express “without prejudice” arrangement. On the other hand, statements made during unsuccessful negotiations are unlikely to be held to constitute binding admissions or commitments, unless they are clearly so intended<sup>(20)</sup>. This means that while procedures in international law cases may appear to have similarities with domestic procedure, there are many differences. Domestic rules of privilege, for example, may not apply.

### **g. The Role of International Organizations**

International organizations play an important role in relation to the articulation and (though less often) the resolution of disputes. In particular the UN has a wide range of powers of recommendation or mediation in international disputes. Key organs include the General Assembly<sup>(21)</sup>, the Security Council<sup>(22)</sup> and the Secretary-General<sup>(23)</sup>.

The UN is based on, and required to comply with, international law<sup>(24)</sup>. There is, however, no formal system of judicial or administrative review of UN collective action although from time to time, the ICJ has examined the legality of UN resolutions which are directly in issue before it<sup>(25)</sup>. It is, perhaps, arguable that an informal system of judicial or administrative review exists by reason of an underlying general principle of legality but this is not widely accepted<sup>(26)</sup>.

Ultimately the Security Council has power to impose sanctions on states or otherwise to take enforcement action under Chapter VII of the Charter. This was exercised in relation to Korea (1949) but later, the veto prevented it being exercised in relation to a range of other situations: e.g. Suez (1956), Hungary (1956), Czechoslovakia (1968). Chapter VII action of a modest kind was later taken in relation to Southern Africa (Rhodesia, SW Africa/Namibia, South Africa).

Since 1989, Chapter VII of the UN Charter has, by contrast, been used continuously in relation to Kuwait, Iraq, Somalia, former Yugoslavia, Rwanda, Libya, Haiti, Liberia and Angola, although with mixed results. By contrast no

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(20) Aegean Sea Continental Shelf Case (Jurisdiction) ICJ Reports 1978 at 3, 39-40; Gulf of Maine case ICJ Rep 1984 at 246, 307-8; Qatar/Bahrain ICJ Reports 1994 at 112.

(21) UN Charter Articles 10, 11 (2) (subject to Article 12).

(22) UN Charter, Articles 24, 34, 35, 36, 37, 38, 40.

(23) UN Charter, Articles 97, 99.

(24) UN Charter, Articles 1, 2, 24 (2), 36(3), 92, 96.

(25) See, for example, *Namibia Opinion* ICJ Reports 1971 at 16.

(26) Lockerbie (Interim Measures of Protection) ICJ Reports 1992 at 3.

Chapter VII action has been taken in some other cases of apparently equal significance. These include the Kurds in Northern Iraq and the situations in Burundi, Burma and Chechnya. The Security Council cannot, in practice, take enforcement action against a permanent member, although other UN organs may be critical of the action taken, as was the case in Grenada, Panama and Iraq.

Regional organizations may also act independently in relation to particular situations<sup>(27)</sup> which are understood to threaten the peace and security of the region. For example, the Organization of American States acted in respect of the Cuban Missile Crisis, the Association of African States/African Union acted in respect of Libya-Chad, Western Sahara, and Ethiopia-Eritrea, and the Economic Community of West African States acted in respect of Liberia. However, enforcement action requires the approval of the Security Council<sup>(28)</sup>.

### **h. The UN Security Council and the Use of Force**

In order to evaluate more fully the role of the Security Council in guaranteeing international peace and security, it is necessary to consider the use of force, the prohibition on the use of force by states and the concept of self defence.

There is extensive case treaty law, case law and custom on the role of international law in controlling the use of force. Examples include the UN Charter Articles 1, 2(3) and 2(4), 51, and Chapter VII. There are also General Assembly Resolutions, examples of which include the Friendly Relations Declaration (1970), the Definition of Aggression (1974) and many ICJ cases and advisory opinions. Examples of those include Nicaragua case (Merits)<sup>(29)</sup>, Nuclear Weapons Opinion<sup>(30)</sup>, Oil Platforms case (Iran v USA)<sup>(31)</sup>, Wall Advisory Opinion<sup>(32)</sup> and Armed Activities on the Territory of the Congo (DRC v Uganda)<sup>(33)</sup>.

The history of international law provides many examples of attempts to regulate the use of force including the Covenant of the League of Nations (1919), the 1928 General Treaty for the Renunciation of War (The Kellogg-

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(27) UN Charter, Article 52.

(28) UN Charter, Article 52.

(29) 1986 ICJ Reports 14.

(30) 1996 ICJ.

(31) 2003 ICJ Reports 161.

(32) 2004 ICJ Reports 136 at para 139.

(33) 2005 ICJ Reports 168.

Briand Pact) and the UN Charter (1945). The original Charter scheme was that the UN would have its own standing army ready to act when needed, but divisions between states made this impossible and Chapter VII was little used during the Cold War. Since the Cold War, peace-keeping under Chapter VII of the UN Charter has become a significant part of the UN's activity. The UN budget is, however, under increasing pressure so while the UN has capacity to enforce sanctions and other measures against states, it may be reluctant to do so, both for political reasons and also for internal financial reasons.

