



The UN Security Council and Human Rights

State Sovereignty and Human Dignity

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- The United Nations Security Council is primarily a political body, and its actions on human rights depend heavily on political will and political consensus, especially among the permanent members.
- The Council has a large and varied tool box to deal with human rights situations said to be linked to international peace and security, but consistency in the use of this toolbox is another question.
- Inconsistency is a product of the fact that the exercise of power varies with different situations, and thus the role of both permanent and elected members – along with various non-state actors – shifts from case to case.
- An enduring tension is that while universal human rights are well-established in international law, their enforcement often depends on inconsistent state policies and national power – whether inside the UNSC or otherwise.
- The Council lacks independent power (that is, capability) and thus has to rely on borrowed power. It can only do what state political will and consensus and cooperation allow it to do.
- To the extent that state members of the Council fail to adequately manage serious human rights violations, this failure will encourage various actors to proceed outside the Council, with a loss of reputation and power for that UN organ – and a decline in orderly international relations.



Contents

1. Introduction: Law and Politics in the Council	2
2. After the Cold War, Incomplete Change	3
2.1 Early Efforts.	3
2.2 Western Neo-imperialism and Legalistic Debates?	3
2.3 Calculating the National Interest	4
2.4 Normative Advance, but Problems of Implementation	5
3. Contemporary Dilemmas	5
3.1 Libya	5
3.2 Syria	6
3.3 Other Human Rights Dilemmas in the Council	7
4. The Council's Toolbox and Human Rights	8
4.1 Enforcement Action: Use of Force	8
4.2 Enforcement Action: Sanctions	8
4.3 UN Peacekeeping and Other Field Missions	9
4.4 International Criminal Law and the ICC	9
5. Council Dynamics: Discernible Patterns?	10
5.1 Non-permanent Members Can Have Impact	10
5.2 Non-state Actors Manifest Shifting Influence	11
5.3 UN Security Council Remains an Important Venue	11
5.4 Double Standards Remain	11
6. Conclusion	12
References	13

1. Introduction: Law and Politics in the Council

In 1945 the founders of the United Nations concluded that the League of Nations had been too democratic and gave too much attention to the sovereign equality of states. Weakness resulted. They therefore created a UN Security Council (UNSC) with five permanent members, supposedly the Great Powers, which possessed a veto over Council resolutions in the attempt to mesh power with international action for the management of world problems. All sovereign states were equal, but pragmatic recognition of power factors meant that some needed to be more equal than others. It came to be that the 15 Council members – five permanent with a veto and 10 elected – represented pooled sovereignty. The Council was legally supreme over UN members, each being required to carry out the »decisions« of the UNSC as per UN Charter Article 25. All member states used their sovereignty to consent to this arrangement when they joined the organisation.¹

The UN Charter, a quasi-global constitution, not only gives the Council primary responsibility for the maintenance of international peace and security that is capable of superseding the view of any state. It also stipulates in Article 103 that Charter provisions shall prevail over any other international agreement. It is therefore up to the UNSC to decide what actions are required for the maintenance or restoration of international peace and security, or for the advancement of human rights and fundamental freedoms that might be linked to security. The Charter also requires the organisation to avoid intervening in matters that are essentially within the domestic jurisdiction of states (this norm does not pertain to Council enforcement actions). But again, it is the Council that determines the meaning of Charter wording. There is no clear system of international judicial review or any other mechanism to authoritatively determine the legality of Council action. This leaves the Council as the final legal arbiter of its own actions.²

1. In 1945 the permanent five (P-5 – Britain, China, France, the Soviet Union, and the United States) were joined on the Council by six elected, rotating members for a membership of 11. In 1965 after much decolonisation, while the P-5 remained, the Charter was amended to provide for 10 elected members for a new membership of 15. From 1965, nine affirmative votes were required to pass a resolution, with no negative vote by any of the P-5. P-5 abstentions do not count as a veto.

2. The two Lockerbie cases at the International Court of Justice from the late 1990s (Libya v. the United States, and Britain) raised the question of whether the ICJ might exercise judicial review of Council resolutions. The reasoning of various judges in accepting jurisdiction, and the disposal of the cases through settlement in 2003, left that question unanswered. See further Michael J. Matheson, ICJ Review of Security Council Decisions, 36 *George Washington International Law Review* 615 (2004).

The Achilles heel of the UN Security Council, the *sine qua non*, is the need for political will and political agreement. Only if Council members – and above all the permanent five (P-5) with the veto – can agree on the need for action, and the form of action, can that body function as intended. As is well known, the development of the Cold War in the late 1940s almost immediately rendered the Council a divided and mostly ineffective organ. During the Cold War, however, the situations in both Rhodesia (now Zimbabwe) and South Africa showed how the UN system might ultimately function on topics of present interest.

In 1966 the Council voted for a legally binding trade embargo on the territory of Rhodesia, then characterised by white minority rule and an armed insurrection, holding that the situation constituted a threat to international peace and security. Likewise in 1977 the Council voted for a legally binding arms embargo on weapons trade with South Africa, then characterised by apartheid and armed resistance. Thus in the 1960s and 1970s, the Security Council could be seen as holding the view that denial of human rights inside territories might constitute a threat to international peace and security, leading to the invocation of Charter Chapter VII, which authorised the Council to take enforcement actions – which all member states were legally obliged to implement. So despite the Cold War, with regard to the one issue of white minority rule in southern Africa, the members of the Security Council reached agreement on legally strong enforcement action. The Council can only reach legally binding »decisions« with regard to peace and security.

