

ARTICLE

The U.N. Security Council's Duty to Decide

Anna Spain*

Abstract

When faced with a global crisis within the scope of its mandate, the United Nations Security Council (UNSC or Council) has no obligation to decide whether or not to take action. This Article argues that it should. The UNSC is the only governing body with the legal authority to authorize binding measures necessary to restore peace and security, yet neither the United Nations Charter nor the UNSC's own rules clarify the extent of its obligations. Unlike courts, the UNSC lacks a procedural rule establishing that it has a duty to decide. Unlike the United States Congress, which accepts its practical duty to declare war, the UNSC lacks consensus about when it must take up a matter. As a result, UNSC members can, and frequently do, defer making decisions in politically difficult cases. The costs of this ambiguity to those who depend on the UNSC for their security are high, making debate about UNSC reform critical and necessary.

In contrast to conventional scholarship addressing UNSC reform, this Article focuses on improving the UNSC's decision-making process through the adoption of new procedural measures. It presents a novel approach to thinking about UNSC reform by translating wisdom from the realm of legal process theory to the political, quasi-judicial UNSC. The central argument

*Anna Spain, Associate Professor at the University of Colorado Law School. The author thanks Curtis Bradley, Laura Dickinson, Jean Galbraith, Mary Ellen O'Connell, David Pozen, Kal Raustiala, Pierre Schlag, Lawrence Susskind, Edward Swaine, Bart Szewczyk and Annecoos Wiersema; participants at the 106th American Society of International Law Annual Meeting "New Voices" panel, the Wharton-CU International Law Workshop, and the 2012 Junior International Law Scholars Association Workshop; and the faculties of Washington & Lee University Law School, University of Colorado Law School, University of Seattle Law School, and University of Denver Law School for their helpful comments on earlier drafts. The author is also grateful to the Colorado European Union Center for Excellence for providing research funding for this project. Finally, the author owes thanks to Jacob Marx for his excellent research assistance.

is that the Council itself should adopt three procedural duties aimed at improving its decision-making process. First, the duty to decide would require the Council to take up decisions about whether or not it will take action in crises under its jurisdiction. Second, the duty to disclose would require the Council, when it takes no decision in a particular situation, to publicly disclose its reasoning for not doing so. Third, the duty to consult would obligate the Council to take reasonable measures to consult those nations, and the people therein, most affected by decisions falling under its Chapter VII authority regarding sanctions, intervention, and the use of force. After describing these duties, this Article draws upon qualitative data from within the U.N. itself to justify why this reform proposal, unlike many others, is viable. It also draws upon insights from the disciplines of legal process theory, social psychology, and negotiation to give explanatory power to why such reform matters will prove effective. Making these changes will enhance the UNSC's decision processes in ways that will further its legitimacy and relevance in today's world of multi-varied and evolving forms of conflict.

“There must be, not a balance of power, but a community of power; not organized rivalries, but an organized common peace.”

-Woodrow Wilson¹

I. Introduction

Calls for reform at the United Nations Security Council (UNSC or Council) abound. During the recent crisis in Syria, for example, the Council has been publicly criticized for its inaction, rekindling the debate over whether and how the Council should fulfill its mission to “promote the establishment and maintenance of international peace and security.”²

¹ President Woodrow Wilson, Presidential Address to the Senate, Congressional Serial Set Vol. No. 7125, Session Vol. No. 12 64th Congress, 2nd Session, S.Doc. 685, (Jan. 22, 1917).

² U.N. Charter art. 26 (“In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.”); *see also, e.g., France Recognizes Syrian Opposition Coalition*, AL JAZEERA, Nov. 14, 2012, <http://www.aljazeera.com/news/middleeast/2012/11/20121113174633204988.html> (quoting British Foreign Secretary William Hague as expressing frustration that “our

Leaders within the United Nations (U.N.) have also voiced concerns regarding the role and composition of the UNSC. In 2004, then-U.N. Secretary-General Kofi Annan issued a report calling for widespread reform of the UNSC, pushing it to move from a Council that serves the interests of the victors of World War II (WWII) to one that serves the global collective interests of nations and people alike.³ His predecessor, U.N. Secretary-General Boutros Boutros-Ghali, made a similar plea in 1995: “We are, indeed, well aware, today, that as a result of the sudden acceleration in the pace of change, a certain number of principles which, in the past, were the foundation for international society have become outdated or obsolete.”⁴ Given that the last significant reform to the UNSC occurred in 1963, when the United Nations General Assembly (UNGA) increased the membership of the Council from 11 to 15, there is a growing consensus at the U.N. that reform is long overdue.⁵

In recent years, scholars have proposed numerous reform measures.⁶ Most of these are substantive in nature, addressing, for example, problems

efforts . . . to encourage the UNSC to take on its responsibilities have been vetoed by Russia and China”); David Kaye, *Responsibility to Object*, FOREIGN POLICY, Jan. 10, 2013 (critiquing the UNSC’s silence on taking action in Syria to end the armed conflict there and proposing several solutions); Michael Bröning, *Time to Back the Syrian Opposition*, FOREIGN AFFAIRS, Dec. 17, 2012 (critiquing inaction and arguing that Western leaders should intervene by supplying the opposition with arms).

³ Report of the U.N. Secretary-General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 252, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*].

⁴ U.N. Secretary-General Boutros Boutros-Ghali, Statement delivered to the Congress on Public International Law held at the United Nations, UN Press Release SG/SM/5583 & L/2710 at 2 (March 17, 1995).