### **i. Enforcement action by the Security Council under Chapter VII**

The scheme for enforcement action by the Security Council action is set out in Chapter VII of the UN Charter but since 1945, this has been implemented in ways not originally envisaged by the drafters of the UN Charter. For example, during the Cold War little use was made of Article 41: economic measures were taken only against Rhodesia and South Africa. Subsequently there has been a far greater use of Article 41 including the comprehensive sanctions against Iraq, and many arms embargos. Sanctions have also been imposed on non-state entities including against Taliban in Afghanistan, Al Qaida and Gaddafi.

There has been much legal debate as to the basis of Security Council authorization of force under Chapter VII. Is this Article 42 or is this provision essentially obsolete? Or is it Article 39? Or Chapter VII in general? There was little authorization of force by the Security Council during the Cold War. The action taken by the Security Council in response to the Iraqi invasion of Kuwait was said to mark the start of a New World Order. Key resolutions included SC Resolution 678 (1990) which authorized the use of 'all necessary means' against Iraq and SC Resolution 687 (1991) which imposed an elaborate cease-fire regime including comprehensive economic sanctions and disarmament requirements. And since 1991, the Security Council has authorised military action by member states within many states, including Yugoslavia, Somalia and Libya (2011).

Much discussion has focussed on whether implied or revived authorisation is an adequate legal basis for the use of force. In Operation Iraqi Freedom 2003, lawyers queried the legal basis for the use of force against Iraq in 2003. Possibilities included Security Council Resolution 1441, in combination with Security Council Resolutions 678, 687 and in 2011, the Security Council authorized the use of force in Libya in Resolution 1973 (2011). Again, legal

questions arose: did the military operation extend beyond that which had been authorized?

### **j. Prohibition of the Use of Force by States**

Much debate has also focussed on Article 2(4) UN Charter:

“All members shall refrain in their international relations from the threat of use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

Questions arise as to the language of the Charter, including questions about “the use of force” (Article 2(4)), “aggression” (Article 39), “armed attack” (Article 51), and the interpretation of “Member States”, “international relations” and “force”. While there may be shared understandings within political groups (e.g. the European Union) and/or groups with shared language (e.g. GCC), many of these words and phrases do not translate precisely so complete agreement may be difficult to obtain. Further, there is division between commentators as to the proper interpretation of this phrase “political independence of any state”. This issue was, for example, recently revived in academic debates in relation to Syria.

Another question arises as to whether Article 2(4) of the UN Charter allows the use of force for humanitarian intervention. The UK was the first state openly to advocate a doctrine of humanitarian intervention; it did so to justify its enforcement of no-fly zones over Iraq (1991- 2003). Other states were doubtful as to legality of this. There were various subsequent attempts to establish a framework for humanitarian intervention.

In 1999, certain states invoked humanitarian intervention as the legal basis for the NATO air campaign over Kosovo. The Non-Aligned Movement (NAM), Russia and China argued that the intervention was unlawful under Article 2(4). Questions arose as to the threshold for intervention and the appropriate modalities of humanitarian intervention.

By 2005, the Responsibility to Protect (R2P) had emerged from the World Summit Outcome Document (2005). This is a political, not a legal, doctrine and its use has been problematic. It is, however, clear that there is a significant difference between forcible intervention and invitation by a government. One key factor is the existence of civil war and of prior outside intervention. Intervention may also take place at the request of the government. Examples

include Bahrain 2011, Mali 2013, Ukraine 2014, and Yemen 2015.

It is therefore clear that international law on the use of force is not static. It is dynamic, it has developed over time and continues to develop. That is true, too, for international law on self defence.

### **k. Self Defence**

The starting point for self defence is Article 51 of the UN Charter which provides for individual and collective self defence in the event of armed attack. But a wider customary law right, including a right of anticipatory self-defence and a right to protect nationals abroad, seems to exist separate from the UN Charter. Writers and states disagree fundamentally on the scope of the right of self-defence because they take different views on the interpretation of the UN Charter, the state of customary international law in 1945 and on policy issues.

It is argued by some that self-defence as a temporary right until the Security Council has taken “measures necessary to maintain international peace and security”<sup>(34)</sup>. That was the case in respect of Security Council Resolution 665, on the Iraqi invasion of Kuwait. For others, self defence is a customary right that is not usurped by treaty obligations. In any event, collective self-defence is now the norm. Typically, it has an additional requirement: declaration by victim state that it has been subjected to an armed attack; invitation by victim state to third state to use force in collective self-defence

One of the most interesting examples is the Iraq invitation to the USA and others to act against ISIS in Syria<sup>(35)</sup>. This was a wide claim to collective self-defence. What is clear is that any use of force in self-defence must be necessary and proportionate but it is not clear whether an armed attack is necessary for self-defence. Can, for example, self-defence be used against an imminent attack? There is a division between certain developed states which take a wide view of self-defence and developing states which take a narrow view. There has been relatively little use of anticipatory self-defence in practice.

States are divided on the use of self-defence in protection of nationals. Initially, the USA, Israel and the UK invoked this doctrine in situations including Suez 1956, Entebbe 1976, US rescue mission in Iran 1980, Grenada 1983, and Panama 1989. Self-defence against terrorism is widely accepted but questions

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(34) UN Charter, Article 51.