In these two cases, the Council never clarified the exact legal grounds for invoking Charter Chapter VII, which led to legally obligatory sanctions. Was it the denial of certain human rights, or the presence of some violence associated with denial of rights, or – in the Rhodesia case – the white minority's unilateral declaration of independence from the United Kingdom? Part of the art of diplomacy used within the Council sometimes is to construct vague language so as to secure the necessary votes to pass a resolution. Political necessity often supersedes legal precision in that body. The Council is primarily a political body, and only secondarily a legal one.

Both during the Cold War and after, questions about legality were added to questions about effectiveness. Deciding on enforcement actions was one thing; making

them effective and then actually controlling the situation on the ground was something else. Neither Council action in southern Africa during the Cold War led to rapid and progressive change, with there having been many violations of the sanctions regimes. Change eventually came to both situations, but not simply because of Council action.

2. After the Cold War, Incomplete Change

With the decline of the competition for strategic supremacy between the Soviet Union and the United States – a rivalry that had marginalised the UN Security Council on most major issues of world affairs – the 1990s saw hopes rise for a more effective Council. In January 1992 the Council itself suggested, in a presidential statement backed by a consensus of all its members, that it intended to take a broad and authoritative approach to protecting human dignity: »the non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security« (UN Doc: S/23500, 31 January 1992). In the view of some optimistic observers, human security (perhaps a synonym for human dignity) was now as important as national security.

2.1 Early Efforts

This 1992 presidential statement – defining various problem areas as security threats so as to be able to reach legally binding decisions – was accompanied by comparable concrete actions in specific situations, such as forced dislocation and cross-border flight in northern Iraq in 1991 and massive starvation in Somalia in 1992. In the latter case in particular, any prospect of inter-state armed conflict resulting from that situation was remote. Yet the Council sought to maximise cooperation with its efforts to manage a situation presenting a dire threat to human dignity by labelling its approach as an enforcement action under Charter Chapter VII. Of course, legal labels did not obviate the need for effective measures on the ground. In Iraq certain Western states instituted a no-fly zone, even though it was not explicitly approved by the UNSC (in its key resolution 688 of April 1991), combined with assistance to refugees and internally displaced persons. In Somalia implementation of UNSC resolutions led to deployment of mainly US military forces

operating to protect an assistance scheme devised by the International Committee of the Red Cross (ICRC) and its partners. In effect, the Council provided collective legitimacy for a policy through its resolutions in New York, and other actors implemented the policy through their actions on the ground. Council partners might be states, unique NGOs like the ICRC, or other non-state actors like the UN Office of the High Commissioner for Refugees (UNHCR).

Developments were driven often by more than a legalistic effort to repackage human rights problems as security subjects. In places like El Salvador in the late 1980s and early 1990s – where an internal armed conflict had spilled over into Nicaragua and where the conflict had attracted the attention of both superpowers and their allies – it was impossible to separate human rights from security in reality. One could not reduce the tensions and fighting without improving the protection of human rights. Certain parties would not lay down their arms unless death squads were controlled and unless there were prospects for free and fair elections leading to some power sharing. Hence, UN diplomatic actions, led by the Secretary-General but approved by the Security Council, and entailing a multi-faceted UN field mission, combined human rights and security measures for practical reasons.

2.2 Western Neo-imperialism and Legalistic Debates?

Yet as early as the mid-1990s, when some observers held high expectations for a reinvigorated Council and when that organ was showing creativity and willingness to work with various partners for practical human rights results inside state boundaries, an undertow of concern manifested itself. Given that many Council actions were initiated by the United States and its close allies, Russia (which had replaced the Soviet Union in 1992) and China were not always enthusiastic about the course of events, especially when Council resolutions might authorise the deployment of Western military forces and/or benefit what they saw as Western national interests. Both China and Russia manifested many human rights problems at home and sometimes seemed uncomfortable with a majority in the Security Council that wanted much international activism on human rights questions.

It can be recalled that in 2007 those two states cast a double veto on a Council draft resolution that would have pressured Myanmar (Burma) on human rights matters. The official rationale for the vetoes was that while Myanmar did indeed have an imperfect record on human rights, the situation was an internal matter and did not entail a threat to international peace and security. This was not the first or last time that legal rationales about a veto were accompanied by various political or economic interests. In 2008 the same two states again exercised a double veto, blocking a US effort to impose mandatory sanctions on Zimbabwe, where the Robert Mugabe government had trampled on many human rights. Again the rationale for the vetoes was that – absent a genuine threat to international peace and security – state sovereignty and domestic jurisdiction blocked Council enforcement action.

Likewise, others among the developing countries, recalling their experiences with Western colonialism or other negative experience with Western states, were not always supportive of what they sometimes saw as Western moralistic crusading. Some in this latter grouping saw the Council's expansive and intrusive action as a form of neo-colonialism in which the same old Western powers sought to dictate the internal affairs of weaker states. It can be noted that on the 2007 vote on Myanmar and the 2008 vote on Zimbabwe mentioned above, South Africa also voted in opposition. In 2011 in early Council voting on the Libyan situation, both India and Brazil abstained rather than support a Western-sponsored resolution authorising a no-fly zone for the ostensible purpose of protecting civilians from attacks by Muammar Kaddafi forces (discussed further below).

