The "S Word" and Security Council: The Role and Powers of the United Nations Security Council in the Creation of New States

Article *in* Thomas Jefferson law review · December 2013

CITATIONS
4

READS
2,600

1 author:

Qerim Qerimi
University of Prishtina
52 PUBLICATIONS **96** CITATIONS

SEE PROFILE

THE "S WORD" AND SECURITY COUNCIL: THE ROLE AND POWERS OF THE UNITED NATIONS SECURITY COUNCIL IN THE CREATION OF NEW STATES

Qerim Qerimi*

I. INTRODUCTION

There are many ways to describe the gamut of anger, controversy, and complex reality that surrounds the creation, modification, and/or termination of the still central actor of the world public order—the State. These descriptions include: the "S word" of Louis Henkin, [1] and the "organized hypocrisy" of Stephen D. Krasner;[2] various other depictions of State sovereignty and its key component, territorial integrity; notions that denote some of the associated repercussions, such as the "political divorce" of Allen Buchanan,[3] a term of art for secession; or "the most deep-seated of all human feelings" (i.e., self-determination) of Eleanor Roosevelt.[4] This

---

*Qerim Qerimi is a Professor of International Law, International Law of Human Rights, and International Organizations at the University of Prishtina in Kosovo. Formerly a Visiting Research Scholar and Fulbright Visiting Professor at Harvard Law School (2011-2012), he is currently serving as Vice Dean for Academic Affairs of the Faculty of Law – University of Prishtina. From 2008 to 2010, he was a Senior Adviser to the Minister of Foreign Affairs of Kosovo, and a member of Kosovo's team in the advisory proceedings before the International Court of Justice in the case of *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*. He wishes to acknowledge the US government-sponsored Fulbright international educational exchange program for its invaluable support during his 2011–2012 year as a Fulbright Visiting Scholar and Professor at Harvard University. He also acknowledges the helpful comments received from his colleagues at Harvard Law School's Visiting Scholar/Visiting Researcher Colloquium. The usual disclaimer applies.

1. Louis Henkin, *That "S" Word: Sovereignty and Globalization, and Human Rights, et cetera*, 68 FORDHAM L. REV. 1, 1-2 (1999) ("I don't like the 'S word.' Its birth is illegitimate, and it has not aged well. The meaning of 'sovereignty' is confused and its uses are various, some of them unworthy, some even destructive of human values . . . . I address the sovereignty of states. It is part of my thesis that the sovereignty of states in international relations is essentially a mistake, an illegitimate offspring. Sovereignty began as a domestic term in a domestic context. It referred to relations between rulers and those they ruled, between the 'Sovereign' and his or her subjects. Its application to modern states - a state is not a person, but an abstraction - and its relation to other abstractions, such as the governments which represent states, has inevitably brought distortion and confusion."). *See also* Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31 (1995/1996).

2. *See* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999). *See also Stephen D. Krasner Interview: Conversation with History*, Institute of International Studies, U. OF CAL. BERKELEY, *available at* http://globetrotter.berkeley.edu/people3/Krasner/krasner-con3.html (last visited May 21, 2013) ("[O]rganized hypocrisy occurs when states say one thing but do another; they rhetorically endorse the normative principles or rules associated with sovereignty but their policies and actions violate these rules.").

3. *See* ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC (1991).

4. Eleanor Roosevelt, *The Universal Validity of Man's Right to Self-Determination*, 27 DEPT. ST. BULL. 919 (1952).

Article is therefore about the State. However, contrary to the predominant practice and scholarship that focus on the question of achieving statehood from angles such as the exercise of the right to self-determination (internal or external),[5] secession or remedial secession,[6] or through a declaration of independence,[7] this Article

5. *See* Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 RECUILES DES COURS (1999) (explaining that the *terms* "internal" and "external" are used to express a more precise designation about the way the right to self-determination is being realized or implemented in practice rather than to indicate the existence of two distinct rights, as opposed to two aspects of the same right). Antonio Cassese, *The Self-Determination of Peoples*, *in* THE INTERNATIONAL BILL OF RIGHTS 100 (Louis Henkin ed., 1981) (explaining that the right to external self-determination can be most appropriately conceived as an entitlement of a people to decide its international status; usually to form a sovereign and independent entity, and as such "[t]o be free from foreign interference which affects the international status of that state."). *See* Eric Kolodner, *The Future of the Right to Self-Determination*, 10 CONN. J. INT'L L. 153, 159 (1994) (explaining that unlike external self-determination, internal self-determination entitles the right of individuals or groups of individuals to internally participate in the decision-making process within a sovereign and independent state, "[w]hich affects the political, economic, social, and cultural conditions" under which they live). *See also* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION 113 (1990). *See* Allan Rosas, *Internal Self-Determination*, *in* MODERN LAW OF SELF-DETERMINATION 225-52 (Christian Tomuschat ed., 1993) (discussing in detail the meaning of "internal" and "external" in the self-determination context). G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/Res/1541 (XV) (Dec. 15, 1960). The resolution explains that external self-determination is often equated with secession, *id.*, and the statement is relatively correct, unless a certain people decide to join another independent and sovereign state, which is implied in the notion of "[f]ree association or integration with an independent state", *id. See* Hector Gros Espiell, *The Right to Self-Determination*, at 48, ¶ 257, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980). The author points out that, for instance, in 1965, the territory of Ifnii chose its incorporation with Morocco, *id*., and in another case, in 1975, the Mariana Islands decided to freely associate with the United States, *id.* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 247 (1979). The author points out that, in fact, the distinctive element that marks secession from a *regular process* of self-determination is that it implies the establishment of a State "[b]y the use or threat of force and without the consent of the former sovereign", *id. See also* BLACK'S LAW DICTIONARY 1351 (6th ed. 1990) ("[T]he act of withdrawing from membership in a group.").

6. *See* Accordance with international law of the unilateral declaration of independence with respect to Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 82 (July 22), *available at* http://www.icj-cij.org/docket/files/141/15987.pdf. The advisory opinion noted in the context of assessing the legality of Kosovo's declaration of independence that radically different views were expressed by the participating States in the advisory proceedings "regarding whether international law provides for a right of 'remedial secession' and, if so, in what circumstances, *id.* at 39, and, there was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of 'remedial secession' were

actually present in Kosovo," *id.* [hereinafter Kosovo Advisory Opinion]. *See* ALLEN BUCHANAN, *supra* note 3; Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFFAIRS 31, 35-36 (1997) (providing authoritative doctrinal perspectives and arguing that a "remedial right only" is applicable if a group has been the victim of injustice at the hands of the State). *See also* Karl Doehring, *Self-Determination*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 47, 58 (Bruno Simma ed., 2002) ("A right of secession could . . . be recognized if the minority discriminated against is exposed to actions by the sovereign State power which consist in an evident and brutal violation of fundamental human rights"); Jonathan I. Charney, *Self-Determination: Chechenya, Kosovo, and East Timor*, 34 VAND. J. TRANSNAT'L L. 455, 464 (2001) (proposing a number of criteria that would enable a people to attain the support of the international community for actions based on a claim of self-determination in a context other than colonial: a bona fide exhaustion of peaceful methods of resolving the dispute between the government and the minority group claiming an unjust denial of internal self-determination, including efforts to use the good offices of other states and intergovernmental organizations; a demonstration that the persons making the group's self-determination claim represent the will of the majority of that group; and a resort to the use of force and a claim to independence is taken only as a means of last resort); Harry Beran, *A Democratic Theory of Political Self-Determination for a New World Order*, *in* THEORIES OF SECESSION 33, 48 (Percy B. Lehning ed., 1998) (arguing from a perspective of democratic theory of self-determination that "any territorial community within a state has the right to secede."); Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 310 (1994) ("The right of self-determination may be seen as a variable right, depending on a combination of factors. The two most important of these seem to be the degree of destabilization in any given claim, taking into account all the circumstances surrounding it, and the degree to which the responding government represents the people belonging to the territory. If a government is quite unrepresentative, the international community may recognize even a seriously destabilizing self-determination claim as legitimate."); Eric Kolodner, *The Future of the Right to Self-Determination*, 10 CONN. J. INT'L L. 153 (1994); Thomas Franck, *Post Modern Tribalism and the Right to Secession*, *in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW (Brolmann et al. eds., 1993) (suggesting that in *extremis* there may be a right to secede if minority rights are being trampled on in an unbearable or irredeemable way); Lawrence S. Eastwood, Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L L. 299, 348 (1993) (concluding that the primary object of secession should be to provide certain oppressed groups with the means to free themselves from the control of oppressive parent states); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 199-201 (1991) (proposing that the following factors be considered in determining the legitimacy of secession claims: the immediacy of the historical grievance; the extent to which a people has kept its claim alive; the extent to which the territory has been settled by the dominant group; and the nature of the historical grievance); Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779, 861-862 (1976) (putting forward the following three general normative recommendations: "1. The demand for separation may be permissible if it purports to maximize all the important values of all groups; 2. A separate body politic should not be created out of an existing territorial association in such a way as to destroy an original entity. Human rights policy considerations should also apply to the group remaining after separation; 3. Any territorial entity envisaged must have the minimum base values necessary to become a viable and

seeks to explore another mode of effectuating statehood—one that arises out of the dismemberment of an existing sovereign and independent State. It investigates the role and powers of the United Nations Security Council with regard to the establishment of a new body politic in the world's community of States.

This Article frames the resulting key question in the following way: What is the role (if any, and if so, to what extent) and legal status or scope of powers of the UN Security Council in relation to the creation of States in international law? Similar to the means of achieving statehood, the present scholarship largely maintains its interest in such themes as the reform (and its probable shaping) of the Security Council[8] or its purported or actual legislative activity.[9] This

---

responsible body politic in the world community."); Onyeonoro Kamanu, *Secession and the Right to Self-Determination: An OAU Dilemma*, 12 J. MOD. AFR. STUD. 355, 361 (1974) (arguing in favor of secession in cases of "definite and substantial grievances."). *See* Michael Eisner, *A Procedural Model for the Resolution of Secessionist Disputes*, 33 HARV. INT'L L. J. 407, 419 (1992) (proposing a three-stage procedural solution to secessionist disputes: the creation of a special U.N. commission to study secessionist claims and make recommendations; if the UN Security Council finds the claim to secession to have merits, the UN would organize a plebiscite; in the post-plebiscite phase, the UN would maintain its presence in the disputed region, and if the vote is in favor of independence, the UN would help to set up and to consolidate the governing institutions of the new sovereign entity). *See also* ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2004); MORTON H. HALPERIN ET AL., SELF-DETERMINATION IN THE NEW WORLD ORDER (1992); and Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971).

7. *E.g.*, Kosovo Advisory Opinion, *supra* note 6 at ¶ 79 ("During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not.").

8. *See, e.g.*, David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993); Michelle Smith, *Expanding Permanent Membership in the UN Security Council: Opening a Pandora's Box or Needed Change?*, 12 DICK. J. INT'L L. 173 (1993); Amber Fitzgerald, *Security Council Reform: Creating a More Representative Body of the Entire U.N. Membership*, 12 PACE INT'L L. REV. 319 (2000); Thomas M. Franck, *Collective Security and UN Reform: Between the Necessary and the Possible*, 6 CHI. J. INT'L L. 597 (2006).

9. *See, e.g.*, Peter Hulsroj, *The Legal Function of the Security Council*, 1 CHINESE J. INT'L L. 59 (2002); Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175 (2005); Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542 (2005); Craig Forcese, *Hegemonic Federalism: The Democratic Implications of the*

falls short of any examination of the Security Council's precise role and powers to effectuate a new, or terminate an existing sovereign and independent State.