(35) The Iraqi invitation is UN doc S/2014/691, 20 September 2014 and the US position on ISIS is UN doc S/2014/695, 23 September 2014.



remain as to whether non-state actors can commit an armed attack in the absence of any state involvement in that attack.

### 3. Current Challenges

Much of the complexity of the current world order arises from issues of sovereignty. But sovereignty itself has a troubled history. The Peace of Westphalia, a 1648 settlement<sup>(36)</sup> which ended the Thirty Years War, is recognized by many lawyers and political scientists as the origin of the nation state and of the modern system of international relations<sup>(37)</sup>. Described as representing “the majestic portal which leads from the old into the new world”<sup>(38)</sup>, the Treaty of Westphalia established a system of sovereign states which, while not without ambiguities, served Europe and, following the granting of independence to Europe’s colonies, the world, for at least three hundred years<sup>(39)</sup>. However, over the last thirty or so years, the world order has changed beyond recognition. The UN has sanctioned intervention in sovereign states including Iraq, Somalia, Haiti, Rwanda, Bosnia, Cambodia and Liberia, European countries have surrendered their sovereignty to a pan-European entity, the EU, and international treaties have asserted that resources located within sovereign states are the common heritage of mankind.

Arguably, revolutions in sovereignty result from prior revolutions in ideas about justice and political authority<sup>(40)</sup>. New ideas challenge the legitimacy of the existing international order and gain popular support. This leads to protest, to political upheaval and eventually to the birth of a new political order. In early modern Europe, for example, the Protestant Reformation led to a century of war, which culminated in the Peace of Westphalia. In the

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(36) The settlement included the Treaty of Westphalia of 24 October 1648 between Ferdinand III, the Holy Roman Emperor, and Louis XIV of France and their respective allies; and the Treaty of Osnabruck, also of 24 October 1648, between the Holy Roman Emperor and Sweden.

(37) See, for example, L. Gross, ‘The Peace of Westphalia, 1648-1948’ (1948) 42 *American Journal of International Law* 20.

(38) *Ibid* 28.

(39) For recent discussion of the significance of Westphalia to the global system of international relations see, for example, R. Jackson, ‘Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape’ (1999) 47 *Political Studies* 431; C. Ku, ‘Catholicism, the Peace of Westphalia and the Origins of Modern International Law’ (1996) 1 *The European Legacy* 734; A. Osiander, *The States System of Europe, 1640-1990* (Oxford: Clarendon, 1994); D. Philpott, ‘Westphalia, Authority and International Society’ (1999) 47 *Political Studies* 566; D. Philpott, ‘Sovereignty: An Introduction and Brief History’ (1995) 48 *Journal of International Affairs* 353; D. Philpott, ‘Ideas and the Evolution of Sovereignty’ in S. H. Hashmi (ed.), *State Sovereignty: Change and Persistence in International Relations* (University Park: Pennsylvania State University Press, 1997).

(40) This is the central claim of D. Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: Princeton University Press, 2001).

twentieth century, a new understanding of nationalism triggered protest and revolt which by the early 1960s had led to widespread decolonisation. For both revolutions, agreement on sovereignty was the term on which the crisis was settled. Such agreement has not yet been reached for issues of peace and international security and it is clear that the complex issues which underpin the international debate are beyond the current capacity of the system of international relations which was established by the UN Charter in 1945. Does that render the Security Council ineffective?

### **a. Relationship between National and International Governance**

Effective law enforcement, nationally and internationally, is premised on the existence of stable legal and political institutions and on the rule of law. Legislation alone will not prevent international instability but if properly used, law is an important tool in the fight. A comprehensive solution will require technological innovation, improved surveillance techniques, financial resources, societal change and above all, political will at national and international levels. If law, either national or international, is to provide a realistic foundation for its own implementation, it must provide for consultative or participatory approaches, it must facilitate transparency and accountability and it must establish processes and requirements that are feasible and achievable. Consequently, compliance with international agreements will vary according to both the content of a particular agreement and the relationship of that agreement to national sovereignty.

The Westphalian legal order, which was based on independent, sovereign and territorially defined states, allowed each state to pursue its own interests within its sovereign territory and gave each state equality within the global system. International law emerged as “the body of rules and principles of action which are binding upon civilised states in their relations with one another”<sup>(41)</sup>. That classical view of international law distinguished clearly between international and domestic law and between public and private international law. Public international law, the domain of sovereign states, provided a body of customary law and series of binding instruments, the purpose of which was to govern relationships between states. The framework was “stylized, hierarchical and static”<sup>(42)</sup>, it assumed that states agree to international treaties when those treaties correspond with state interests, and that having agreed to a treaty, states

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(41) J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th edition by H. Waldock) (Oxford: Clarendon Press, 1963), 1.

(42) E. B. Weiss, ‘Understanding Compliance with International Environmental Agreements: The Baker’s Dozen Myths’ (1999) 32 *University of Richmond Law Review* 1555, 1558.

comply with that treaty by implementing it within their sovereign territory. If or when a state fails to comply, mechanisms for the resolution of international disputes are available and sanctions will deter and punish offenders<sup>(43)</sup>.