Moreover, brutal local factions in places like the western Balkans, Somalia, and Rwanda, inter alia, could care less about the niceties of Council pronouncements based on Charter provisions and other parts of international law. In their struggles for power, and sometimes extermination of their perceived enemies, only countervailing power – not diplomatic and legal niceties – could check their brutal ambitions. It has been said with only slight hyperbole that in Somalia in the early 1990s, no local fighter carrying a weapon had ever heard of the 1949 Geneva Conventions, the laws of war, or war crimes. So, as before, questions about legality were joined to questions about effectiveness.

2.3 Calculating the National Interest

Developing a consistently effective Security Council that could manage a broad array of complicated human rights problems – even if redefined as security problems – remained an elusive goal. The old Achilles heel remained: difficulty of securing political agreement on precisely what to do and how to do it. While some human rights groups gave priority to human rights, human security, human dignity, or the humanitarian imperative, UN member states rarely did so in any simple way. If development of a world of democratic states and human rights protections was sometimes seen as part of national values and maybe even national interests, other considerations of self-interest often clouded the picture.

All, or almost all, states also brought to the UNSC table their narrow conceptions of parochial national interests. As John Stoessinger has noted, when approaching security or human rights issues at the UN, inter alia, states do not jettison their usual concerns with their own particular prerogatives and aspirations for power, influence, independence, national security, and material gain (Stoessinger 1977). In short, they bring to the Council their national experiences and preoccupations. When the Council deals with peace and justice issues, narrow national interests are rarely absent. If we assume the United States was genuinely interested in utilising the UNSC to stop atrocities in Syria in 2012, we should probably also assume Washington would be satisfied that the fall of the Bashar al-Assad regime would deprive Iran of a principal ally. In that same case, if we assume Russia was genuinely interested in a proper interpretation of the UN Charter, we should probably also assume Moscow would want to prevent the fall of the Assad government – its only open ally in the Arab world.

If the Security Council contemplates a messy enforcement action to protect human dignity in situations of violence – often involving irregular warfare featuring militias (and sometimes governments) with no sense of military honour or respect for the laws of war – exactly which outside government will put its military personnel in harm's way to protect the rights of «others», and what will be the reaction «back home» when no traditional self-interest seems to be in play to justify casualties and expenses? When a Dutch contingent suffered a single fatality in a UN security force in Bosnia serving near Srebrenica in 1995, the government in The Hague with-

drew its troop commitment to the UN. When about a dozen Belgians were killed in Rwanda at the start of the genocide in 1994, the government in Brussels sought the withdrawal of all Belgian personnel remaining in a UN field mission. When the United States suffered 18 fatalities in violence in Somalia in 1992, the Clinton Administration, which was under considerable congressional pressure, moved to scale back US involvement in that country (and strongly resisted UN intervention in the follow-on Rwandan situation in 1994). When a French military deployment in Afghanistan in 2012 suffered four fatalities, the Sarkozy regime moved to accelerate the French military withdrawal from that country.

2.4 Normative Advance, but Problems of Implementation

Despite these very real problems concerning how governments calculate the national interest, and despite a resulting mixed record of concrete Council actions in particular situations like Somalia, Rwanda, the western Balkans, etc., a cosmopolitan normative development could be seen over time. At a UN summit meeting in 2005, building on a Canadian diplomatic initiative, the UN approved an abstract principle that came to be known as R2P: the Responsibility to Protect. This stated that while states had the primary responsibility to implement the international law of human rights (understood to include the laws of war or international humanitarian law), if a state proved «manifestly unwilling or unable» to do so, other states had the responsibility to step in and provide that protection in conformity with the UN Charter and international law. Four types of human rights violations were mentioned as triggering R2P: genocide, crimes against humanity, major war crimes, and ethnic cleansing. A number of states expressed reservations about the wording, but nevertheless the new norm was approved by consensus.

But just as the 1948 Treaty Against Genocide did not specify which actor should take what particular action when confronted with genocide, so R2P – as endorsed at the UN – did not specify any details about implementing the principle. As in the Rwandan genocide of 1994, within the Council the problem of generating the political will and political consensus to act in difficult circumstances remained. Again, what state was prepared to place its personnel in harm's way in order to protect

the rights of others when such intervention might prove costly in terms of blood and treasure? The Council can activate a certain legal authority, and thereby perhaps provide a sense of legitimacy to adopted policies, but it has no independent military capability. All of its military power is borrowed from states, with other arrangements previewed in the Charter in 1945 having fallen by the wayside.³ Cosmopolitan principles were sometimes undercut by traditional, if parochial, notions of self-interest. Deploping the latter did not necessarily reduce their impact.

3. Contemporary Dilemmas

Contemporary dilemmas can be initially addressed through a comparison of Libya in 2011 and Syria in 2011-2012, both seen as part of a broader «Arab Spring» in which opposition forces sought to overturn longstanding authoritarians.

3.1 Libya

In Libya a rebellion against Kaddafi's 42 years of erratic and repressive rule led to prolonged instability. When Kaddafi threatened to exterminate his opponents, Western and Arab states introduced resolutions in the Security Council, ostensibly to protect civilians from attacks, but in reality intended to encourage the rebellion and hamper its repression. The rhetoric of R2P was much employed. A no-fly zone was finally approved in March by a vote of 10 in favour with 5 abstaining – the zone was implemented primarily by Western military forces. Fourteen NATO states plus four Arab partners took part in military operations (whereas another 14 NATO states declined to directly engage in force). When the Council authorises states to use «all necessary means» to implement a resolution, these general words do not implement themselves. As events played out, it was clear that Western states such as Britain and France, strongly supported by the United States, sought regime change and thus the removal of Kaddafi and the triumph of rebel forces. This was protested particularly by China and Russia, which had abstained on the no-fly zone resolution and thus let it pass, arguing that approval for «all

3. Under Article 43, states were supposed to designate, in advance of need, certain military forces to the UN Military Staff Committee. This never played out as intended.

necessary means« was strictly for protection of civilians. Their view was that the Council had approved strictly limited humanitarian intervention but not regime change. Kaddafi was eventually captured and killed as his regime was swept away. It was unlikely that the rebel side could have won the day, at least not in the time it did, without myriad forms of support from outside actors, mostly Western.