The predominant extra-colonial contemporary practice, save to the extent it has exceptionally allowed, has been that of disallowing the birth of new nations. This practice of favoring the preservation of territorial integrity has not been unconditional. New emerging countries could come into existence, not from any single legal principle, but rather a variety of factual patterns. These factual patterns presumably form a set of consensual criteria that constitutes the basis for modern secessionist claims. These patterns include, or refer to: illegal annexation of territories (e.g., the Baltic states, Eritrea);[10] gross human rights violations, including foreign support in

UN Security Council's "Legislative" Phase, 38 VICT. U. WELLINGTON L. REV. 175 (2007).

10. *See, e.g.*, I. JOSEPH VIZULIS, THE MOLOTOV-RIBBENTROP PACT OF 1939: THE BALTIC CASE 16-17 (1990) (explaining that the three Baltic States (Estonia, Latvia, and Lithuania) were invaded by the Soviet Union in June 1940 following the Soviet Union-Nazi Germany secret accords, known as the Molotov–Ribbentrop Pact; and they regained their independence upon the dissolution of the Soviet Empire; and Lithuania was the first of the former Soviet Union republics to declare its independence on March, 11 1990, though it was not until September 1991 that Moscow recognized it). *See, e.g.*, LAURI MÄLKSOO, ILLEGAL ANNEXATION AND STATE CONTINUITY: THE CASE OF THE INCORPORATION OF THE BALTIC STATES BY THE USSR 108 (2003) (providing an example of the legal implications of the Soviet annexation of the Baltic states in 1940 by concluding that the annexation was an illegal act that "violated at least two fundamental international legal norms that bound the USSR and the Baltic States in their inter-State relations: prohibition of the use of force and the right of peoples to self-determination."); Eastwood, *supra* note 6, at 321 (noting "the beginning of international recognition of a limited secession right applicable to illegally annexed territories."). *Cf.* James Crawford, Legal Counsel for Australia, *Case Concerning East Timor*, 1995 I.C.J 45 (February 16) (arguing that the obligation to refuse recognizing a situation born out of violation of the right to self-determination has not yet become part of customary international law). *See, e.g.*, ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 221-222 (1995) (providing a succinct summary of Eritrean claims: "(1) in pre-colonial history there had not been a nation-State with a stable territorial base encompassing both Eritrea and Ethiopia and to which Ethiopia could claim continuity; (2) in 1952 Eritrea was federated with Ethiopia against its will; no plebiscite or referendum was held to establish the will and the wishes of Eritreans, as in accordance with U.N. practice; (3) in actual fact, it was Ethiopia that in 1962 unilaterally repealed the federal arrangement and then forcibly annexed Eritrea; (4) the forcible annexation of Eritrea by Ethiopia amounted to a grave denial of the right to self-determination."). *See generally* BEREKET HABTE SELASSIE, CONFLICT AND INTERVENTION IN THE HORN OF AFRICA (1980); BEREKET HABTE SELASSIE, ERITREA AND THE UNITED NATIONS (1989); Alemante G. Selassie, *Ethnic Identity and Constitutional Design for Africa*, 29 STAN. J. INT'L L. 1 (1992); Bereket Habte Selassie, *Self-Determination in*

the form of military intervention (e.g., Bangladesh);[11] breakup of the State (e.g., the Soviet Union, former Yugoslavia); [12] peaceful separation or mutual agreement (e.g., Czechoslovakia, South Sudan);[13] or agreement of the entire population (e.g., unification of Germany).[14]

The United Nations has hardly responded in any effective or consistent manner. For some time it was largely paralyzed by the dynamics of the Cold War and afterwards still possessed some of the Cold War and pre-Cold War attitudes and strategies toward self-determination and statehood. As one author put it, "[r]arely has [the United Nations] acted in a timely fashion or shown much innovation."[15] After the fall of the Iron Curtain, the UN developed

---

Principle and Practice: The Ethiopian–Eritrean Experience, 29 COLUMB. HUM. RTS. L. REV. 91 (1997-1998).

11. Bangladesh, previously called East Pakistan, was also known as East Bengal. It was a geographically separate part of the state of Pakistan, created when British India became fully independent in 1947. The independence of Bangladesh was generally considered a *fait accompli* achieved as a result of foreign assistance in special circumstances. The violation and repression engaged in by the Pakistan military regime made reunification unthinkable, and in effect legitimized the creation of the new State. *See* Barry M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L. J. 120, 133 (1992) (explaining human rights abuses in general and India's military intervention in Bangladesh); NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY 90 (1985). *See* INTERNATIONAL COMMISSION OF JURISTS, THE EVENTS IN EAST PAKISTAN, 1971, 69 (1972) (reporting on Bangladesh's secession, the International Commission of Jurists noted that, "if one of the constituent peoples of a State is denied equal rights and is discriminated against, it is submitted that their full right of self-determination will revive.").

12. *See, e.g.*, Lawrence M. Frankel, *International Law of Secession: New Rules for New Era*, 14 HOUS. J. INT'L L. 521 (1992); Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992); Eastwood, *supra* note 6.

13. *See* Jon Elster, *Transition, constitution-making and separation in Czechoslovakia*, 36 EUR. J. SOCIOLOGY 105 (1995); Blanka Kudej, *Legal History of Czechoslovakia: From its Creation in 1918 to its Peaceful Separation in 1992*, 24 INT'L J. LEGAL INFO. 71 (1996); Eric Stein, *Peaceful Separation: "A New Virus"?*, 36 COLUM. J. TRANSNAT'L L. 25 (1998). *See* TED DAGNE, SUDAN: THE CRISIS IN DARFUR AND STATUS OF THE NORTH-SOUTH PEACE AGREEMENT (2010) (explaining the process that led to South Sudan's independence).

14. Mahulena Hofmann, *The Right to Self-Determination: The Case of Germany*, *in* CONSTITUTIONALISM – OLD CONCEPT, NEW WORLDS (Eibe Riedel ed., 2005).

15. Wolfgang Danspeckgruber, *Introduction*, *in* THE SELF-DETERMINATION OF PEOPLES: COMMUNITY, NATION, AND STATE IN AN INTERDEPENDENT WORLD 1, 6 (Wolfgang Danspeckgruber ed., 2002).

into a revived organization—more active and capable of managing international crises.[16] At the end of the last century and the first decade of the twenty-first century, the UN made a conspicuous departure from the Cold War conundrum, although not with entirely satisfactory results. The UN's involvement in settling complex sovereign disputes and sovereignty-related conflicts could perhaps best be characterized as a mixture of success and failure, of absolute or relative absence and presence, or of reception and denial.

The UN's noted accomplishments in performing effectively and efficiently as to conflict resolution include such cases as Cambodia, East Timor, and Bougainville (Papua New Guinea). Conflict resolution accomplishments took place in other cases through concerted involvement with others (e.g., the Quartet on Middle East); by prevention from playing a role (e.g., the Kashmir dispute), or being bypassed (e.g., in Sri Lanka and Aceh region of Indonesia); and, at other times, via absence in regional disputes (e.g., North-East Asia, including the Korean Peninsula).

The UN's current involvements include the UN Assistance Mission in Afghanistan, the UN Assistance Mission in Iraq, the UN Mission for the Referendum in Western Sahara, the UN Peacekeeping Force in Cyprus, the UN Mission in the Republic of South Sudan, and with significantly reduced functions and presence, the UN Mission in Kosovo.

16. *E.g.*, S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) (explaining that, for instance, none of the interventions that involved the use of military instrument during the Cold War were authorized by the UN Security Council; and the end of the Cold War, however, brought the concept of collective intervention into life; and the principle of collective intervention emerged in the beginning of 1990s through the Security Council's authorization of the use of force in Iraq (Gulf War) in 1991); S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992) (Somalia in 1992); *see* S.C. Res. 836, U.N. Doc. S/RES/836 (Jun. 4, 1993) (Bosnia and Herzegovina from 1992); S.C. Res. 940, U.N. Doc. S/RES/940 (Jul. 31, 1994) (Haiti in 1994); S.C. Res. 929, U.N. Doc. S/RES/929 (Jun. 22, 1994) (Rwanda in 1994(Operation Turquoise)); S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1992) (Sierra Leone in 1997); S.C. Res. 1101, U.N. Doc. S/RES/1101 (Mar. 28, 1997) (Albania in 1997 (Operation Alba)); S.C. Res. 1264, U.N. Doc. S/RES/1264 (Sept. 15, 1999) (East Timor in 1999); S.C. Res. 1528, U.N. Doc. S/RES/1528 (Feb. 27, 2004) (Côte d'Ivoire in 2004). *See, e.g.*, Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security after the Cold War*, 32 COLUM. J. TRANSNAT'L L. 201 (1994) (noting that not all of the Security Council's actions can be considered successful, and that in some instances, such as Bosnia and Herzegovina, little effective action was taken by the Security Council at all, despite the existence of a brutal conflict).

The above notwithstanding, the UN has played a significant role, including its massive missions on the ground, in all three cases where states have achieved or declared their independence in this century: East Timor, Kosovo, and South Sudan. These case studies will offer the key basis for discussing the role and powers of the UN Security Council in the process of State-building and State-creation. First, this Article will explain the Security Council's powers and recent practice of their exercise in Part II. In particular, this Article will examine the scope of its Chapter VII powers, the discretion and probable limits of their exercise, and the activities termed by some as "legislative." This discussion will be followed by Part III: an exposé and analysis of the Security Council's involvement in the cases of East Timor, Kosovo, Sudan, and South Sudan. Next, Part IV analyzes the understanding of the relationship between the Security Council and territorial integrity. Part V presents the concluding remarks.

II. THE SOURCE OF AUTHORITY AND POWERS OF THE UN SECURITY COUNCIL

The Security Council is a principal organ of the United Nations, vested with primary, though not exclusive, responsibility for the maintenance of international peace and security.[17] The source of its powers is the ever-developing Charter of the United Nations.[18] The Security Council is empowered to make recommendations[19] and to adopt decisions that are binding upon all Member States of the United Nations.[20] In this latter sense, it enjoys powers not conferred upon

17. U.N. Charter art. 24, para. 4, *opened for signature* June 26, 1945 (entered into force October 24, 1945) [hereinafter U.N. Charter] ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council *primary responsibility* for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.") (emphasis added).

18. *See id. See also* Sir Michael Wood, *The UN Security Council and International Law: The Legal Framework of the Security Council*, HERSCH LAUTERPACHT MEMORIAL LECTURES, 1, 7, *available at* http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/lectures/2006_hersch_lecture_1.pdf.

19. U.N. Charter, *supra* note 17, art. 39.

20. *Id.* art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

any other organ of the world organization or indeed any other international organ.[21]

A. The Source and Nature of the Security Council's Power

The Security Council's wide range of powers is prescribed in Chapters VI, VII, VIII, and XII of the Charter. The key, though not the only, powers of the Security Council are those powers relating to the establishment and maintenance of international peace and security. Article 39, the first provision in Chapter VII, lays down two essential functions that define the scope of the Council's powers that fall within the ambit of maintaining or restoring international peace and security. First is the Council's power to determine the existence of any threat to the peace, breach of the peace, or act of aggression.[22] Second—which follows the making of such determination—is the Council's power to make recommendations, or decide what measures shall be taken to maintain or restore international peace and security,[23] including but not limited to,[24] the use of armed force.[25]

B. Scope and Recent Exercise of the Security Council's Power

In acting under Chapter VII of the Charter, the Security Council may take a broad range of measures. These measures, intended to bind all Member States, vary from the establishment of international criminal tribunals, to the seemingly abstract and general measures for combating international terrorism. For example, in 1991, the Security Council created a UN Compensation Commission, [26] which is responsible for processing claims and paying compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait.[27] The Council previously reminded Iraq of its liability under international law for any loss, damage, or injury arising from its invasion, [28] and it relied upon this rather broad liability principle as the basis for establishing the Compensation

21. *See* Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. UNITED NATIONS L. 73, 77 (1998).