By the 1990s, the international world order had changed<sup>(44)</sup>. States continued to be the primary actors but other parties had begun to contribute to the development, interpretation and implementation of international law<sup>(45)</sup>. The distinction between public and private international law had blurred and the Security Council had become active in intra-state matters. Patterns of compliance with international treaties also changed<sup>(46)</sup>. States agreed to treaties to be seen to be exercising leadership, because other states are doing so, because states with leverage are encouraging them to do so, or because failure to do so would result in political or economic isolation. Some states agreed to treaties knowing that they lacked the capacity to comply with those treaties, while others had capacity but did not intend to comply. The hierarchical model of implementation, by which national governments negotiated international agreements and then implemented those agreements in their sovereign territory through national legislation, was no longer the sole vehicle for compliance since it did not accommodate non state participants such as industry groups, multinational companies and NGOs. From this changing pattern, there emerged a growing recognition that the international legal environment is dynamic not static, that compliance may adhere to a horizontal not vertical model, and that parties interact in complex ways over time, resulting in the rapid formation and destruction of state and non state based alliances. This challenged earlier assumptions about the implementation of, and compliance with, international agreements.

In the light of these changing patterns, in the mid 1990s Weiss and Jacobson

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(43) H. K. Jacobson and E. B. Weiss, 'Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project' (1995) 1 *Global Governance* 119, 122.

(44) See R. Higgins, *Problems and Process: International Law and How We Use It* Oxford: Clarendon Press, 1994; R. Higgins, 'The Reformation of International Law' in R. Rawlings (editor), *Law, Society and Economy: Centenary Essays for the London School of Economics 1895-1995* London: Oxford University Press, 1997; R. Jackson, 'Sovereignty at the Millenium' (1999) 47 *Political Studies* 423; J. H. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 *American Journal of International Law* 782.

(45) P. Sands, 'Turtles and Torturers: The Transformation of International Law' (2001) 33 *New York University Journal of International Law and Politics* 527.

(46) See, for example, E. B. Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 *Georgetown Law Journal* 675.

analysed the extent to which eight countries and the EU comply with five international environmental agreements<sup>(47)</sup> and identified factors which tend to strengthen compliance with international environmental agreements<sup>(48)</sup>. They concluded that in general richer countries and those with democratic governments had a high level of compliance. According to that study, the strength and health of national political and economic systems and a deep public commitment are the most important factors in determining compliance. This led Weiss and Jacobson to conclude that long term strategies must focus on these issues<sup>(49)</sup>. Weiss subsequently challenged the proposition that “almost all nations observe almost all the principles of international law and almost all of their obligations almost all of the time”<sup>(50)</sup>. She argued that in international environmental law, non-compliance tends to occur because political capital is gained from negotiating and signing new agreements, but not from subsequently implementing those agreements<sup>(51)</sup>. In addition, it is often hard to measure compliance and the effectiveness of an agreement does not necessarily correlate with compliance with that agreement since parties which wish to further the objectives of an agreement may do so by complying with the terms of the agreement or may find some other means by which the same objectives can be achieved within their own countries.

Assuming the continuance of the international system on which this paper is premised, Weiss’ conclusions are relevant here because irrespective of whether an international treaty is agreed or whether some other mechanism

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(47) The countries are Brazil, Cameroon, China, Hungary, India, Japan, USSR/Russian Federation and US, together with EU. The agreements are the 1972 World Heritage Convention, 1973 Convention on International Trade in Endangered Species, 1983 International Tropical Timber Agreement, 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (“London Convention”) and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.

(48) See E. B. Weiss and H. K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: MIT Press, 1998); E. B. Weiss and H. K. Jacobson, ‘Why Do States Comply with International Environmental Agreements: A Tale of Five Agreements and Nine Countries’ (1996) 1 *Human Dimensions Quarterly* 1; E. B. Weiss, ‘The Five International Treaties: A Living History’ in E. B. Weiss and H. K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: MIT Press, 1998); H. K. Jacobson and E. B. Weiss, ‘Compliance with International Environmental Accords: Achievements and Strategies’ in M. Rolen, H. Sjoberg and U. Svedin (eds.), *International Governance on Environmental Issues* (London: Kluwer Law International, 1997).

(49) E. B. Weiss and H. K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: MIT Press, 1998), 542.

(50) L. Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed.) (New York: Columbia University Press, 1979), 47.

(51) E. B. Weiss, ‘Understanding Compliance with International Environmental Agreements: The Baker’s Dozen Myths’ (1999) 32 *University of Richmond Law Review* 1555.

emerges, if that treaty or mechanism does not achieve a reasonable level of compliance at international level, it will be of no more value than existing treaties and mechanisms. The next section relates Weiss' conclusions to the international security debate and identifies issues which are likely to be relevant at international level<sup>(52)</sup>.

### **b. Compliance with International Agreements**

First, no country complies fully with all of its international legal obligations<sup>(53)</sup>. At best, countries comply substantially with their international commitments. For example, many countries comply with monitoring and reporting requirements but do not comply with the requirements relating to the use and transfer of resources. Alternatively, a state may comply fully with one treaty relating to a particular resource but may disregard other treaties relating to the same resource, particularly if inconsistencies exist between treaties. There are also parts of the world, primarily in central Africa, in which the political situation is so unstable that governments may not even know to which treaties they are a party. More stable developing countries may have political will to comply but may lack the resources to do so<sup>(54)</sup>. Weiss and Jacobson's study of compliance found that each of the eight countries and the EU which they reviewed had taken some steps towards compliance with each of the five agreements but the extent of compliance varied significantly between countries and within the same country, between agreements<sup>(55)</sup>. There was no single factor which determined the extent of compliance although generally, the longer an agreement is in effect, the greater the trend is towards compliance.