Two further points might be noted in this brief synopsis. First, the Arab League and the Gulf Cooperation Council had shaken off their status quo orientation by calling for the removal of Kaddafi. Over time Kaddafi had alienated most potential allies. He had, in effect, given the Arab world a bad image. Arab League action, and other Arab and African decisions, made it politically difficult for various states – including China and Russia but also India and Brazil – to oppose all Council resolutions. Second, Western actions in Libya – which in reality were the pursuit of regime change and not just the blocking of war crimes and crimes against humanity – antagonised China and Russia and contributed to their subsequent policies regarding Syria.

Interestingly, Germany was one of the five in the abstention column, breaking with its Western allies. Portugal, an elected Council member, joined with the majority in approving use of »all necessary means«, so Germany isolated itself on this vote. The German government also declined to participate in what became a largely NATO implementation effort. All major German political parties seemed split or indecisive on the Libyan question, wanting to see the back of Kaddafi but unable to agree on how to bring that objective about. Some feared an escalation to the use of ground troops, doubting that air power alone would prove effective.⁴

3.2 Syria

Against the background of Libyan developments, events in Syria played out quite differently as of the time of writing. There was an uprising against the long rule of the Assad family, which had governed for more than 40 years in a highly repressive manner. During 2011 Bashar al-Assad resisted the mostly peaceful and prolonged

demands for significant change and increasingly resorted to violence to maintain his control. Armed insurgents joined the peaceful protestors as the country veered towards what many observers considered to be civil war (internal armed conflict in legal terms). Again there was much discussion of R2P as social media presented images of Syrian armed forces firing on civilian targets. Some traditional journalists avoided a governmental ban, slipped into the country, sent out disturbing reports, and a few paid with their lives. The UN High Commissioner for Human Rights, Navi Pillay, addressed the General Assembly on 12 February 2012 and said that crimes against humanity had probably been committed there. UN Secretary-General Ban Ki-moon also urged international action.

Again, Western states cooperated with Arab states and the Arab League to initiate a draft resolution in the Security Council calling on Assad to step down in favour of his Vice President in the hopes that this would lead to negotiated and peaceful change. But this time around China and Russia exercised a double veto to block Council action. All other 13 Council members voted in favour, including Germany, which had abstained on the use of force in Libya (the Council resolution on Syria did not call for the use of force).

Following the double veto, there were testy exchanges between diplomats at a level rarely seen in public. Russia – perhaps stung by the harsh reaction to its vote, and playing on its close relations with the Assad government – then made a futile effort to mediate a solution on its own as diplomatic and other action shifted to developments outside the Council. China also sent special diplomats to Damascus. But after the double veto, and with arms shipments from both Russia and Iran, the Assad regime intensified its crackdown on protestors and insurgents.

China did not have the comparable vested interests in Syria that the Russians did, and it was not entirely clear why China antagonised so many by its vote, especially since Russian opposition alone was sufficient to block Council action. Of course, China was an authoritarian state that had engaged in the Tiananmen Massacre of 1989 against protesting civilians. It had seemed nervous that the democracy movement known as the Arab Spring might spread to East Asia, cracking down on dissidents in the first half of 2011. But usually China

4. For one discussion of the various reasons for the German abstention see *Der Spiegel Online International*, 21 March 2011; available at: <http://www.spiegel.de/international/germany/0,1518,752259,00.html>.

deferred to Council action on human rights that was supported by its economic partners in the developing world and that did not engage its own vital interests. As an authoritarian state with many human rights problems at home, China was not usually seen as being committed to the international protection of human rights as a matter of principle; but it did usually calculate how not to antagonise others on many human rights issues in Africa and the Middle East. One view was that absent a Russian veto, China would have abstained on the Syrian resolution.

In the Syrian case, a majority of 13 in the Council believed the UN should override the Syrian government's claim to sovereignty and push for change at the top of the government, given the attacks by the Assad regime against large segments of the Syrian population. According to various media reports, the civilian death toll was probably more than 8,000 as of late March 2012. An emerging principle is that if a government engages in systematic attacks on its people in order to maintain control, it has lost the right to rule as a matter of political legitimacy. But China and Russia objected to the Council trying to affect governing arrangements in Syria. Especially Moscow had particular investments in the Assad regime – political, military, and economic.

Council deliberations were not just about moral principles and legal logic but also about a broad range of calculations in the larger game of international relations. It is possible that especially Russia, but perhaps even China, wanted to stand up to the West in the Syrian case to show that Western states could not easily control international relations and/or take Moscow and Beijing for granted. State foreign policy usually reflects mixed motives, some of which are not fully and publicly displayed. With the United States, both deploying more military forces in Asia – presumably to counterbalance China – and often criticising Russia for human rights violations at home, perhaps Council deliberations were affected by these larger frictions. Motivation is usually hard to prove in a definitive way in complicated cases.⁵

After the vote in the Council, the General Assembly took up the Syrian question and overwhelmingly passed (137 in favour, 12 opposed, 17 abstaining) a non-binding re-

solution that was virtually identical to the one vetoed in the UNSC. The sponsors of the resolution thus kept the diplomatic pressure on Assad for meaningful change, while trying to embarrass Russia and China by forcing them to be publicly associated with other »no« votes from controversial states like Iran, North Korea, Cuba, and Venezuela. None of this diplomatic manoeuvring produced significant policy change in the short run by either Assad or his principle allies. Subsequently, the UN and the Arab League appointed Kofi Annan to mediate at least a humanitarian agreement in the Syrian case, and his mission was playing out at the time of writing.