22. U.N. Charter, *supra* note 17, art. 39.

23. *Id.*

24. *Id.* art. 41.

25. *Id.* art. 42.

26. S.C. Res. 692, U.N. Doc. S/RES/692 (May 2, 1991).

27. *See, e.g.*, S.C. Res. 855, ¶ 1, U.N. Doc. S/RES/855 (Aug. 9, 1993).

28. *See, e.g.*, S.C. Res. 746, ¶ 9, U.N. Doc. S/RES/746 (Mar. 17, 1992).

Commission.[29] Likewise, the Council imposed disarmament obligations on Iraq[30] and determined or "guaranteed" an international boundary between Iraq and Kuwait.[31]

On other occasions, the Council declared the applicability of the Fourth Geneva Convention to the occupied Palestinian territories.[32] It established two ad hoc war crimes tribunals for the former Yugoslavia[33] and Rwanda.[34] Under resolution 1373, the Security Council adopted a range of abstract measures for all States to combat international terrorism, and prevent and suppress the financing of terrorism.[35] Also adopted were a range of general obligations on States to keep weapons of mass destruction and their means of delivery out of the hands of non-State actors by resolution 1540.[36]

Although other scholarly literature discusses the notion of legislative acts by the Security Council before the adoption of these latter resolutions (i.e., resolutions 1373 and 1540) to describe the various acts of the Council,[37] States used the term "legislator" for the first time after the adoption of resolutions 1373 and 1540.[38] Unlike

---

29. *See, e.g.*, S.C. Res. 855, *supra* note 27.

30. *See, e.g.*, S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 8, 1991).

31. *See id*. *See also* S.C. Res. 773, U.N. Doc. S/RES/773 (Aug. 16, 1992); S.C. Res. 806, U.N. Doc. S/RES/806 (Feb. 5, 1993).

32. *See, e.g.*, S.C. Res. 681, U.N. Doc. S/RES/681 (Dec. 20, 1990); S.C. Res. 799, U.N. Doc. S/RES/799 (Dec. 18, 1992); S.C. Res. 904, U.N. Doc. S/RES/904 (Mar. 18, 1994).

33. S.C. Res. 827, U.N. Doc. S/RES/827 (Sept. 25, 1993).

34. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

35. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

36. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

37. *See supra* note 9. *See also* Keith Harper, *Does the United Nations Security Council Have the Competence to Act as a Court and Legislature?*, 27 N.Y.U. J. INT'L L. & POL. 103 (1994); Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 954 (1994); Frederic L. Kirgis Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 520-22 (1995); Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325, 326 (1995).

38. *See, e.g.*, U.N. Doc. S/PV. 4950, at 9-10 (Apr. 22, 2004). The document explains that the representative of Angola to the UN declared in the Council debate that "[b]y adopting resolution 1373 (2001), the Security Council took the unprecedented step of bringing into force legislation binding on all States on the issue of combating terrorism", *id.* at 9-10. *Cf.* S.C. Res. 1540, *supra* note 36. The resolution explains that the representative of Algeria declared in the same Council debate, in connection with resolution 1540: "In the absence of binding international standards, and because of the seriousness and the urgent nature of the threat, the response to it needs to be articulated and formulated by the Security Council. It is

the adoption of resolution 1373—which passed without any concern expressed, though such concerns would have been expected[39]—objections were raised with regard to resolution 1540.[40] The

understood that, in shouldering this responsibility, the Security Council is acting in an exceptional manner, since, clearly, the Charter does not give it a mandate to legislate on behalf of the international community, but simply gives it the principal responsibility for the maintenance of international peace and security", *id.* at 5.

39. *See* U.N. Doc. S/PV.4432, at 5 (2001) (noting the statement of the UK Permanent Representative to the UN and chairman of the Security Council's Counter-Terrorism Committee: "I have been very struck by the responsiveness of the membership to the outreach programme of the counter-terrorism Committee . . . . They have come to the meetings that we have had on these items, not with complaints about the Security Council—which they might well have had, given the unique nature, I think, of resolution 1373 (2001)—but in order to bring out the questions they have in their minds about the substance of what we are doing.") (citing S.C. Res. 1373, *supra* note 35).

40. *See* U.N. Doc. S/PV. 4950, *supra* note 38, at 13 (Benin) ("Efforts have been made to dispel concerns of parties on the question, but we believe that certain aspects of those concerns remain, particularly those related to the question of legitimate self-defence. It seems important to us that in the draft resolution the scope of Chapter VII be reduced to certain obligations of States, particularly those contained in the three Articles to which some delegations referred in the course of our debate today."); *id.* at 15 (Pakistan) ("[s]een from a historical, legal and political perspective, the draft resolution . . . raises a number of doubts, questions and concerns . . . . Pakistan believes that the first question is whether the Security Council has the right to assume the role of prescribing legislative action by Member States . . . . Secondly, there is a discrepancy between the professed objective of the draft resolution and its provisions . . . . Thirdly, there is no justification for the adoption of this resolution under Chapter VII of the Charter. The threat of WMD proliferation by non-State actors may be real, but it is not imminent. It is not a threat to peace within the meaning of Article 39 of the United Nations Charter . . . . Fourthly, this fear is exacerbated by the open-ended nature of the draft resolution. It provides for further decisions, in operative paragraph 10. Thus the scope of the draft resolution could be enlarged beyond non-State actors . . . . Fifthly, the creation of a Security Council committee, in operative paragraph 9, is unnecessary. Its functions are unclear and unspecified . . . . Sixthly, the definitions provided in the footnote of the draft resolution are entirely unclear. Are missiles, rockets and unmanned aerial vehicles the only means for the delivery of WMD? Who will judge whether or not they are designed for this purpose? What is meant by the term "related materials"?"); *id.* at 20 (Peru) ("We believe that the current text of the draft resolution remains ambiguous in its following elements. First, it is not clear with regard to sanctions or coercive measures that may be taken in cases of non-compliance. Secondly, it does not include a specific list of materials for the production of weapons of mass destruction that are subject to control, which could lead to conflicting interpretations. Thirdly, it raises a number of questions regarding follow-up and monitoring mechanisms."); *id.* at 23 (India) ("Our recognition of the time imperative in seeking recourse through the Security Council does not, however, obscure our more basic concerns over the increasing tendency of the Council in recent years to assume new and wider powers of legislation on behalf of the international community, with its resolutions binding on all States. In the present instance, the Council seeks to both define the non-proliferation regime and monitor its implementation. But who will monitor the

objectors demanded that the Security Council deny any "legislative authority" or claimed that the Security Council's enactment of "global legislation is not consistent with the provisions of the United Nations Charter." [41] For example, Mexico objected to resolutions that established the two war-crimes tribunals on grounds that the Council had exceeded its powers.[42] However, both resolutions were adopted

---

monitors? We are concerned that the exercise of legislative functions by the Council, combined with recourse to Chapter VII mandates, could disrupt the balance of power between the General Assembly and the Security Council, as enshrined in the Charter."); *id.* at 28 (Japan) ("In adopting a binding Security Council resolution under Chapter VII of the United Nations Charter, the Security Council assumes a lawmaking function. The Security Council should, therefore, be cautious not to undermine the stability of the international legal framework."); *id.* at 30 (Cuba) ("[t]he Cuban delegation is . . . concerned that the Security Council, recognized to be of limited composition, and in which some members have the right of veto, has taken the initiative to prepare a draft resolution on a subject which should continue to be considered in the framework of the traditional multilateral disarmament machinery, where the appropriate space exists to negotiate a legally binding instrument."); *id.* at 31 (Indonesia) ("[t]he draft resolution is unbalanced and has consequently raised serious concerns, as it impinges on the sovereign rights of Member States. Because of its wide-ranging ramifications, the issues contained in it need to be further deliberated and clarified prior to its adoption. Indeed, we are of the opinion that legal obligations can only be created and assumed on a voluntary basis. Any far-reaching assumption of authority by the Security Council to enact global legislation is not consistent with the provisions of the United Nations Charter. It is therefore imperative to involve all States in the negotiating process towards the establishment of international norms on the issue."); *id.* at 33 (Iran) ("The proposed resolution contains certain concepts and definitions that are either inadequately elaborated or inconsistent with the terms and definitions embodied in existing international instruments on nuclear, biological and chemical weapons.").

41. *See* U.N. Doc. S/PV. 4950, *supra* note 38, at 31 (Indonesia); *id.* at 32 (Iran); *id.* at 5 (Algeria). *See also id.* at 23 (India) ("Our recognition of the time imperative in seeking recourse through the Security Council does not, however, obscure our more basic concerns over the increasing tendency of the Council in recent years to assume new and wider powers of legislation on behalf of the international community, with its resolutions binding on all States."); *id.* at 30 (Cuba).

42. *See, e.g.*, U.N. Doc. A/55/PV.95, at 3 (Mar. 14, 2001); U.N. Doc. A/55/PV/102, at 3 (Jun. 12, 2001) (explaining that the matter has been dealt with by the ICTY, which dismissed the allegation that the Tribunal had been unlawfully established by the Security Council). *See* Prosecutor v. Tadić, No. IT-94-1-AR72, 35 I.L.M. 32, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 48, (Int'l Crim. Trib. for the Former Yugoslavia October, 2, 1996). The Appeals Chamber of the Tribunal was of the view that the Council was endowed with the power to create the ICTY as a measure under chapter VII of the Charter in light of a determination made by it that there exists a threat to the peace. *Id.* ¶ 44. The Tribunal also addressed the question of *legislation* at the international level, providing the following reasoning: "It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the

unanimously.[43] This factual background raises two critical questions; What is the scope of the Security Council's powers? And what are the limitations on the Security Council in exercising its Chapter VII powers?

In its *Prosecutor v. Tadić* decision, the Appeals Chamber of International Criminal Tribunal for the former Yugoslavia ("Tribunal" or "ITCY") clarified that the choice of means and their evaluation is left to the Security Council under Article 39 of the Charter. In this context, the Security Council "enjoys wide discretionary powers; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations."[44] Thus, in the view of the ICTY, "it is clear" from the text of this provision that "the Security Council plays a pivotal role and exercises a very wide discretion."[45] This discretionary power, however wide it might be, is not *ad infinitum*.

C. Possible Limitations of the Security Council's Power

Although any limitation is rarely observed in practice, the discretionary power is not deprived of critical normative character. Article 24(2) is the explicit provision that prescribes these limitations, which are connected to action or behavior conditioned by the demand for conformity with "the Purposes and Principles of the United Nations."[46] The International Court of Justice ("ICJ" or "Court")

---

international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear-cut. Regarding the judicial function, the International Court of Justice is clearly the 'principal judicial organ' . . . . There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects." *Id.* ¶ 43.

43. *See* Press Release SC/715, *available at* http://www.un.org/News/Press/docs/2001/sc7158.doc.htm.; and Press Release SC/8076, *available at* http://www.un.org/News/Press/docs/2004/sc8076.doc.htm..

44. *Id.* ¶ 39.

45. *Id.* ¶ 28.