Second, implementation, compliance and enforcement are not interchangeable

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(52) Weiss challenged 13 myths about compliance with international environmental treaties.

(53) E. B. Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1999) 32 *University of Richmond Law Review* 1555, 1560. Also see generally A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995) and H. K. Jacobson and E. B. Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' in E. B. Weiss and H. K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: MIT Press, 1998), 511.

(54) See, for example, I. F. I. Shihata, 'Implementation, Enforcement and Compliance with International Environmental Agreements – Practical Suggestions in the Light of the World Bank's Experience' (1996) 9 *Georgetown International Environmental Law Review* 37.

(55) H. K. Jacobson and E. B. Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' in E. B. Weiss and H. K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: MIT Press, 1998), 511.

terms and none of those terms denotes effectiveness<sup>(56)</sup>. Implementation refers to actions which are taken to give effect to the national obligations of an international agreement<sup>(57)</sup>. Often such actions will include the enactment of national legislation and the development of corresponding policy. Compliance includes implementation but also measures the extent to which implementation takes place. Compliance tends to refer to actions which take place on a voluntary basis, not to those which are forcibly effected by enforcement mechanisms as a sanction for non-compliance. Compliance may be divided into two, or possibly three, categories<sup>(58)</sup>. Procedural compliance refers to the extent to which states comply with procedural requirements such as the filing of reports by particular dates. Substantive compliance refers to the extent to which states comply with substantive obligations such as effecting reductions in pollution or conserving particular sites. Arguably, there is a third element of compliance, that is compliance with the spirit of the agreement. This is controversial because it refers to compliance with an intangible intention, not compliance with an obligation set out in a treaty, so it is impossible to measure. The management of compliance includes three tasks<sup>(59)</sup>. First, it requires review and assessment of the performance of the parties in order to identify problems with the regime itself and to distinguish internal violations from other types of non compliance. Second, it requires that appropriate responses to non-compliance produce and maintain a level of compliance acceptable to the parties to the regime. Third, it may require adjustment of rules in order to improve regime performance. Enforcement refers to actions taken to effect compliance after non-compliance has been detected. It may rely on penalties, sanctions, other coercive measures or formal dispute resolution processes. Finally, effectiveness refers to the extent to which the agreement resolves the

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(56) For the relationship between implementation, compliance and effectiveness see H. K. Jacobson and E. B. Weiss, 'Compliance with International Accords: Achievements and Strategies' in M. Rolen, H. Sjöberg and U. Svedin (eds.), *International Governance on Environmental Issues* (London: Kluwer Law International, 1997), 82-84; H. K. Jacobson and E. B. Weiss, 'A Framework for Analysis' in E. B. Weiss and H. K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: MIT Press, 1998), 4-6.

(57) For implementation see D. G. Victor, K. Raustiala and E. B. Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Cambridge: MIT Press, 1998) which uses fourteen case studies to demonstrate that implementation is the key to effectiveness. This, it is argued, is because agreements aim to constrain not only sovereign states but also a variety of non-state parties who behaviour does not necessarily change simply because states have made international commitments.

(58) Jacobson and Weiss in Rolen et al, 83.

(59) See A. Chayes, A. H. Chayes and R. B. Mitchell, 'Managing Compliance: A Comparative Perspective' in E. B. Weiss and H. K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: MIT Press, 1998), 49.

problem which it is designed to address. There tends to be a direct relationship between compliance and effectiveness but this is not always correct. If, for example, an agreement is poorly designed, compliance will not necessarily lead to effectiveness since the provisions of the agreement may not be sufficient to resolve the original problem. Alternatively, the problem which the agreement was designed to resolve may have changed over time so the agreement may not address aspects of the problem which emerged after the negotiation of the agreement. Consequently if a new international security instrument is negotiated and agreed, effectiveness (not implementation, compliance or enforcement) must be the primary measure of its success. Studies which focus on the extent to which corresponding domestic legislation is in place, the extent to which that legislation conforms to the language of the international instrument and the extent to which national governments fulfill monitoring or reporting requirements are all important, but none of those measurements would confirm the extent to which the treaty protects security.

Third, a binding agreement is not necessarily preferable to a non-binding agreement. This is because compliance varies so widely between countries and between agreements that the binding or non-binding nature of an agreement may not be the most relevant factor in determining the effectiveness of that agreement. In international law, binding international agreements are an important source of international law<sup>(60)</sup> and the Statute of the ICJ lists international agreements as the first of the materials which it applies to disputes<sup>(61)</sup>. Non binding agreements tend to be treated as subsidiary sources of international law, some of which may contribute to the emergence of a subsequent international instrument. In fact, non-binding agreements are common in many areas of international law including human rights and the environment. The 1948 Universal Declaration on Human Rights, 1989 UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade and 1998 FAO International Code of Conduct on the

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(60) See, for example, J. Crawford, *Brownlie's Principles of Public International Law* (8th ed.) (Oxford: Oxford University Press, 2012), 3-29; R. Jennings and A. Watts, *Oppenheim's International Law: Part One* (9th ed.) (London: Longman, 1992), 31-36.