3.3 Other Human Rights Dilemmas in the Council

Beyond Libya and Syria, other dilemmas arose. After the International Criminal Court (ICC) came into being in 2002, the George W. Bush Administration not only failed to ratify the Court's Rome Statute; it also sought to undermine the Court in various ways. In the UNSC in 2002 and 2003, Washington sought and obtained from the Council an exemption from the Court's jurisdiction for any US military personnel serving abroad. The official rationale was that Washington feared politicised claims against its nationals about war crimes. Given the US threat of veto on resolutions authorising or renewing peacekeeping and enforcement missions, other Council members felt they had no option but to yield to Washington's views, whether well-founded or not. The British and French governments, by comparison, had ratified the Rome Statute, believing that procedures in place guaranteed the Court's proper functioning (China and Russia, like the United States, have never ratified the Rome Statute). After spring 2004, when unauthorised photos indicated egregious abuse of prisoners by US military personnel at the Abu Ghraib prison in Iraq, Washington dropped its efforts to exempt US personnel from charges of war crimes via the ICC.

In 2005 the Bush Administration abstained on a resolution in the UNSC requesting the ICC to investigate possible crimes within its jurisdiction by Sudanese leaders concerning policies in Darfur. The US abstention thus allowed the resolution to pass and indicated the United States would no longer try to undermine the Court concerning possible crimes by non-US personnel. In its view, lacking other practical options regarding attacks on ci-

5. See further the excellent analysis by Dmitri Trenin on Russian policy in the Syrian case; available at: http://www.nytimes.com/2012/02/10/opinion/why-russia-supports-assad.html?_r=1&emc=eta1.

vilians in Darfur, the Bush foreign policy team therefore decided to utilise, via the UNSC, the ICC rather than try to kill it. Later, in 2011, the Obama Administration joined all other Council members in referring the matter of possible war crimes and crimes against humanity in Libya to the ICC. With regard to Syria in 2012, however, the United States and some other governments hesitated in pressing the issue of crimes against humanity by Assad and other high leaders, believing that such a reference to international criminal law at that time might impede the search for a negotiated solution to the bloody conflict.

4. The Council's Toolbox and Human Rights

The comparison of the Libyan and Syrian cases above makes very clear that the Council record on human rights matters is not as consistent as most moral philosophers and international lawyers might like. As one keen observer remarked, »The Security Council has displayed little consistency in applying humanitarian standards to its decisions and actions. But, presumably, inconsistency is to be preferred to disinterest« (Luck 2006: 83). As the Council grappled with a variety of situations involving human rights considerations, and however inconsistent its record, it manifested a number of options at its disposal.

4.1 Enforcement Action: Use of Force

If we briefly return to its most potent legal option, that of invoking Charter Chapter VII and approving some sort of enforcement action, the key point to be emphasised again is that the Council, lacking independent power (i.e. capability) and thus having to rely on borrowed power, can only do what political will and consensus and cooperation allow it to do. This is demonstrated by events in the Ivory Coast during recent years. When in late 2010 and early 2011 Laurent Gbago refused to abide by the results of relatively free and fair elections and leave office, and when the violence accelerated, the Council expanded its involvement under primarily French leadership (France was the former colonial power in the Ivory Coast). To try to control events over about a decade – starting with diplomacy and peacekeeping and moving to an enforcement action – the Council relied heavily at times on military units supplied by Nigeria under the aegis of the Economic Community of West African States, also on its own field security mission (Uni-

ted Nations Mission in Cote d'Ivoire), and still further on French military forces. A complicated and multifaceted Council involvement finally, by spring 2011, secured rule by Alassou Ouattara, who had won national elections. The Council in New York had indeed displayed relatively principled concern for free and fair elections as well as for protecting civilians from systematic attacks. But its practical response in the field was heavily dependent on a variety of shifting actors whose evolving and changing roles over time had to be negotiated in an ad hoc manner (see further Forsythe 2012b: chapter 6).

4.2 Enforcement Action: Sanctions

Some Council enforcement actions may be non-forcible and rely on mandatory sanctions of various types – diplomatic, trade, travel, banking, etc. Whether the matters concern human rights or other subjects, the Council has become more sensitive in recent years about not punishing a nation for the sins of its government. This sensitivity derives in large part from UN experience with Iraq after the 1991 Gulf War. Concerned with maintaining pressure on the Saddam Hussein regime with regard to weapons of mass destruction as well as some human rights issues, the Council levied a mandatory trade embargo on Iraq. As documented by the ICRC and UNICEF, inter alia, this resulted in a spike in infant mortality, child malnutrition, and other negative effects for the Iraqi population, despite the latter's having no control over Saddam's policies. The heavy-handed UN sanctions policy, even with subsequent exemptions for humanitarian reasons, actually led to the strengthening of Saddam's regime as it controlled distribution measures through ration cards, which also allowed it to control dissent and enhance self-serving corruption.