46. U.N. Charter, *supra* note 17, art. 24, para 2;. *see, e.g.*, MICHAEL J. MATHESON, COUNCIL UNBOUND: THE GROWTH OF UN DECISION MAKING ON CONFLICT AND POSTCONFLICT ISSUES AFTER THE COLD WAR 35 (2006) (noting that while "the Council is obligated to act in accordance with these purposes and principles . . . it is not clear how much this obligation actually limits the Council in practice. The purposes and principles are very general statements that are not defined and are subject to a wide range of interpretation, and some by their nature do not seem to have specific legal content.").

explains the Security Council's Article 24(2) limitations in the *Conditions for Admission* case:

> The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers and criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of the constitution.[47]

The ICTY also confirmed that the Security Council's "powers are not unlimited."[48] The Security Council is an organ of an international organization, which is established by a treaty that serves as a constitutional framework for the world organization. The Security Council "is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be."[49] In any event, these powers are confined within "the limits of the jurisdiction of the [UN] at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization."[50] Ultimately, the ICTY Appeals Chamber concluded "neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutes* (unbound by law)."[51]

It is worth recalling that situations warranting resort to the powers provided under Chapter VII are those related to the "threat to the peace," "breach of the peace," or "act of aggression."[52] The Yugoslav Tribunal in its *Tadić* decision examined the legal character of the situations warranting the Security Council's exercise of power. In this connection, the Tribunal stated that whereas the "act of aggression" is more amenable to a legal determination, the "threat to the peace" is more of a political concept.[53] While the Security

---

47. Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57 (May 28), at 64.

48. *Tadić*, 35 I.L.M. at ¶ 28.

49. *Id.*

50. *Id.*

51. *Id.*

52. U.N. Charter, *supra* note 17, art. 39.

53. *Tadić*, 35 I.L.M. at ¶ 29. *See also* W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 93 (1993) (noting that a "threat to the peace" is, and was obviously designed to be, subjectively determined).

Council is fully authorized and most properly suited to discharge this duty with such great margin of discretion, "the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter."[54]

Because of this determination, there is wide acceptance that the Security Council ought to act in accordance with the Purposes and Principles of the United Nations. In addition, it cannot contravene peremptory norms of general international law (*jus cogens*).[55] As stated by Judge ad hoc Lauterpacht in his Separate Opinion at the Provisional Measures stage of the *Genocide* case:

> The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a simple hierarchy of norms—extend to a conflict between a Security Council resolution and *jus cogens*.[56]

The International Court of Justice stated as long ago as 1951 in its *Reservations* Advisory Opinion that, for example, genocide is contrary "to the spirit and aims of the United Nations."[57]

Clarity is limited in understanding the nature and scope of powers of the Security Council. The instruments to understand these limitations include the judicial acceptance that the key notion of "the threat to the peace" is political, and that determining what constitutes a threat is discretionary. But these instruments are far from sufficient to eliminate the question of possible judicial review or even invalidation of the Council's actions by a judicial body. The closest candidate to perform this role would be the ICJ, the principal judicial organ of the UN.

---

54. *Tadić*, 35 I.L.M. at ¶ 29.

55. *See, e.g.*, Sir Michael Wood, *The UN Security Council and International Law: The Security Council's Powers and their Limits*, HERSCH LAUTERPACHT MEMORIAL LECTURES, 1, 3, *available at* http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/lectures/2006_hersch_lecture_2.pdf.

56. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. And Herz. v. Serb. and Montenegro), 1993 I.C.J. 325, 440 (Sept. 13) (separate opinion of Judge *ad hoc* Lauterpacht).

57. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 22 (May 28).

The UN Charter does not provide any automatic role for the ICJ. And there are questions about the ICJ's primary role and the Security Council's broad discretion on matters of international peace and security. One may still wonder—and legitimately so—whether some other principle can empower the Court to exercise judicial functions over the Council's decisions; such as one that could emanate from either a broad notion of international justice, or non-exclusivity on the side of the Security Council to deal with matters pertaining to the establishment and maintenance of international peace and security. Or one may wonder whether the ICJ's mere judicial functions are sufficient to exercise judicial powers over the Security Council's decisions.

One case in point could be the ICTY's pronouncement that at least a component of Article 39 of the Charter (i.e., the act of aggression) is open to a legal or judicial determination, which is arguably an avenue for possible judicial intervention. Beyond the ICJ's frequent involvement in the application and interpretation of decisions of the Security Council,[58] there are occasions where the Court examined the validity of Security Council's decisions. In its *Namibia* case, the ICJ referred to a "situation which the Court has found to have been *validly* declared illegal [by the Security Council]."[59]

In view of the foregoing, the Court has been engaged in some fashion in exercising its judicial function vis-à-vis resolutions of the Security Council. But the exercising of its judicial function does not extend to nullification of any of the Security Council's actions or decisions.[60] The Court has determined the meaning of various

58. *See, e.g.*, Kosovo Advisory Opinion, *supra* note 6, at 18, ¶ 46-47 ("While the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions," and that it has done so both in the exercise of its advisory and contentious jurisdictions. Therefore, there is "nothing incompatible with the integrity of the judicial function in the Court undertaking such a task.").

59. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution, Advisory Opinion, 1971 I.C.J. 16, 54, ¶ 118 (June 21) (emphasis added).

60. *See* Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 4 (1996) (concluding that the ICJ "[h]as engaged, and will continue to engage, in variegated forms of 'review,' but the judicial review will not soon extend to a judicial

provisions of Security Council resolutions, interpreted them, devised special rules or methods of interpretation, and has applied them to real-world situations.[61]

In conclusion, as the past trends in decision have indicated, it is unlikely for the ICJ to constrain in any substantial manner the action of the Security Council under Chapter VII. The sources of this condition are the nature of powers, the wide discretion, and the resulting flexibility permitted by the organization's foundational document—the UN Charter. It is similarly critical to note that this same source of authority imposes upon the Security Council the duty to be guided in its operation by, and act based on, the precepts of the Charter.

The further inescapable conclusion is the wide acceptance of the logic that a superior norm of the kind of *jus cogens* would naturally constrain the Security Council, whose actions may not be entirely absolved of at least some form of judicial review—be it implicit, indirect, or incidental—by the ICJ. Having examined the powers of the Security Council, their nature, scope and probable limitation, the next section explores the selected case studies in light of the Security Council's actions in relation to the processes of State-building.

III. RELEVANT STATE-BUILDING PRACTICE: CASES OF EAST TIMOR, KOSOVO, SUDAN AND SOUTH SUDAN

Amidst grave humanitarian crises, the Security Council had to resort to Chapter VII to address another new situation: the governance of territories shattered by conflicts. Acting under its Chapter VII powers, the Security Council found itself in two of the largest field missions that it had undertaken for an interim period, with the exercise of essentially sovereign domestic functions in Kosovo and East Timor. A similar mission of governance, the first of this kind in the post-Cold War era, was the UN Transitional Authority in

finding that some particular Council action is 'null and void.'"). *See also* W. Michael Reisman, *supra* note 53, at 92-93 (stating that, "[i]n no opinion to date has the Court held an action by a major political organ to be *ultra vires*. But one can find in the advisory jurisdiction of the International Court analogues to *Marbury v. Madison*. Like its American counterpart, the Court was able to assert its right to pass on the legality of legislative decision making without . . . bringing itself into direct conflict with the political branches. Like *Marbury*, such international decisions may serve as a fundamental precedent for establishing the legitimacy of the International Court's general judicial review.").

61. *See, e.g.*, Kosovo Advisory Opinion, *supra* note 6.

Cambodia ("UNTAC").[62] The functions of this mission were, however, delegated by the 1991 Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia.[63] Unlike its later decisions, including decisions on Kosovo and East Timor, the Security Council authorized the UNTAC functions based not on its authority to make recommendations to States for the settlement of disputes, but on its Chapter VII powers.[64]

The origins of the notion of territorial governance could be traced to a seven-month administration of Irian Jaya (western New Guinea) during the transition from Dutch colonial rule to Indonesian control in 1962-1963, and after the UN General Assembly created the United Nations Temporary Executive Authority to perform this task.[65] A few years later in 1967, the General Assembly terminated the mandatory power of South Africa and created a UN Council for South West Africa[66] (the country's official name today is the Republic of Namibia). The General Assembly empowered the Council with the authority to carry out the functions of governance in the territory.[67] However, South Africa declined to yield the territory of Namibia to UN administration.[68]

On June 10, 1999, the Security Council adopted resolution 1244, a binding decision under Chapter VII.[69] It deployed international civil and security presences in Kosovo, "under United Nations

---

62. For a thorough discussion of the events in Cambodia, *see* Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT'L L. 1 (1993).

63. *See* Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Oct. 23, 1991, art. 6, 31 I.L.M. 183, 184 (1992).

64. *See* S.C. Res. 718, U.N. Doc. S/RES/718 (Oct. 31, 1991) (noting that the agreements for a comprehensive political settlement of the Cambodia conflict signed in Paris provided "for the designation of a special representative of the Secretary-General and the establishment of a United Nations Transitional Authority in Cambodia"). Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, *supra* note 63, at. pmbl. *See also* Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L L. 76, 77 (2001).

65. GA Res. 1752, U.N. Doc. A/5217 (Sept. 21, 1962). *See also* D.W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 255-61 (1964); Matheson, *supra* note 64, at 77.

66. *See* Qerim Qerimi, *An Informal World: The Role and Status of "Contact Group" Under International Law*, 7 CHI-KENT J. INT'L & COMP. L. 117, 125 (2007).

67. GA Res. 2248, ¶ 1, U.N. Doc. A/6657 (May 19, 1967); Qerimi, *supra* note 66, at 125.

68. Qerimi, *supra* note 66, at 125.

69. *See* S.C. Res. 1244, U.N. Doc. S/RES/1244 (Jun. 10, 1999).

auspices,"[70] and authorized the Secretary-General to establish "an international civil presence in Kosovo in order to provide an interim administration for Kosovo."[71] The Secretary-General promptly created the international civil presence, known as the United Nations Interim Administration Mission in Kosovo ("UNMIK"), and appointed a special representative to head the organ. The first UNMIK regulation enacted by the special representative, pursuant to his authority under Security Council resolution 1244, provided, "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General."[72]

A few months after the adoption of resolution 1244, in resolution 1272, acting under Chapter VII, the Security Council established the United Nations Transitional Administration in East Timor ("UNTAET").[73] The resolution provided UNTAET with "overall responsibility for the administration of East Timor"[74] and empowered UNTAET "to exercise all legislative and executive authority, including the administration of justice."[75] The latest of the Council's Chapter VII missions were concerned not so much with governance. They were concerned with conflict resolution and assistance in processes related to the conduct of agreed popular referenda and overall support for peace agreements in Sudan and South Sudan.

What could be described as a post-colonial or contemporary variant of the United Nations' trusteeship practice or of the League of Nations' system of mandates, the practice of territorial governance has been elsewhere described as a "revival,"[76] "in the framework of new times,"[77] of the "humanist vision"[78] of international organizations, "faithful to the teachings of the 'founding fathers' of

70. *Id.* art. 5.

71. *Id.* art. 10.

72. UNMIK Regulation 1999/1 on the Authority of the Interim Administration in Kosovo, UNITED NATIONS INTERIM ADMINISTRATION MISSION IN KOSOVO, 1 (July 25, 1999), *available at* http://www.unmikonline.org/regulations/1999/re99_01.pdf.

73. S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

74. *Id.* art. 1.

75. *Id.*

76. *See* Kosovo Advisory Opinion, Separate Opinion of Judge Cançado Trindade 2010 I.C.J. 523 (July 22), *available at* http://www.icj-cij.org/docket/files/141/16003.pdf.