(61) 1945 Statute of the International Court of Justice, Article 38 (1) states:  
The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:  
international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;  
international custom, as evidence of a general practice accepted as law;  
the general principles of law recognized by civilized nations;  
subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.



Distribution and Use of Pesticides are all non-binding but important sources of international law. Some of these sources subsequently served as the basis for binding conventions<sup>(62)</sup>, others did not, but all established expectations or norms with which states (and other actors) were expected to comply. In fact, non-binding instruments have some advantages over binding instruments. For example, non-binding instruments may provide flexibility which binding instruments lack, they may be easier to negotiate, their transaction costs may be lower and they rarely require supporting domestic legislation. Weiss suggests that assumptions about differences in compliance with binding and non-binding instruments arise from differences in discipline<sup>(63)</sup>. Lawyers tend to assume that a binding instrument will be characterised by greater compliance than a non-binding instrument but for political scientists, the binding or non-binding nature of an agreement does not necessarily determine the level of compliance or non compliance<sup>(64)</sup>. In fact, the binding or non-binding nature of an agreement may reflect a range of other factors which influenced parties at the time of negotiation and which may, or may not, be relevant subsequently<sup>(65)</sup>. Binding agreements may provide mechanisms for the resolution of disputes, but not all binding agreements do so and even where they do, such mechanisms are often not used. Instead, parties often rely on financial or diplomatic pressure or coercive measures. These informal mechanisms may be used for both binding and non-binding agreements so in the area of enforcement, the differences between binding and non-binding agreements may not be significant. This supports the argument that the effectiveness of an international agreement, not its form, is the most important issue. Consequently, the form of any future international instrument will be less important than the steps taken by its parties to ensure its effectiveness.

Fourth, precise obligations do not necessarily lead to precise implementation. It is easier to monitor compliance with precise, rather than imprecise, obligations but ultimately, the overall effectiveness of an instrument is more

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(62) For example, 1989 UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade and 1998 FAO International Code of Conduct on the Distribution and Use of Pesticides developed into 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

(63) E. B. Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1999) 32 University of Richmond Law Review 1555, 1568.

(64) See, for example, P. M. Haas, 'Why Comply, or Some Hypotheses in Search of An Analyst' in E. B. Weiss (ed.), *International Compliance with Non-Binding Accords* (Washington DC: American Society of International Law, 1997), 23.

(65) See C. Lipson, 'Why are Some International Agreements Informal?' (1991) 45 *International Organization* 495.

important than compliance with the specific obligations of an instrument. This is because compliance does not necessarily lead to effectiveness. States which are committed to the outcomes of instruments to which they agree may prefer precise obligations because such obligations enable them to state their own position with clarity, to compare their position with that of other states, and provide a set of obligations which can be incorporated into national legislation. However, there are situations in which it is inappropriate or impossible to mandate precise obligations. For example, the 1972 World Heritage Convention relies on imprecise obligations and does not impose targets or timeframes<sup>(66)</sup>. This enables states to manage sites of natural and cultural heritage in a manner appropriate to the location of those sites. It is unlikely that the flexibility of this obligation reduces its effectiveness. In fact, the reverse appears to be correct since this flexibility enables governments to devolve management responsibility to the lowest possible level and so to include local communities in decision making processes<sup>(67)</sup>. It follows that if an international security instrument is created in the future, that instrument need not include precise obligations unless there is a good reason for their inclusion. Good reasons do exist (e.g. the identification of targets may encourage states to meet those targets) but if good reasons have not been identified, it may be better to include flexible obligations and to encourage parties to implement those obligations in whatever manner is most appropriate in their own countries<sup>(68)</sup>.

Fifth, if an international instrument requires regular national reporting, the purpose of reporting must be clear. In the 1990s, it was customary to include reporting requirements in new treaties. This, it was believed, led to increased

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(66) For example, Article 4 of the 1972 World Heritage Convention states: 'Each State Party...recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage...belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.'

(67) Weiss and Jacobson's research indicated that the countries which they investigated had complied substantially, if not fully, with the obligations of the World Heritage Convention. See H. K. Jacobson and E. B. Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' in E. B. Weiss and H. K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: MIT Press, 1998), 519.

(68) This flexibility should relate to the manner in which an obligation is to be implemented, not to the existence of the obligation itself. This is because a future duty to negotiate is meaningless in practical terms - no party can be forced to agree to obligations beyond those to which it has already agreed. Hence all obligations (although not the means by which those obligations are to be implemented) should be included in the original agreement. For discussion of the future duty to negotiate, see R. R. Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 *International and Comparative Law Quarterly* 549, 552.

compliance<sup>(69)</sup>. In fact, the experience of several international environmental treaties confirms that some states were reluctant to report their own failures, some reports were inconsistent, incomplete, inaccurate or late, different countries used different formats so comparison was difficult, and particularly in countries with few professional staff, the production of regular reports occupied staff who might otherwise have been engaged in tasks more closely related to environmental protection<sup>(70)</sup>. For treaty secretariats, the processing of national reports is time consuming and requires resources which might also be better used for other purposes. National reporting enables governments and secretariats to identify national and international trends over extended periods of time. This, however, requires consistent and verifiable reports in a standard format. This may be beyond the capacity of many developing countries, particularly countries which are politically unstable and have frequent changes of government. Consequently, if a future international instrument requires regular reporting, donor assistance may be needed to develop national reporting capacity. Alternatively, off-site monitoring using advanced technology could offer a reliable means by which consistent and verifiable data is obtained. If this was undertaken on a regional basis, meaningful comparisons could be made between countries as the same monitoring techniques would be used at all sites and data would be presented in a consistent format.