As a result of this experience, when the Council subsequently voted for various sanctions and arms embargoes on more than a half-dozen occasions, primarily because of human rights violations, it sought to employ »smart« or »targeted« sanctions that were directed to political elites, whether governmental or insurgent, who were responsible for the abusive policies at issue. These efforts in such places as the Sudan, Liberia, Sierra Leone, Democratic Republic of Congo, and Serbia rarely controlled a situation, in the sense of leading to decisive change. But the Council's sanctions policies sent the signal of international concern and oversight – combined with other diplomatic and security measures, it did ratchet up pressure on offending par-

ties. As was true in general and not just on human rights issues, Council sanctions reflected a middle ground between diplomatic talk and forceful measures. They were therefore attractive to Council members who could agree that more than just talk was necessary, but who could not agree that military force was merited. Of course, sanctions could be combined with deployment of a security mission, as was the case in Sudan, Sierra Leone, Ivory Coast, and elsewhere (on UN sanctions in general, see Carisch and Richard-Martin 2011; Cortright and Lopez 2002).

Relatedly, there was the matter of the blacklisting of individuals and organisations under various UNSC sanctions resolutions. When adopting measures against terrorism, for example, a sub-commission of the Council might indicate a list of individuals and organisations whose financial assets were to be frozen and financial transfers blocked. It was not always clear how such a list was compiled. There were complaints that the Council and its subsidiary bodies made mistakes in compiling the black list, for example interfering with the legitimate work of true humanitarian organisations, with resulting hardship for persons in need of assistance. By 2009 procedures had been improved, and by 2010 an ombudsman had been appointed by the Council to handle complaints and appeals in this matter.

4.3 UN Peacekeeping and Other Field Missions

In a few cases, the Council supervised UN administration of territory for a time, as in Kosovo after the NATO bombing in 1999. As a result the Council wound up overseeing a range of complicated human rights issues pertaining to such subjects as elections, criminal prosecutions, and much more (see Matheson 2006: chapter 4).

There were also Chapter VI peacekeeping missions at the disposal of the Council. Not foreseen in the Charter but evolving from practical creativity in the 1940s and 1950s, this type of armed diplomacy was not so much intended to coerce but to interpose »blue helmets« between fighting parties to facilitate disengagement, and/or to show the UN flag and supervise a situation, leading to reports being sent back to New York. Over time, simple or first-generation peacekeeping that focussed on supervision of armistice agreements and demilitarised zones became complex or second-generation peacekeeping. The latter almost always entailed some human

rights dimension such as investigating claims of atrocities. Lightly armed and with a mandate to use force only in the self-defence of the mission, these Chapter VI deployments were sometimes upgraded to Chapter VII enforcement operation as circumstances changed in the field and political will changed in New York – as already noted with regard to the Ivory Coast.

In Sudan, for example, particularly with regard to the western province of Darfur, despite the fact that various parties sometimes used the term genocide to refer to attacks there on civilians, political will was lacking for Chapter VII deployment. The area of concern was large, the offending parties were dangerously obstinate for much of the time, and the UN members with sufficient military capability for action were otherwise engaged or preoccupied. For a time, there proved to be political will only for a Chapter VI peacekeeping deployment, reflecting a combined UN-African Union operation (2006 to the present). This was insufficient to rectify the gross violations of human rights occurring, but it was at least something. It signalled Council concern, provided direct reporting from the scene, and occasionally offered fleeting protection to a few potential victims. Over time, for whatever reason, the scale of gross violations of human rights seemed somewhat reduced, and some refugees – but by no means all – returned, even as violence escalated further south along the Nubian mountains.

From time to time, the Council was faced with charges of war crimes or other misbehaviour by UN field personnel in various parts of the world, with allegations running from human trafficking to sexual misconduct. The United Nations lacked the legal authority to either train or prosecute national personnel seconded to UN agencies. In certain situations, UN officials in New York arranged the transfer of temporary UN personnel back to their country of origin, where investigation and prosecution was left to the national authorities.

4.4 International Criminal Law and the ICC

Perhaps to compensate for its lack of an adequate response to the situation in Darfur via peacekeeping, the Council brought into play recourse to international criminal law. As noted above, in 2005 in a surprising vote in the Council, that organ referred the situation of western Sudan to the International Criminal Court. The move was

surprising in the sense that the George W. Bush Administration, which had been trying to kill the ICC, abstained on the draft resolution and thus allowed it to pass by a vote of 11-0-4 (Algeria, Brazil, China, the United States). Thus, the United States, not to mention authoritarian China, signalled cooperation with the Court as a measure to bring pressure on Sudanese leaders, who were seen as ultimately responsible for the Janjaweed militia attacks on civilians in Darfur. Space does not permit a full accounting of subsequent events involving ICC indictments of President Omar al-Bashir and others in the Sudanese leadership, the difficulty of securing arrests in the face of governmental non-cooperation (including by China), and the failure of international criminal law to deeply affect the situation – at least as of the time of writing.

The more general point is that use of international criminal law is another tool in the Security Council toolbox for dealing with gross violations of human rights. The Council can do this by: creating ad hoc criminal courts itself, as was done for the former Yugoslavia (1993) and Rwanda (1994); assisting in the creation and functioning of special criminal courts, as in Sierra Leone and East Timor and Lebanon; calling on states to employ international criminal law in other ways; or referring matters to the ICC as per Sudan and Libya (2011) – such referral being consistent both with its Charter responsibilities and with the Rome Statute of the ICC. Council reference to international criminal law is often controversial, hugely complex, and covered in detail elsewhere (see Moss 2012; Scheffer 2012; and Forsythe 2012a).