77. *Id.*

78. *Id.*

the law of nations."[79] And it has been accepted as a practice that finds ample support in the implied and evolving Chapter VII powers of the UN Security Council.[80]

A. East Timor

The Security Council's involvement on matters concerning East Timor dates back to 1975, when the Security Council opposed the Indonesian invasion, which was marked by violence and brutality.[81] At the time, the territory's nominal status in the UN remained that of a non-self-governing territory under the Portuguese administration.[82]

---

79. *Id.*

80. *See, e.g.*, Erika de Wet, *The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX*, 103 AM. J. INT'L L. 83, 87 (2009) (noting that "by now the Security Council is widely acknowledged to have the power to establish a civil administration under the auspices of the United Nations on the basis of its implied powers under Chapter VII of the Charter. The implied power to establish a civil administration flows from the Security Council's express powers in Article 41 to take nonmilitary measures for the maintenance or restoration of international peace and security."); Erika de Wet, *The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law*, 8 MAX PLANCK Y.B. UNITED NATIONS L. 291 (2004); Matheson, *supra* note 64, at 85 (noting that "Chapter VII itself does not expressly limit the measures the Council may take pursuant to its determination of a threat to or breach of the peace," and that, "[t]he Council's authority to require measures of the sort already taken in Kosovo and East Timor cannot be doubted. These measures were plainly necessary to avoid a serious resumption of conflict, and took the form of an interim administration designed to last until the peace was securely restored and the future of these territories could be determined through other political processes. As such, this type of UN governance is likely to find a prominent place in the international community's inventory of tools for dealing with conflict situations and postconflict societies."). *See also* Separate Opinion of *Judge Cançado Trindade*, *supra* note 76, at 549, ¶ 64 ("Prolonged oppression stresses the pressing need for safeguarding the rights of the inhabitants, and this again brings to the fore the notion of *trusteeship*, this time related to the contemporary experiments of international administration of territory. In the U.N. World Summit of September 2005, the former U.N. Trusteeship Council came indeed to the end of its days, replaced as it was by the U.N. Peacebuilding Commission, but the basic idea of *trusteeship* seems to have survived in the new context. It is thus not surprising to find that, out of a context of utmost violence such as that of Kosovo in the decade of 1989-1999, Security Council Resolution 1244 (1999) emerged, followed by the goals of self-government and U.N.-supervised independence pursued by the victimized population.").

81. *See* S.C. Res. 384, U.N. Doc. S/RES/384 (Dec. 22, 1975).

82. *Id.* pmbl. (regretting that the Portuguese Government did not discharge fully its responsibilities as administrating power in the territory).

In resolution 384, the Security Council called upon all States to respect the territorial integrity of East Timor as well as the right of its people to self-determination,[83] and to facilitate the decolonization of the territory.[84] The Security Council called upon the government of Indonesia to immediately withdraw all its forces from the territory of East Timor. The Security Council repeated the same calls under resolution 389, adopted one year later in 1976.[85] A series of talks were launched afterwards, conducted under the auspices of the UN Secretary-General between Indonesia and Portugal.

In May 1999, the Security Council welcomed a UN-sponsored agreement between Indonesia and Portugal, which allowed for UN-supervised popular referendum in East Timor in August 1999.[86] In June 1999, the Council decided to temporarily establish the United Nations Mission in East Timor ("UNAMET") to organize and conduct the popular referendum.[87] In August of the same year, the Council decided to extend the mandate of UNAMET for one month.[88] The Security Council again extended UNAMET's mandate until November 30,[89] and called upon all parties to cooperate with it in the implementation of its mandate.[90]

In September 1999, the Security Council authorized the establishment of a multinational force in East Timor.[91] The force was

83. *Id.* art. 1.

84. *Id.* art. 4.

85. *See* S.C. Res. 389, U.N. Doc. S/RES/389 (Apr. 22, 1976).

86. *Id.* arts. 1-2. S.C. Res. 1236, U.N. Doc. S/RES/1236 (May 7, 1999) (welcoming the conclusion of the Agreement between Indonesia and Portugal on the question of East Timor, as well as the Agreements between the United Nations and the Governments of Indonesia and Portugal regarding security arrangements and the modalities for the popular consultation of the people of East Timor through a direct ballot).

87. S.C. Res. 1246, art. 1, U.N. Doc. S/RES/1246 (Jun. 11, 1999) (deciding "to establish until 31 August 1999 the United Nations Mission in East Timor (UNAMET) to organize and conduct a popular consultation, scheduled for 8 August 1999, on the basis of a direct, secret and universal ballot, in order to ascertain whether the East Timorese people accept the proposed constitutional framework providing for a special autonomy for East Timor within the unitary Republic of Indonesia or reject the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia, in accordance with the General Agreement and to enable the Secretary-General to discharge his responsibility under paragraph 3 of the Security Agreement.").

88. S.C. Res. 1257, U.N. Doc. S/RES/1257 (Aug. 3, 1999).

89. S.C. Res. 1262, art. 1, U.N. Doc. S/RES/1262 (Aug. 27, 1999).

90. *Id.* art. 2.

91. S.C. Res. 1264, art. 1, U.N. Doc. S/RES/1264 (Sept. 15, 1999).

established pursuant to a request of the government of Indonesia addressed to the UN Secretary-General.[92] In October of the same year, the Security Council established UNTAET, which was entrusted with overall responsibility for the administration of East Timor and empowered to exercise all legislative and executive authority, including the administration of justice, as an interim measure towards independence.[93] It further stressed the need for UNTAET "[t]o carry out its mandate effectively with a view to the development of local *democratic* institutions."[94]

In October 2000, the Security Council adopted another resolution on East Timor. It insisted, among other things,

[T]hat the Government of Indonesia take immediate additional steps, in fulfillment of its responsibilities, to disarm and disband the militia immediately, restore law and order in the affected areas in West Timor, ensure safety and security in the refugee camps and for humanitarian workers, and prevent cross-border incursions into East Timor.[95]

In January 2001, the Security Council extended the mandate of UNTAET for one year, bearing in mind the possible need for adjustments related to the independence timetable.[96] In January 2002, the Council extended the mandate of UNTAET until May 20, 2002.[97]

By way of conclusion, the Security Council's involvement in the case of East Timor has been extended over a relatively long period of time, beginning in 1975, and included a variety of measures, ranging from the opposition of Indonesian invasion to the establishment of a UN Mission in East Timor to organize and conduct a popular referendum on the fate of the territory. The Security Council's role has been pivotal in establishing the first sovereign State of the 21st century, including the fundamental parameters for a democracy, via the authorization of its missions on the ground.

The Security Council brought to an end the East Timor saga in ways that fulfilled the will of its people. In doing so, the world

---

92. *Id.*
93. S.C. Res. 1272, *supra* note 73, art. 1.
94. *Id.* art. 8 (emphasis added).
95. S.C. Res. 1319, art. 1, U.N. S/RES/1319 (Sept. 8, 2000).
96. S.C. Res. 1338, art. 2, U.N. Doc. S/RES/1338 (Jan. 31, 2001).
97. S.C. Res. 1392, art. 2, U.N. Doc. S/RES/1392 (Jan. 31, 2002).

discovered the Security Council's new and indispensable function of establishing or re-establishing public order in an area lacking one. The Security Council's intervention was warranted and in exercise of its primary role in matters of global peace and safety, same as in the case of Kosovo. However, one should note the varying specificities of the two cases, including in particular East Timor's colonial status.

B. Kosovo

The first Security Council resolution that addressed the situation in Kosovo was resolution 855 of August 1993.[98] This resolution called on the authorities in the Federal Republic of Yugoslavia ("FRY") to reconsider their refusal to allow the Conference on Security and Cooperation in Europe ("CSCE") mission to continue its activities in Kosovo, to take the practical steps necessary for the resumption of the CSCE activities, and to agree with an increase in the number of the CSCE monitors.[99] It did so after it reaffirmed its relevant resolutions aimed at putting an end to conflict in the former Yugoslavia, expressed determination to avoid any extension of the conflict in the former Yugoslavia, and, in this context, attached great importance to the work of the CSCE missions and to the continued ability of the international community to monitor the situation in Kosovo.[100]

Almost five years later, in March 1998, the Council adopted resolution 1160.[101] It called upon the FRY to immediately take the steps needed to achieve a political solution to the issue of Kosovo through dialogue.[102] It further called upon the Belgrade authorities and the Kosovo-Albanian leadership to enter urgently and without preconditions into a meaningful dialogue on Kosovo's political status issues, noting the readiness of the Contact Group (i.e., France, Germany, Italy, the Russian Federation, the United Kingdom, and the United States) to facilitate the dialogue.[103]

Another resolution was adopted in September of the same year, and the Security Council expressed grave concern at the "intense fighting in Kosovo and in particular the excessive and indiscriminate

98. S.C. Res. 855, U.N. Doc. S/RES/855 (Aug. 9, 1993).
99. *Id.* art. 2.
100. *Id.* pmbl.
101. S.C. Res. 1160, U.N. Doc. S/RES/1060 (Mar. 31, 1998).
102. *Id.* art. 1.
103. *Id.* art. 4.

use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties."[104] It also expressed deep concern over the flow of refugees and the increasing number of displaced persons as a result of the use of force in Kosovo.[105] Against the background of further deterioration of the humanitarian and security situation, the Security Council demanded an end to hostilities,[106] and called upon the FRY and the Kosovo-Albanian leadership to immediately enter into a meaningful dialogue without preconditions and with international involvement.[107] This dialogue was to be held according "to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo."[108]

In October 1998, the Security Council adopted another resolution.[109] It endorsed and supported the agreements reached between the FRY and the Organization for Security and Co-operation in Europe ("OSCE"), allowing the OSCE to establish a verification mission in Kosovo and between the FRY and NATO on an air verification mission over Kosovo.[110] It further demanded that the FRY cooperate fully with these missions and implement fully the previous resolutions of the Council.[111] The resolution affirmed that the unresolved situation in Kosovo was a continuing threat to peace and security in the region.[112]

The fourth resolution adopted in November of 1998 was resolution 1207, in which the Security Council deplored the continued failure of the FRY to cooperate fully with the ICTY, and called upon the FRY authorities and the Kosovo-Albanian leadership to cooperate

---

104. S.C. Res. 1199, pmbl, U.N. Doc. S/RES/1199 (Sept. 23, 1998).

105. *Id.*

106. *Id.* art. 1.

107. *Id.* art. 3.

108. *Id.*

109. S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998).

110. *Id.* art. 1. The air verification mission was a North Atlantic Treaty Organization ("NATO") mission established by an agreement between NATO and the Federal Republic of Yugoslavia, providing for NATO air surveillance to verify compliance with the provisions of Security Council resolution 1199 (1998) demanding an end to hostilities and a ceasefire in Kosovo.

111. *Id.* art. 3.

112. *Id.* pmbl.

fully with the prosecutor in the investigation of all possible violations within the Tribunal's jurisdiction.[113]

In May 1999, the Security Council yet again adopted another resolution that expressed grave concern at the humanitarian catastrophe in and around Kosovo[114] and the enormous flux of refugees.[115] It called for access for the UN, the UN High Commissioner for Refugees, and other international humanitarian organizations and personnel.[116] The resolution further emphasized that the humanitarian situation will continue to deteriorate in the absence of a political solution to the crisis.[117]

In June 1999, the Security Council adopted resolution 1244, which brought an end to the seventy-eight day aerial bombing campaign of NATO against the FRY.[118] The resolution was adopted following the G-8 Foreign Ministers' adoption of general principles on the political solution to the Kosovo crisis. The resolution stressed the necessity of FRY's agreement to a number of principles. Those principles were presented to its leadership by the then-President of Finland, Martti Ahtisaari, representing the European Union, and Viktor Chernomyrdin, Special Representative of the Russian President.[119] Both sets of principles were made an integral part of resolution 1244 as annexes 1 and 2.[120]

The agreement on principles accepted by the FRY provides, *inter alia*, for "an immediate and verifiable end of violence and

113. S.C. Res. 1207, art. 4, U.N. Doc. S/RES/1207 (Nov. 17, 1998).

114. S.C. Res. 1239, pmbl., U.N. Doc. S/RES/1239 (May 14, 1999).

115. *Id.*

116. *Id.* arts. 2-3.

117. *Id.* art. 5.

118. *See, e.g.*, Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828 (1999); Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999); Christine M. Chinkin, *NATO's Kosovo Intervention: A "Good" or "Bad" War?*, 93 AM. J. INT'L L. 841 (1999); Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857 (1999).