Sixth, democracy can promote compliance with international environmental agreements but it does not necessarily do so. Stable democracies may foster respect for the rule of law, encourage public participation in national and international affairs, have an independent legal system with effective enforcement mechanisms, and be characterised by transparency and accountability at all levels of government. But not all democracies are stable, not all stable democracies have the financial resources necessary to implement their international agreements, and in stable democracies in which those resources do exist, public opinion may not support international commitments. Consequently, national commitment to the implementation of international agreements, together with capacity to implement that commitment, is more important than the form of government.

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(69) As early as 1991, the effectiveness of national reporting was challenged on the grounds that it involved self-assessment. See K. Sachariew, 'Promoting Compliance with International Environmental Standards: Reflections on Monitoring and Reporting Mechanisms' (1991) 2 *Yearbook of International Environmental Law* 31. Sachariew also noted that ongoing reporting requirements are part of a trend towards institutionalism. This trend focuses on compliance with procedural requirements, not on the extent to which international environmental instruments solve the problems which they are designed to address.

(70) E. B. Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1999) 32 *University of Richmond Law Review* 1555, 1574.

Seventh, the incorporation of formal dispute mechanisms into international treaties is not essential because in the event of disputes, those mechanisms are often not invoked. Some recent international environmental treaties incorporate formal dispute mechanisms<sup>(71)</sup> but parties often seek to resolve disputes through formal or informal meetings of the parties or by developing procedures to address non compliance within the framework of the agreement. For example, parties to the Montreal Protocol established an implementation committee and developed non compliance procedures. Initially those procedures dealt only with procedural non compliance such as failure to comply with annual reporting requirements, but later they dealt with non compliance with substantive commitments to reduce and phase out ozone depleting chemicals<sup>(72)</sup>. Parties may also simply disregard obligations with which they disagree, or lack the capacity to implement obligations, and other parties may ignore this since they too are likely to have disregarded some international obligations. In fact, failure to implement part of an international treaty will rarely incur the wrath of other parties unless that failure affects other parties significantly. If other parties are significantly affected, those parties may rely on coercive measures such as withholding goods or services from the offending party, rather than invoking a dispute resolution process, since direct action may be a more effective means of inducing compliance than a lengthy and uncertain legal procedure. This suggests that incorporation of dispute resolution mechanisms may be helpful in encouraging compliance, but that an international forest instrument which does not incorporate such a mechanism will not necessarily be defective.

Eighth, coercive measures to secure compliance with an international agreement may not be effective since parties may find some other way of continuing their non-complying conduct. Traditionally international law enforces compliance by using coercive measures such as penalties, sanctions (military or economic) or suspension or expulsion from an international group. Such measures tend to be used in the event of breaches of obligations in trade agreements or the inappropriate use of force. They are rarely, if ever, used to enforce security obligations. In international law, there are three main kinds

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(71) Those treaties include the 1985 Convention for the Protection of the Ozone Layer, 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Movements of Hazardous Wastes and Their Disposal and 1991 Protocol on Environmental Protection to the 1959 Antarctic Treaty.

(72) Report of the Fourth Meeting of the Parties to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, Paragraph 28, UNEP/OzL.Pro.4/15 (1992).

of coercive measures: trade sanctions<sup>(73)</sup>; the withdrawal of certain privileges of membership<sup>(74)</sup>; and the publication of offences in public forums<sup>(75)</sup>. The potential strength of these measures will vary according to the situation in which they are applied, so it is difficult to comment on the potential effectiveness of these measures in enforcing an international instrument in the future. Barrett argued that if penalties are perceived as being unduly severe, parties will not agree to the instrument from the outset. Consequently, all international instruments are sub-optimal from the outset<sup>(76)</sup>. Weiss observed that no state complies with all of its international obligations all of the time so even with sub-optimal obligations, compliance will not necessarily be forthcoming. It follows that an enforcement mechanism is likely to be necessary. This may be a formal dispute resolution process or it may be the application by other parties (either individually, in informal groups, or collectively as the parties to the agreement) of coercive measures in whatever form is calculated by those parties as being most likely to induce compliance at that time.

Ninth, no single compliance strategy works in every situation and a finely nuanced combination of strategies, including coercive measures and incentives, is usually necessary. That combination will vary according to the nature of the agreement, the parties, the nature and cause of the breach and the external social, political and economic circumstances. It may also vary over time because compliance itself varies over time. Compliance strategies, such as financial incentives, which may be effective in a rapidly developing middle-income country may cease to be effective if that country's income reaches a higher level. Similarly, strategies which work in a poor but reasonably stable developing country may become irrelevant if that country regresses into civil war or suffers a large natural disaster. Even a change of government in a stable and developed country can alter compliance. Barrett argued that no single design of treaty fits all problems. For both treaties and

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(73) For example, Article VIII of CITES states:

The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures: to penalize trade in, or possession of, such specimens, or both; and to provide for the confiscation or return to the State of export of such specimens.