Finally, the Council, often after calling on conflicting parties to pay proper attention to human rights, can request diplomacy by the Secretary-General on human rights matters as an effort in peaceful conflict resolution. The Council may itself appoint one or more of its members to try to iron out an agreement on human rights, with an example being the Western Contact Group on Namibia's right of self-determination, which was achieved in March 1990.

5. Council Dynamics: Discernible Patterns?

It is impossible to do justice here to the broad subject of exercise of influence within the Council. Books exist on the subject (see, e.g., Malone 2004; and Hurd 2007). Generalisations are difficult because power – with influence being a form of soft power – is situation-specific:

the Arab League may generate important influence on one situation being dealt with by the Council (e.g., Libya, 2011) but not on another (e.g., Syria, early 2012). So one actor using similar tactics may prove influential in one context but not in another. One detailed study of the Council and Haiti concluded in part that one should not try to generalise from that one case study, as the role of France and others would be different in other cases (Malone 1998). Moreover, there have been a vast number of Council resolutions passed with some attention to human rights since 1990, not to mention since 1946. Still further, many types of actors may be invited to speak before the Council or may even generate influence from outside Council meetings: UN agencies and officials, regional organisations, various types of NGOs, media agents, leading personalities. Still, several points can be made.

5.1 Non-permanent Members Can Have Impact

First, while the P-5 remain *primus inter pares*, that is not the end of the story. Elected members of the Council can sometimes have discernible impact. One close observer of Council actions in the 1990s concluded that »The new evidence supports the viewpoint that initiative and guidance in the Council often comes from smaller temporary members« (Dedring 2008: 199). In 1999/2000 Canada used its position on the Council to push the subject of improved protection of civilians in armed conflict and other public emergencies; this focus resulted in several Council actions then and later (Brysk 2009: 68-69). In fact, Canada had long been active both outside and inside the Council in developing the notion of R2P. So when in various contemporary situations there was diplomatic talk in Council proceedings about the responsibility to protect and »human security«, Canada could reasonably claim much of the credit for the salience of that diplomatic discourse. Some elected Council members are thrust into some prominence and influence by the very nature of the agenda item – for example, Rwanda in 1994 concerning creation of the International Criminal Tribunal for Rwanda. But even in that case in the Council, Rwanda, while consulted on numerous points, was not influential in trying to mandate that the Tribunal employ the death penalty, opposing views being unyielding on that specific human rights point.

It is not clear that Germany has been able to utilise its current position as an elected member of the Council to generate much influence – on human rights or other issues. Some thought that the election of Germany to the Council, and taking its rotational turn as Council President, might bolster its candidacy for a permanent seat if and when Council reform occurs. But Germany's abstention on the vote to intervene in Libya in 2011, reflecting what some called a policy of avoidance – seems to have erased whatever goodwill it had built up via its diplomatic initiatives on measures against child soldiers and ecological protection.⁶

5.2 Non-state Actors Manifest Shifting Influence

As for non-state actors (of various types), we have already mentioned how ICRC and UNICEF reports about civilian distress under the UN sanctions regime for Iraq in the early 1990s caused the Council to modify that sanctions programme. Navi Pillay, the UN High Commissioner for Human Rights, was quite outspoken on the Syrian situation in 2012, both in the Human Rights Council and in the General Assembly. Her efforts did not move the major actors in the short run but might generate influence over time. On the other hand, it does not appear that the UN Human Rights Council (UNHRC) has had much impact on the Security Council when the former address certain human rights situations that are also on the agenda of the UNSC. It is difficult to be precise, but some observers thought that in the Libyan case of 2011, the Arab League generated more impact on the Security Council than the UNHRC. Certainly there could be more systematic and institutionalised links between the UNSC and the UNHRC.

Finally, with regard to non-state actors, it cannot be emphasised too much that each situation tends to produce its own constellation of winners and losers. When in 1995 the UN High Commissioner for Refugees, Sadako Ogata, tried to get the UNSC to police UNHCR refugee camps in Zaire, then menaced by Hutu militias, she was unsuccessful. Leading Council members sought to avoid a dangerous and messy involvement. Yet in other situations, UNHCR reports and documents affected Council resolutions, as in Northern Iraq in 1991 (see further Ogata 2005).

6. For a discussion of Germany in the Council, see: <http://www.spiegel.de/international/world/0,1518,787322,00.html>.

5.3 UN Security Council Remains an Important Venue

One general factor that is clear is that the Security Council remains an important venue for various actors in international relations who seek the stamp of legitimacy – a sense of correctness – for their policy preference. Because of the wording of the UN Charter, the Security Council remains one of the most important international sources of legitimacy, since its approval for a policy option conveys a sense of legality. This point remains true despite continuing recognition that the structure of the Council – meaning its membership and veto provision – is out of date with changes that have taken place in the world since 1945, or even 1965.⁷ And despite other sources of legitimacy in political affairs, the UNSC stamp of approval remains greatly desired. Hence, it is no surprise that there remains in contemporary times much political struggle in the Council by all actors to gain its collective approval, whether it concerns policy for Myanmar, Libya, Syria, Zimbabwe, Sudan, Ivory Coast, Lebanon, Haiti, etc. (see Hurd 2007).⁸

5.4 Double Standards Remain

Another unchanging general factor is that for political reasons, Council resolutions cannot address human rights defects in the P-5 states themselves or their key allies in any muscular fashion. Given the veto, Council enforcement actions, peacekeeping missions, and criminal law provisions will only be directed to relatively small and weak states that are not close P-5 allies. This Faustian bargain – whereby the possibility of effective action against some was purchased at the expense of letting the P-5 and their closest allies off the hook – was part of the original UN scheme and has not changed. Proposals that the P-5 be required to abstain on matters where

7. Both the need for, and difficulty of, UNSC reform has been much discussed. For one overview, see the discussion in the Council on Foreign Relations at: <http://blogs.cfr.org/patrick/2012/01/11/un-security-council-reform-is-it-time/>.