119. *See* S.C. Res. 1244, *supra* note 69. *See also* Letter Dated 7 June 1999 from the Permanent Representative of Germany to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1999/649 (Jun. 7, 1999) (noting that "[t]he Government of the Federal Republic of Yugoslavia and the Assembly of the Republic of Serbia accepted" the agreement on the principles (peace plan) to move towards a resolution of the Kosovo crisis on June 3, 1999).

120. *See* S.C. Res. 1244, *supra* note 69, art. 1 (deciding "that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2.").

repression in Kosovo;"[121] "[v]erifiable withdrawal . . . of all military police and paramilitary forces;"[122] "[d]eployment in Kosovo under United Nations auspices of effective international and security presences, acting as may be decided under Chapter VII of the Charter;" [123] "[e]stablishment of an interim administration for Kosovo;"[124] and "[a] political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo—taking full account of the Rambouillet accords."[125]

The accords, which were signed by the Kosovo leadership in Paris in March 1999, were at the time rejected by the FRY and Serbian authorities. [126] Under Chapter VIII "Amendment, Assessment, and Final Clauses," the accords provided that,

Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act.[127]

For its part, under resolution 1244, the Security Council regretted that there had not been full compliance with the requirements of its previous resolutions [128] and expressed its determination to resolve the grave humanitarian situation in Kosovo.[129] The Council recalled the humanitarian tragedy taking place in Kosovo,[130] and welcomed the FRY's acceptance of the principles for a political solution to the Kosovo crisis.[131] The Security Council also reaffirmed the Member States' commitment to the

121. *Id.* Annex 2, ¶ 1.
122. *Id.* ¶ 2.
123. *Id.* ¶ 3.
124. *Id.* ¶ 5.
125. *Id.* ¶ 8.
126. *See* Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, *in* Letter dated 4 June 1999 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, at 86, U.N. Doc. S/1999/648 (Jun. 7, 1999) [hereinafter Rambouillet Accords].
127. *Id.*
128. S.C. Res. 1244, *supra* note 69, pmbl.
129. *Id.*
130. *Id.*
131. *Id.*

sovereignty and territorial integrity of the FRY, as set out in the Helsinki Final Act and annex 2.[132]

Acting under Chapter VII,[133] the Security Council decided on the deployment in Kosovo of international civil and military presences, and welcomed the FRY's agreement to such presences.[134] The international civil presence was entrusted to provide "transitional administration while establishing and overseeing the development of provisional *democratic* self-governing institutions."[135] The Security Council further decided that the main responsibilities of the international civil presence would be (among other goals): promoting the establishment—pending a final settlement—of substantial autonomy and self-government in Kosovo;[136] organizing and overseeing the development of provisional institutions for democratic self-government pending a political settlement, including the holding of elections;[137] and facilitating a political process to determine Kosovo's future status, taking into account the Rambouillet accords.[138]

Ultimately, the Security Council's engagement in Kosovo demonstrated both its formal responsibility of maintaining peace and safety and its evident utility of discharging that responsibility for the benefit of those most affected and in need. Notwithstanding delays

132. *Id.* *See* Conference on Security and Co-operation in Europe Final Act, *available at* http://www.osce.org/mc/39501?download=true. The Helsinki Final Act is an accord of the Helsinki Conference on Security and Co-operation in Europe of August 1, 1975, which was signed by thirty-five states, including the United States and most European states. The accords were originally an attempt to improve relations between the former Communist bloc and the West, and cover a variety of themes relevant to international law, international cooperation, peace and security. These themes include, as per the listing order in the document: I. Sovereign equality, respect for the rights inherent in sovereignty; II. Refraining from the threat or use of force; III. Inviolability of frontiers; IV. Territorial integrity of States; V. Peaceful settlement of disputes; VI. Non-intervention in internal affairs; VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief; VIII. Equal rights and self-determination of peoples; IX. Co-operation among States; and X. Fulfilment in good faith of obligations under international law. *Id.* *See also* Kosovo Advisory Opinion, *supra* note 6, at 30 (the ICJ referred to the Helsinki Final Act in its *Kosovo* case in the context of discussing and delimiting the scope of the principle of territorial integrity).

133. S.C. Res. 1244, *supra* note 69, pmbl.

134. *Id.* art. 5.

135. *Id.* art. 10 (emphasis added).

136. *Id.* art. 11 (a).

137. *Id.* art. 11 (c).

138. *Id.* art. 11 (e).

and difficulties, the situation in Kosovo exposed a new face of the Security Council, that of temporary sovereign governance and settlement of sovereignty-related disputes.

The final major case study to be examined is the Security Council's involvement in Sudan. The question addressed and appraised in the following sub-section is: What were the Council's functions and role in Sudan and South Sudan, including the differences and similarities of the Council's activities in that case as compared to the cases of East Timor and Kosovo previously discussed?

C. Sudan and South Sudan

The first Security Council reaction to the civil war in Sudan[139] came with resolution 1547 of June 2004, which established—on the recommendation of the Secretary-General—a special political mission: the United Nations Advance Mission in Sudan ("UNAMIS"). [140] It further endorsed the Secretary-General's proposals for the staffing of the advance team and requested the Secretary-General to conclude all necessary agreements with the Government of Sudan.[141] The resolution also declared the readiness to consider the establishment of a UN peace support operation, which would support a Comprehensive Peace Agreement.[142]

In response to the escalating crisis in Darfur, the Security Council adopted resolution 1556 in July 2004.[143] It endorsed the deployment of an international monitoring team, led by the African Union ("AU"), including a protection force envisioned by and under the leadership of the AU, to the Darfur region.[144] It extended the special political mission previously set out in resolution 1547 for an additional three-month period, and requested the Secretary-General to assist the AU with planning and assessments for its monitoring mission in Darfur.[145]

---

139. For a background to the conflict, *see, e.g.*, FRANCIS M. DENG, WAR OF VISIONS: CONFLICT OF IDENTITIES IN THE SUDAN (1995); AMIR IDRIS, CONFLICT AND POLITICS OF IDENTITY IN SUDAN (2005).

140. S.C. Res. 1547, art. 1, U.N. Doc. S/RES/1547 (Jun. 11, 2004).

141. *Id.* art. 2.

142. *Id.* art. 3.

143. S.C. Res. 1556, U.N. Doc. S/RES/1556 (Jul. 30, 2004).

144. *Id.* arts. 2-3.

145. *Id.* arts. 15-16.

Resolution 1564, adopted in September 2004, expressed the Security Council's grave concern that the government of Sudan had not fully met its obligations noted in resolution 1556.[146] In resolution 1574 of November 2004, the Council declared its support for the efforts of the government of Sudan and the Sudan People's Liberation Movement/Army ("SPLM/A") to reach a Comprehensive Peace Agreement,[147] and reiterated its readiness to establish, upon the signature of such an Agreement, a United Nations peace support operation to support the implementation.[148]

In March 2005, the Security Council decided to extend the mandate of UNAMIS.[149] That same month, following the signature of the Comprehensive Peace Agreement between the government of Sudan and the SPLM/A, the Security Council decided to establish the UN Mission in Sudan ("UNMIS"). UNMIS would consist of military personnel and a civilian component.[150] By creating UNMIS, the Security Council noted the request of the parties to the Agreement to establish a peace support mission.[151] It decided that the tasks of the new mission would, *inter alia*, be to monitor and verify the implementation of the ceasefire agreement;[152] to assist in the establishment of the disarmament, demobilization, and reintegration program;[153] to promote understanding of the peace process;[154] and, most importantly perhaps, "to provide guidance and technical assistance to the parties to the Comprehensive Peace Agreement, in cooperation with other international actors, to support the preparations for and conduct of elections and referenda provided for by the . . . Agreement."[155]

In August 2006, the Security Council decided to expand the mandate of UNMIS to include its deployment to Darfur to further support the implementation of the Darfur Peace Agreement.[156]

146. S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sept. 18, 1994).

147. S.C. Res. 1574, art. 1, U.N. Doc. S/RES/1574 (Nov. 19, 1994).

148. *Id.* art. 6.

149. S.C. Res. 1585, U.N. Doc. S/RES/1585 (2005); S.C. Res. 1588, U.N. Doc. S/RES/1588 (Mar. 10, 2005).

150. S.C. Res. 1590, art. 1, U.N. Doc. S/RES/1590 (Mar. 24, 2005).

151. *Id.* pmbl.

152. *Id.* art. 4 (a)(i).

153. *Id.* art. 4 (a)(iv).

154. *Id.* art. 4 (a)(v).

155. *Id.* art. 4 (a)(x).

156. S.C. Res. 1706, art. 1, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

UNMIS was tasked, among other tasks, with assisting the parties in the preparations for and conduction of referendums provided for in the Darfur Peace Agreement.[157] Following the government of Sudan's opposition to a peacekeeping operation undertaken solely by the UN's UNMIS, the Security Council decided in July 2007, to authorize and mandate the establishment of a UN/AU Hybrid operation in Darfur ("UNAMID").[158]

The referendum to determine the status of Southern Sudan, as foreseen in the Comprehensive Peace Agreement, was held in January 2011, with 98.83 percent of participants voting for independence.[159] Following the referendum, the Security Council decided to extend the mandate of UNMIS until July 9, 2011,[160] and announced its intention to establish a successor mission to UNMIS.[161] On July 8, 2011, the Security Council welcomed the establishment of the Republic of South Sudan upon its proclamation as an independent state.[162] In determining that the situation in South Sudan continued to constitute a threat to international peace and security, the Council, acting under Chapter VII,[163] decided to establish a UN Mission in the Republic of South Sudan ("UNMISS").[164] It mandated UNMISS to consolidate peace and security, in order to help establish the conditions for development "with a view to strengthening the capacity of the Government of the Republic of South Sudan to govern effectively and *democratically*."[165]

Some of the more specific tasks refer to providing good offices, advice, and support to the government of South Sudan for the political transition, governance, and establishment of State authority;[166] promoting popular participation in political processes;[167]

---

157. *Id.* art. 8 (g).

158. S.C. Res. 1769, art. 1, U.N. Doc. S/RES/1769 (Jul. 31, 2007).

159. *See Results for the Referendum of Southern Sudan*, SOUTHERN SUDAN REFERENDUM COMMISSION, http://southernsudan2011.com (last visited May 22, 2013).

160. S.C. Res. 1978, art. 1, U.N. Doc. S/RES/1978 (Apr. 27, 2011).

161. *Id.* art. 2.

162. S.C. Res. 1996, pmbl., U.N. Doc. S/RES/1996 (Jul. 8, 2011).

163. *Id.*

164. *Id.* art. 1.

165. *Id.* art. 3 (emphasis added).

166. *Id.* art. 3 (a)(i).

167. *Id.* art. 3 (a)(ii).

supporting the government in exercising its responsibilities for conflict prevention, mitigation, and resolution;[168] supporting the government, in accordance with the principles of national ownership, in developing its capacity to provide security; establishing rule of law; and strengthening the justice and security sectors.[169]

While these activities are expressed in terms that are more concrete than those to be found in the Security Council's resolutions on East Timor and Kosovo, the fundamental aim of establishing a public order that promoted and supports democratic governance and development remains the same. These activities also exemplify the variety of functions that may be authorized by the Security Council when discharging its primary function of restoring and maintaining international peace and security.

D. State-Building Practice Concluding Remarks

To properly assess the UN's role in the process of State-building, it is critical to first observe the basic legal issue involved: the establishment of UN territorial administrations in East Timor and Kosovo under the Security Council's Chapter VII of the Charter. This method is best interpreted as a post-colonial form of the organization's previous trusteeship practice, or of the League of Nations' system of mandates. The advancement of this form of trusteeship practice is an apparent testimony to the continuing changes and evolving application of the Chapter VII powers to cases perhaps unimagined and unexpected at the time the Security Council was founded.