(74) For example, Article 5(6) of the Montreal Protocol on Substances that Deplete the Ozone Layer sets out the procedure by which parties may take action against developing country parties (which, by Article 5, are eligible for certain concessions) which have reported to the Secretariat that having taken all practicable steps, they are unable to meet certain of their obligations under that Protocol.

(75) In 1991, parties to CITES circulated a list of countries which had failed to meet annual reporting requirements.

(76) S. Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty Making* (Oxford: Oxford University Press, 2003).

Security Council resolutions, flexibility is required. Both must be designed to fit the problem which they are intended to solve and treaty obligations must be implemented in a manner appropriate to the conditions of the country in which implementation is to take place.

For an international instrument to be effective, countries must engage fully with that instrument. Engagement requires long term commitment from the whole country, not just from government and long term commitment will develop only when parties can see that their interests are being served. For clearly identifiable issues (e.g. protection of a lake), this is challenging. For matters as complex and diverse as the maintenance of international peace and security, this is almost impossible. It follows that notwithstanding the imperfections of the international system, the Security Council will continue to have a critically important creation in the maintenance of international peace and security for the foreseeable future.

### Conclusion

Throughout the last decade, international law has been challenged repeatedly. In 1948, the three hundredth anniversary of the Peace of Westphalia, Gross wrote of the Westphalian system of international law:

Such an international law, rugged individualism of territorial and heterogeneous states, balance of power, equality of states, and toleration – these are among the legacies of the settlement of Westphalia. That rugged individualism of states ill accommodates itself to an international rule of law reinforced by necessary institutions.<sup>(77)</sup>

In the same article, Gross predicted the need to find a way “..of harmonizing the will of major states to self-control with the exigencies of international society which, by and large, yearns for order under law”<sup>(78)</sup> Writing in 1948, Gross was referring to the collapse of the League of Nations, the establishment of the United Nations, the jurisdiction of the Nuremberg and Tokyo Tribunals which tried those charged with offences against Allied prisoners of war, and the reconstruction of post war Europe. More than fifty years later, the tension between the will of major states and the need for order under law remains unresolved. By the beginning of the twenty-first century, globalisation had forced the “rugged individualism” of states into an uneasy compromise within the UN system, but events of the period since 1992 demonstrate that at times,

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(77) Gross, L., ‘The Peace of Westphalia, 1648-1948’ (1948) 42 *American Journal of International Law* 20, 40.

(78) *Ibid.*, 41.

the UN system is poorly equipped to deal with complex security issues, particularly as some of those issues challenge the principles of sovereignty on which international law is premised.

In fact, extensive protection for international peace and security already exists in international law, albeit in an uncoordinated collection of legal instruments. There are gaps in that protection but events of the period since 1990 confirm that the biggest challenges are the development of the rule of law in turbulent regions of the world and the identification of a means by which existing law, national and international, can be implemented effectively on a global scale, not the creation of further international agreements.

Earlier in this paper, it was argued that the Security Council is central to security, peace and justice, since it provides guarantees of security for millions of impoverished people in developing countries<sup>(79)</sup>. Any diminution in that security may result in a reduction in basic livelihood resources and irreversible stress on water and food supply. This, in turn causes migration into already hard pressed urban areas or across borders into the sovereign territory of equally impoverished neighbouring states. Forced migration separates communities from their livelihoods, their support systems and their roots, and may lead to the spread of disease, pressure on already fragile ecosystems and conflict over scarce resources. All too often, the result is civil war, and the inevitable dependence on the short term assistance of aid agencies that follows. Consequently, lack of confidence in the Security Council itself may be a threat to the territorial integrity and political and economic independence of a state, since it may dislocate communities, cause forced migration and consequential dependence on short term aid. It follows that the failure to avert conflict is in fact a threat to sovereignty, that is, to “political independence and territorial integrity”<sup>(80)</sup>, just as important as more visible threats and of much longer term significance, since its consequences impact throughout the global system, in this generation and for generations to come.

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(79) For the relationship between natural resources and conflict see, for example, P. Le Billon, ‘The Political Ecology of War: Natural Resources and Armed Conflicts’ (2001) 20 *Political Geography* 561; J. Fairhead, ‘The Conflict Over Natural and Environmental Resources’ in E. W. Nafziger, R. Vayrynen and F. Stewart (eds.), *War, Hunger and Displacement: The Origins of Humanitarian Emergencies Vol. 1* (Oxford: Oxford University Press, 2000); M. T. Klare, *Resource Wars: The New Landscape of Global Conflict* (New York: Metropolitan Books, 2001); S. M. Murshed, ‘Conflict, Civil War and Underdevelopment: An Introduction’ (2002) 39 *Journal of Peace Research* 387; M. L. Ross, ‘How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases’ (2004) 58 *International Organization* 35.

(80) UN Charter Article 2(4).



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