8. Regarding Kosovo in 1999, NATO states sought legitimacy for their bombing campaign against Serbia, not authorised by the UNSC, through collective solidarity of an alliance of democratic states. Regarding the 1962 Cuban missile crisis, the United States sought legitimacy for its »quarantine« of Soviet shipping through endorsement by the Organization of American States – the UNSC being predictably stymied by the veto. The Council is not the only source of international collective legitimacy, just the most authoritative. Actually for a democratic state, the process is bi-level: a government needs to secure both international and domestic legitimacy, usually by obtaining collective approval both from an international organisation and from constitutional procedures at home.

they are involved, but cannot claim self-defence, have never been accepted. Attempts to amend the UN Charter are subject to the veto. So a certain double standard persists regarding use of the Council to deal with human rights matters.

This situation is certainly of concern to those, including especially those in the global South, who seek impartial and even-handed justice. They argue that international ethics have progressed since 1945 and the time has passed for double standards regarding the behaviour of the P-5. Be that as it may, if the question is US torture in its counter-terrorism policies after 9/11 (with much British cooperation), Russian indiscriminate attacks in Chechnya or Georgia, or Chinese hosting of the Sudan's al-Bashir while an ICC arrest warrant was outstanding against him, inter alia, one cannot expect any action from the UNSC. As one participant and reflective thinker observed, »Double standards abound. Order does not necessarily equate to fairness. In the Council the powerful impose what they can, the weak endure what they must« (Malone 2004: 617).

However, if the P-5 states use their veto repeatedly to protect their narrow national interests and preferences at the expense of giving proper attention to serious human rights violations, they will discredit themselves and the UN Security Council. This will encourage a variety of actors to bypass the Council and pursue controversial policies outside that organ. This happened during the Cold War, and it happened in 1999 in the NATO bombing of Serbia with relation to human rights violations in Kosovo.

6. Conclusion


The UN Security Council, particularly since the end of the Cold War, has been paying much more attention to human rights and humanitarian affairs. Without doubt, it has resorted more often to enforcement actions under Charter Chapter VII, framing the agenda item as both concerning the human dignity of individuals and a matter of international peace and security. One reflection of these developments is increased talk about »human security«, which seeks to recast and expand the privileged discourse about »security«. On balance, the Council has increased attention to »atrocities crimes« such as genocide, crimes against humanity, major war crimes, and ethnic cleansing, while also emphasising »humanity

law«, which is a combination of human rights, humanitarian, and criminal law (see further Scheffer 2012 and Teitel 2011).

In relative and historical terms, the UNSC has helped to shrink the domain of absolute and defensive state sovereignty, while expanding the rights of international action under the notion of a community responsibility to protect individuals. These diplomatic and legal frames in New York have often been accompanied by much creative manoeuvring by the Office of the Secretary-General, under Council supervision and review, in order to implement the established Council mandates on the ground. The latter process is neither smooth, nor timely, nor guaranteed, and it has much room for improvement, particularly with regard to UN second-generation peacekeeping. Since various forms of UN peacekeeping have existed for more than 50 years (the first large mission was 1956), it is remarkable how ad hoc and unreliable the process remains. And vague enforcement mandates authorising states to use »all necessary means« to deal with a situation are fraught with possible misunderstanding and controversy.

While one can chart increased recourse to certain legal claims and institutions – from a responsibility to protect to the use of various types of internationally approved criminal courts – much depends on shifting political will and political agreement. Council member states may be able to reach fragile agreement on trying to prevent »atrocities crimes« in Libya but not Syria. They may be able to impact human rights developments in important ways in Ivory Coast but not Zimbabwe. They may attempt provocative measures in Lebanon but not so much in Sri Lanka or Bahrain. This inconsistency is not because of a lack of clever thought or adequate lawyering but because of state disagreement on what is feasible and whose interests are being advanced or impeded.

A concern for absolute consistency may indeed be the hobgoblin of small minds, and the historical record shows increased, albeit uneven, Council attention to human dignity, as linked to international peace and security. Claims to state sovereignty and domestic jurisdiction are not always absent, but they do not always control. In many situations the fate of individuals would have been worse without Council action, or indeed were worse without Council action, as in Zimbabwe and Syria. It remains to be seen whether somehow developments can reduce the obvious double standards that still exist.



In the meantime, some changes might be institutionalised. Firstly, when debating security issues with human rights implications, the relevant UN officials should always be invited to address the Council – such as the UN High Commissioner for Human Rights, the UN High Commissioner for Refugees, the UN Coordinator of Humanitarian Affairs, and/or the President of the UN Human Rights Council. Secondly, when approving an enforcement action, the Council should always create a follow-on supervising committee to report back to the UNSC about fidelity to – and progress in implementing – the mandate. In the past, proper oversight could certainly have been improved. Thirdly, for second-generation or complex peacekeeping entailing human rights duties, the Council should revisit the subject of advance earmarking of national troop commitments so that the Office of the Secretary-General does not have to construct each mission from zero.



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