While there appears to be wide academic consensus that the Security Council, acting under Chapter VII, is fully empowered to authorize such governance missions, the discussion in this section also reveals that both in the case of UN Mission in East Timor and in Kosovo, the relevant parties' consent preceded the Council's authorization of these missions.[170] Thus, in the case of East Timor, there were the agreements between Indonesia and Portugal, and between the UN and the governments of Indonesia and Portugal.,

168. *Id.* art. 3 (b).

169. *Id.* art. 3 (c).

170. *See, e.g.*, Matheson, *supra* note 64, at 83 (noting that "[a]part from the consent given by Indonesia and arguably by the FRY, UN action was based on the authority of the Security Council under Chapter VII of the Charter.").

With regard to the deployment of UN mission in Kosovo, there was acceptance by the FRY of the political principles in resolution 1224.

The Security Council's consistent adoption of the notions of "democracy" or "democratic" governance is a novel phenomenon in the context of both the territorial governance missions (i.e., Kosovo and East Timor) and peace-building ones (i.e., South Sudan) as a defining mode of the institutional settings to be established in those territories.[171] Given the aims of this Article, it is significant to observe the Security Council's crucial role in providing assistance in organizing popular referendums on the international status of specific territories, in addition to other critical tasks such as the electoral processes and overall support for institution-building.

Both popular consultations (in East Timor and South Sudan) were, however, organized pursuant to the mutual agreements of the parties involved, as opposed to any authorization by the Security Council. No such provision existed in the resolution concerning Kosovo, which unlike the referendums on East Timor and South Sudan, prescribed a UN-facilitated political process that was to take into account the Rambouillet accords as a mechanism for determining Kosovo's future status. The relevant status provision in the accords was the clause that provided for a final settlement for Kosovo to be determined on the basis of the will of the people, among a number of other rather vague and general factors.[172]

This indirect reference to the will of the people in resolution 1244 was expressly referred to by the Constitutional Framework for Self-Government in Kosovo. The UN Secretary-General's Special Representative adopted the Constitutional Framework pursuant to his authority under resolution 1244.[173] The Constitutional Framework determined that:

Within the limits defined by [resolution] 1244 (1999), responsibilities will be transferred to Provisional Institutions of Self-

171. *See* S.C. Res. 1272, *supra* note 73, art. 8; S.C. Res. 1244, *supra* note 69, art. 10, art, 11; S.C. Res. 1996, *supra* note 162, art. 3. *See also* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

172. *See* Rambouillet Accords, *supra* note 126, ch. 8, art. 3.

173. *See* Regulation No. 2011/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, UNITED NATIONS INTERIM ADMINISTRATION MISSION IN KOSOVO, *available at* http://www.assembly-kosova.org/common/docs/FrameworkPocket_ENG_Dec2002.pdf.

Government which shall work constructively towards ensuring conditions for a peaceful and normal life for all inhabitants of Kosovo, with a view to facilitating the determination of Kosovo's future status through a process at an appropriate future stage *which shall, in accordance with [resolution] 1244* (1999), *take full account of* all relevant factors including *the will of the people*.[174]

Unlike the pertinent agreements on East Timor and South Sudan, the Rambouillet accords were not signed by the FRY or Serbian delegations. Yet, the Rambouillet accords were to be taken into "full account," according to the political principles that were accepted by the FRY government and the Assembly of Serbia on June 3, 1999, and thereafter incorporated in resolution 1244 as annex 2.[175] In this sense, one could advance the proposition that there was at least "an imperfect formal consent" to the will of the people.

As a next step, the key question this Article seeks to explore is whether the Security Council, without clear or explicit consent of the affected UN Member State, is empowered to take decisions that prescribe either an act or a process that directly or indirectly leads to, or culminates with, the establishment of a new body politic and, thus, effectively dismembers an independent and sovereign State.

IV. THE SECURITY COUNCIL AND TERRITORIAL INTEGRITY

The question of the relationship between the Security Council and territorial integrity came up recently in the Advisory Opinion on Kosovo's declaration of independence. The way it presented itself made it go rather unnoticed. But, there was at least one express mentioning by Judge Sepúlveda-Amor in his separate opinion in the *Kosovo* case.[176] While Judge Sepúlveda-Amor concurred with the Court's rationale that there were many legal questions that required the Court's attention and guidance, he advocated for a broader perspective by the Court on matters before it.[177] It was in this

174. *Id.* pmbl. (emphasis added).

175. *See* S.C. Res. 1244, *supra* note 69, annex 2; and Letter dated 7 June 1999 from the Permanent Representative of Germany to the United Nations Addressed to the President of the Security Council, *supra* note 119.

176. *See* Kosovo Advisory Opinion, Separate Opinion of Judge Sepúlveda-Amor 2010 I.C.J. 491 (July 22), *available at* http://www.icj-cij.org/docket/files/141/15997.pdf.

177. *Id.* at 498, ¶ 33.

connection that the following relevant part of his statement was articulated:

> The scope of the right to self-determination, the question of "remedial secession," *the extent of the powers of the Security Council in relation to the principle of territorial integrity*, the continuation or derogation of an international civil and military administration established under Chapter VII of the Charter, the relationship between UNMIK and the Provisional Institutions of Self-Government and the progressive diminution of UNMIK's authority and responsibilities and, finally, the effect of the recognition or non-recognition of a State in the present case are all matters which should have been considered by the Court, providing an opinion in the exercise of its advisory functions.[178]

A. Possible Interpretations of the Council's Power to Determine Statehood

The Court itself has not offered any explicit correlation analysis between the Council and territorial integrity. However, the Court addressed substantive matters that were at the heart of this relationship. A number of statements by both the Court and individual judges are sufficiently instructive to support that claim. In the relevant resolution 1244, the Court noted that the interpretation and application of a decision of the Council or of any one of the political organs of the UN is, in the first place, the responsibility of the organ that has taken the decision.[179] But, it noted that the Court—being the principal judicial organ of the organization—has been nonetheless required to consider the interpretation and legal effects of such decisions.[180] This being the case, the Court considered the role of the Security Council in the determination of Kosovo's final status. Relevant paragraph 114 reads:

> Under the terms of resolution 1244 (1999) *the Security Council did not reserve for itself the final determination* of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.
>
> Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two

178. *Id.* at 499, ¶ 35 (emphasis added).
179. Kosovo Advisory Opinion, *supra* note 6, at 18, ¶ 46.
180. *Id.*

> instruments operate on a different level; unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo.[181]

Several possible avenues of interpretation could be pursued to discern the ordinary meaning of this paragraph. First, the wording "did not reserve for itself" would appear to imply that the Court made a determination of fact, and that the Council did not choose to reserve a particular action for itself. In turn, this line of thinking would appear to suggest that, had the Council reserved its power to determine the final status of Kosovo, it would have been within the ambit of its powers to do so. A related interpretation would be that the key phrase "did not reserve for itself" suggests some understanding by Court that this determination falls within the wide margin of discretion the Security Council enjoys under its Chapter VII powers. Therefore, the Security Council could legally make such a determination—not chosen this time—and, depending on the circumstances, it could also mean application of this discretion (i.e., the determination of the final status for a territory). An argument could be made that the Security Council has not reserved for itself the making of a particular determination, because it has not been empowered to do so. However, the "did not reserve" language is clearly distinguishable, different, and unrelated to any of the notions that require or imply prohibition or absence of authority.

A second mode of interpretation could be made using the broader line of reasoning followed by the Court. Although the Security Council did not reserve for itself the determination of Kosovo's status, the Court agreed that it had prescribed a political process for Kosovo's future status that was left open[182] and does not require the consent of both parties, noting the "*desired* negotiated solution."[183] In turn, it implied in essence that the Security Council

181. *Id.* at 40, ¶ 114 (emphasis added).

182. *Id.* at 37, ¶ 104 ("Although, at the time of the adoption of the resolution, it was expected that the final status of Kosovo would flow from, and be developed within, the framework set up by the resolution, the specific contours, let alone the outcome, of the final status process were left open by Security Council Resolution 1244 (1999). Accordingly, its paragraph 11, especially in its subparagraphs *(d)*, *(e)* and *(f)*, deals with final status issues only in so far as it is made part of UNMIK's responsibilities to '[f]acilitat[e] a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords' and '[i]n a final stage, [to oversee] the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement'.").

183. *Id.* at 36, ¶ 100 (emphasis added).

can impose an outcome that does not guarantee or require the preservation of State sovereignty and territorial integrity. The Court itself reinforced the accuracy of this conclusion when it illustrated the difference between resolution 1244 and other decisions of the Council requiring the preservation of State sovereignty. As the Court noted:

> [The] contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution. For example, although the factual circumstances differed from the situation in Kosovo, only 19 days after the adoption of resolution 1244 (1999), the Security Council, in its resolution 1251 of 29 June 1999, reaffirmed its position that a "Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded." . . . The Security Council thus set out the specific conditions relating to the permanent status of Cyprus.[184]

Individual opinions of both those judges voting with and against the majority's opinion could shed further light on this mode of interpretation. For instance, the then Vice-President Tomka, not joining the majority, wrote in a declaration, "[t]he Ahtisaari Settlement proposal [recommending independence for Kosovo] was not endorsed by the Security Council, the only United Nations organ competent to do it."[185] In his dissenting opinion, Judge Bennouna concluded, "Kosovo's final status must be approved by the Security Council."[186] Similarly, Judge Skotnikov in his dissent noted that the Council has refrained itself from making a determination as to whether the declaration of independence is in accordance with resolution 1244, "although it could have done so by adopting a new resolution or by authorizing a statement from the President of the Council."[187] Judge Cançado Trindade, in his separate opinion, more

---

184. *Id.* at 40, ¶ 114.

185. *Id.* at 9, ¶ 31 (declaration of Vice-President Tomka).

186. *See* Kosovo Advisory Opinion, Dissenting Opinion of Judge Bennouna 2010 I.C.J. 500, 503, ¶ 16 (July 22), *available at* http://www.icj-cij.org/docket/files/141/15999.pdf.

187. Kosovo Advisory Opinion, Dissenting Opinion of Judge Skotnikov 2010 I.C.J. 515, 516, ¶ 4 (July 22), *available at* http://www.icj-cij.org/docket/files/141/16001.pdf (noting in this context that "Security Council

along the lines of the Court's opinion, also stated "[t]hat U.N. Security Council resolution 1244 (1999) did not determine Kosovo's end-status, nor did it prevent or impede the declaration of independence of 17 February 2008 by Kosovo's Assembly to take place."[188]

None of the judges thus questioned the Security Council's authority, had it decided to endorse the independence of Kosovo, or otherwise determine its final or future status. Indeed, far from questioning its authority or judging any possible invalidity in the measure adopted, the position expressed by most individual judges is significantly more direct and conclusive, arguing that the settlement—notwithstanding its content—must have been decided or endorsed by the Security Council. What appears to be the clear common denominator is that the Court never implies that the Security Council would not have the power to take measures that would determine the international status of a territory, including the dismemberment of an existing independent and sovereign State.

The case here is one where the Security Council, acting under Chapter VII and, as an exceptional measure,[189] exercised those empowerments dictated by the "grave humanitarian tragedy."[190] Thus, while aiming at re-establishing "a basic public order in an area beset by crisis,"[191] the Security Council established an exceptional legal régime that superseded and suspended temporarily the authority of the sovereign State.[192] And, as a mechanism for the final settlement, the Security Council prescribed a political process that contemplated the will of the people of the territory, short of any

resolutions are political decisions. Therefore, determining the accordance of a certain development, such as the issuance of the UDI [unilateral declaration of independence] in the present case, with a Security Council resolution is largely political. This means that even if a determination made by the Court were correct in the purely legal sense (which it is not in the present case), it may still not be the right determination from the political perspective of the Security Council. When the Court makes a determination as to the compatibility of the UDI with Resolution 1244 — a determination central to the régime established for Kosovo by the Security Council — without a request from the Council, it substitutes itself for the Security Council."). *Id.* at 3, ¶ 9.

188. Separate Opinion of Judge Cançado Trindade, *supra* note 76, at 614, ¶ 230.

189. Kosovo Advisory Opinion, *supra* note 6, at 35, ¶ 97.

190. *Id.* at 21, ¶ 58.

191. *Id.* at 36, ¶ 98.

192. *Id.* at 36.

requirement to preserve the sovereign's territorial integrity or acquire its consent on the final settlement.

It follows from this discussion that the ICJ does not question the authority of the Security Council to reserve for itself the power to decide over the international status of a territory. The content of the Security Council's decision would appear to indicate that it may, without the express consent of the parent State, authorize a process that essentially leads to the establishment of a new body politic and, thus, effectively dismembers an independent and sovereign State in situations beset by grave humanitarian crisis. It is the exceptional nature of events that would appear to have conditioned and determined the Security Council's decision to impose the chosen outcome and, similarly, the Court's understanding of, or concurrence with it.

B. Overcoming the Possible Limitations of Council's Power

This background necessitates a further inquiry into the state of law that applies to the powers of the Security Council and their relationship with State sovereignty and territorial integrity. Article 2(7) of the UN Charter is the relevant provision:

> Nothing contained in the present Charter shall authorize the United Nations to intervene *in matters which are essentially within the domestic jurisdiction of any* state or shall require the Members to submit such matters to settlement under the present Charter; but *this principle shall not prejudice the application of enforcement measures under Chapter VII*.[193]

Two important situations can be distinguished, where the second may override the first. The first is that the organization or its authorized organs cannot intervene in matters that essentially fall within sovereign jurisdiction. Second, this principle is not applicable if the Security Council adopts enforcement measures under Chapter VII.

First, with regard to domestic jurisdiction, there appears to exist an undisputed and well-settled convention that such grave, insulting actions to human dignity as the commission of genocide, ethnic cleansing, war crimes, and crimes against humanity are clearly excluded from matters which are essentially within the domains of

193. U.N. Charter, *supra* note 17, art. 2, ¶ 7.

sovereign jurisdiction. The General Assembly Heads of State and Government met and gave an authoritative answer in the 2005 World Summit Outcome, affirming the collective international responsibility "to protect . . . populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[194] The world's leaders further acknowledged the Security Council's right to act should national authorities be manifestly failing to protect their populations and peaceful means prove inadequate.[195]

Events, occurring within the boundaries of a State, which may pose a threat to the peace, thus forming the basis for the invocation of Chapter VII powers, are certainly not limited to the most heinous crimes just referred to. Over time, they have included and may involve "cross-border violence, substantial refugee flows, serious regional instability, or appreciable harm to the nationals of another state."[196] In its *Tadić* judgment, the ICTY's Appeals Chamber, had the occasion to deal with the Security Council's status in the context of situations of civil war or internal conflict.[197] The Tribunal noted that "the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a 'threat to the peace' and dealt with under Chapter VII."[198]

In the second situation, as noted above, the principle of non-intervention in matters essential to domestic jurisdiction does not prejudice the application of enforcement measures adopted by the Council, acting under Chapter VII.[199] This scenario makes it clear

194. *See* G.A. Res. 60/1, U.N. Doc. A/RES/60/1, at art. 138 (Oct. 24, 2005) (2005 World Summit Outcome).

195. *Id.* art. 139.

196. Matheson, *supra* note 64, at 83 (noting that these situations "could lawfully form the basis for a determination by the Council under Chapter VII. The Council has the right to judge that such effects may flow from a severe humanitarian catastrophe of the sort presented by the situations in Kosovo and East Timor," and that "the Council has shown a willingness during the past decade to act on the basis of a robust and realistic appreciation of what might constitute a threat to the peace. It has used its Chapter VII authority when the conflict or humanitarian crisis in question might have been characterized by some as essentially internal. The Charter vests this judgment in the Council and . . . the Council alone, guided by a good faith appreciation of its role and responsibilities under the Charter.").

197. *Tadić*, 35 I.L.M. at ¶ 30.

198. *Id.*

199. *See, e.g.*, Sir Michael Wood, *The UN Security Council and International Law: The Security Council's Powers and their Limits*, *supra* note 55, at 9 (stating that "Article 2, paragraph 7, could impose limits on the Security Council's powers except where it is taking enforcement measures under Chapter VII. But the current

that sovereign jurisdiction does not bar the Council's action when States fail to protect their populations or act in ways that demand international protection.[200]

C. Limitations on Territorial Integrity

Another international legal instrument merits due consideration. The ICJ declared that the 1970 Declaration on Principles of International concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[201] forms a part of customary international law.[202] The relationship between the Security Council and territorial integrity is addressed in the following way in the Friendly Relations Declaration:

> The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the

---

interpretation of this provision, both by the General Assembly and the Council, and the expansion of international law into fields previously thought to be within the reserved domain (and not only in the field of human rights) means that its importance as a restriction is much reduced.").

200. *Id.*

201. *See* G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

202. *See* Kosovo Advisory Opinion, at 6, ¶ 80. *See also* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. 14, at 101-103, ¶¶ 191-193 (June 27). *See* Pius Okoronkwo, *Self-Determination and the Legality of Biafra's Secession under International Law*, 25 LOY. L.A. INT'L COMP. L. REV. 63, 85 (2002) ("Although the Declaration is a resolution of the U.N. General Assembly, the Declaration has binding legal force. First, the Declaration is an authoritative interpretation of the U.N. Charter; it was not intended to set up new norms, only to elaborate on the meaning of the existing U.N. Charter norms. The Declaration has been 'described as the most important single statement representing what the members of the United Nations agree to be the law of the U.N. Charter on the seven principles with which it deals.' Second, the Declaration is a product of 'consensus in the Special Committee' that drafted it, and the U.N. General Assembly unanimously adopted it."); Chinedu Reginald Ezetah, *International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma*, 19 LOY. L.A. INT'L COMP. L. REV. 811, 834 (1997) ("The juridical status of the Declaration on Friendly Relations is often questioned because Declarations of the General Assembly are non-binding. The General Assembly, however, adopted the Declaration without any negative votes; thus, the Declaration constitutes an *opinio juris* sufficient for the establishment of a customary rule of international law."): Kirgis, Jr., *supra* note 6, at 306 (the Declaration "[p]urport[s] to, and probably do, reflect an *opinio juris*. In the human rights field, a strong showing of *opinio juris* may overcome a weak demonstration of state practice to establish a customary rule.").

> object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. *Nothing in the foregoing shall be construed as affecting*:
>
> *(a) Provisions of the Charter or any international agreement prior to the Charter regime and valid under international law; or*
>
> *(b) The powers of the Security Council under the Charter.*[203]

The so-called "safeguard clause" is another pertinent provision of the Declaration that requires examination, as it describes the nature of relations between the often conflicting principles of States' territorial integrity and self-determination of peoples. It reads:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[204]

Thus, it may not be difficult to ascertain from the applicable legal provisions that international law does not guarantee territorial integrity in perpetuity, nor does it protect it from measures adopted by the Security Council under its Chapter VII powers. In fact, two conclusions can be drawn in this connection: first, international law leaves the powers of the Security Council under the Charter unaffected by the territorial integrity of a State; and second, international law does not guarantee territorial integrity in cases of States not conducting themselves in compliance with the principle of equal rights and self-determination.[205] Moreover, the ICJ clarified in the *Kosovo* case that the principle of territorial integrity, "an important part of the international legal order,"[206] operates among States.[207]

---

203. Friendly Relations Declaration, *supra* note 201 (emphasis added).

204. *Id.*

205. *See, e.g.*, LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 92-94 (1978) (stressing that the Declaration recognizes some right to secede); CASSESE, *supra* note 10, at 120 (affirming that the Declaration permits the right to secession in cases when internal self-determination "is absolutely beyond reach.").

206. *See* Kosovo Advisory Opinion, *supra* note 6, ¶ 80.

207. *See id.* (confirming that "[t]he scope of the principle of territorial integrity is confined to the sphere of relations between States.").

Overall, the analysis in this Article reveals that applicable international law is clear in that it contains no express limitations or legal bar to the Chapter VII enforcement actions of the Security Council in relation to territorial integrity. The practice observed, in particular with regard to resolution 1244, as applied and interpreted by the ICJ, furnishes ample and credible evidence that these powers, when exercised in the face of grave humanitarian situations, could extend to as far as the ultimate creation of a new, or modification of an existing, independent, and sovereign State.

V. CONCLUSION

This Article explored a set of critical notions that define and dominate the discourse on, and operation of, the Security Council in arenas characterized by crisis and conflict. The powers of the Security Council, their scope and shape, have been predominantly examined through the lens of the Security Council's contemporaneous practice as that practice has emerged, developed, and evolved in cases of State-building and State-formation. The case studies of East Timor, Kosovo, Sudan, and South Sudan have been the terrain of investigation.

This Article sought to originally acquire an understanding of the essential relationship between the Security Council and territorial integrity. And thus, it conditioned an analysis of the intertwined concepts, such as the scope of the Security Council's powers, possible limitations and judicial review of the Security Council's decision-making.

The Security Council was in a general state of paralysis imposed by the polarized world of the Cold War. Because of this, the Security Council's revival after the Cold War exposed best the flexible confines of its powers. In turn, this caused confusion and debate about what academia, and later, States, described as "legislative functions" or "international legislation" adopted by the Security Council.

Indeed, as observed, the Security Council was exercising its own broad powers and great margin of discretion accorded to it by the UN Charter. Fearing abuse from such wide authority, the proper scope of this authority and its possible control became as central a tenet as its use to maintain the overarching goal of universal peace and safety. Owing partially to the resulting jurisprudence, a more consolidated, if not settled, vision appears to have emerged: the Security Council is

not unbound by law (*legibus solutes)*. It is at least bound to comply with the rather broad and, in essence, little restrictive Purposes and Principles of the United Nations; and, given that their violation would contravene the very spirit and aims of the organization, also by the peremptory norms of general international law. Short of invalidation, its actions have been subjected not only to the application and interpretation by the World Court, but also to some form of judicial review.

Particular attention was devoted to the principles of content of State sovereignty and/or territorial integrity, seeking to identify what falls "in" and what "out," an inquiry that reveals an ever reduced centrality of the territorial communities in the face of Chapter VII measures of the Security Council. The present state of international law would appear to contain no legal bar to the Chapter VII enforcement measures of the Council, as they relate to State sovereignty and territorial integrity. Those powers, thus, remain intact. The analysis of these powers' extent, although present in a number of relevant contexts, did not reach the point of testing them against the demand or need for territorial change.

The context of a possible use of the Chapter VII powers to institute changes or modifications to a sovereign State's territorial integrity was, therefore, central to the analysis of the Article. The contextual inquiry was formed by those cases that have recently achieved or declared their statehood with varying degrees of the Security Council's involvement. The available practice, as evidenced through an authoritative opinion of the International Court of Justice, shaped an answer that acknowledges the legal plausibility of an enforcement action by the Security Council that, in exceptional situations of humanitarian tragedies, could result in change or modification of a territorial community. To recall the late Czech leader Václav Havel, there is thus "[e]very indication that the glory of the nation-state as the culmination of every national community's history, and its highest earthly value—the only one, in fact, in the name of which it is permissible to kill, or for which people have been expected to die—has already passed its peak."[208]

208. Václav Havel, *Kosovo and the End of the Nation-State*, N.Y. REV. OF BOOKS, June 10, 1999, *available at* http://www.nybooks.com/articles/archives/1999/jun/10/kosovo-and-the-end-of-the-nation-state/?pagination=false.