⁵ G.A. Res. 1991 (XVIII), ¶ 2, U.N. Doc. A/RES/1991 (Dec. 17, 1963); see also Kara C. McDonald & Stewart M. Patrick, *UN Security Council Enlargement and U.S. Interests*, COUNCIL SPECIAL REPORT, NO. 59, Dec. 2010. See *infra* Part IV.A for statements by the UNSC and UNGA members about the need for UNSC reform.

⁶ See, e.g., Bart Szewczyk, *Variable Multipolarity and UN Security Council Reform*, 53 HARV. INT’L L.J. 450 (2012); Kenneth Anderson, *United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of the Nations*, 10 CHI.J. INT’L L. 55 (2009); BRUCE CRONIN & IAN HURD, *THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY* (2008); Vaughan Lowe, Adam Robert, Jennifer Walsh & Dominik Zaum, *Introduction to The UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945* 1, 32–34 (Vaughan Lowe, Adam Roberts, Jennifer Walsh & Dominik Zaum eds., 2008); MICHAEL J. MATHESON, *COUNCIL UNBOUND: THE GROWTH OF UN DECISION-MAKING ON CONFLICT AND POSTCONFLICT ISSUES AFTER THE COLD WAR* (2006); Steven

with the Council's membership structure or the use of the veto power. But as a practical matter, many of these proposals are politically unrealistic.⁷ Some call for amending the U.N. Charter in order to implement reforms—which would require two-thirds majority approval by the 193 nations that comprise the UNGA⁸—while others fail to address the question of implementation altogether. Where nearly all of these proposals fall short is in their failure to reconcile the promise of theory with the exigencies of real world practice.

This Article takes a different approach. First, it provides a legal process map for understanding how the UNSC can reform its own decision-making process in order to alleviate some of the substantive problems identified in previous scholarship. Focusing on process is necessary because fixing substantive problems alone will not, on its own, provide a remedy if the UNSC is still unable to engage in effective decision-making. Second, this Article provides a framework for implementing UNSC reform from within. It takes the view that only the Council itself, with input from other U.N.

Wheatley, *The Security Council, Democratic Legitimacy and Regime Change in Iraq*, 17 EUR. J. INT'L L. 531 (2006); Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT'L L. 632 (2005); Emilio J. Cardenas, *The United Nations Security Council's Quest for Effectiveness*, 25 MICH. J. INT'L L. 1341 (2004); Michael J. Glennon, *The UN Security Council in a Unipolar World*, 44 VA. J. INT'L L. 91 (2003); BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE (1998); 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); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993); David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993); Thomas M. Franck, *United Nations Based Prospects for a New Global Order*, 22 N.Y.U. J. INT'L L. & POL. 601 (1990). For early scholarship critiquing the UNSC after its formation see Leo Gross, *The Double-Veto and the Four-Power Statement on Voting in the Security Council*, 67 HARV. L. REV. 251 (1953); Leo Gross, *Voting in the Security Council: Abstention From Voting and Absence From Meetings*, 60 YALE L.J. 209 (1951); Hans Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59 HARV. L. REV. 1087 (1946).

⁷ See e.g., REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE COLD WAR 111, 117 (Michael Bothe, Mary Ellen O'Connell & Natalino Ronzitti eds., 2005) [hereinafter REDEFINING SOVEREIGNTY] ("There have been many academic proposals to abolish (or appreciably reduce) the veto power. Such proposals remain an academic—and entirely moot—exercise. There is no indication whatever that the five permanent members might be willing to consider divesting themselves of the veto power."); C. Eduardo Vargas Toro, *UN Security Council Reform: Unrealistic Proposals and Viable Reform Options*, AM. DIPLOMACY (2008), available at

<http://www.globalpolicy.org/component/content/article/200/41138.html>.

⁸ U.N. Charter art. 108 & art. 109.

members and outside experts, can adequately assess and design UNSC reform. In other words, if UNSC reform is to have a realistic chance of success, then the UNSC must lead the charge. Accordingly, this Article looks to address the matter of UNSC reform through the lens of process, not of substance. It presents a model for how the Council could adopt such changes from within, while making the case for why the Council should do so.

Taking a process view, this Article identifies a procedural gap in the UNSC's decision-making practices that results in dysfunction: namely, the absence of clear rules for when and under what conditions the Council is obligated to make decisions. By contrast, the rules for courts are clear. Following the principles of procedural justice and due process, courts and judicial bodies around the world recognize that they have a duty to decide cases rightly before them.⁹ This duty to decide prevents courts from treating cases arbitrarily or causing unwarranted delay.¹⁰

⁹ See, e.g., *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("It is equally true, that [the Court] must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide, if it be brought before us."); *Missouri v. Illinois*, 200 U.S. 496, 519–20 (1906) (holding that a federal court's duty to decide a case properly within its jurisdiction, even if there is no applicable rule of decision supplied by general or state law, probably provides the strongest justification for recognizing federal common law); *Nuclear Tests Case (N.Z. v. Fr.)*, 1974 I.C.J. 454–55 (Dec. 20) (dissenting opinion of Judge Berwick) ("In my opinion, there is no discretion in this court to refuse to decide a dispute submitted to it which it has jurisdiction to decide. Article 38 of its statute seems to lay upon this court a duty to decide."); Office of the High Commissioner of Human Rights in Cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, United Nations, U.N. Doc. HR/P/PT/9, 123 (Dec. 1, 2003) (stating that individual judges have the right, and simultaneously the duty, to decide cases before them following the law); UN Special Rapporteur on the study on the Independence of the Judiciary, *Draft Universal Declaration on the Independence of Justice (The "Singhvi Declaration") Principle 2* U.N. Doc. E/CN.4/Sub.2/1985/18/Add.5/Rev.1 (1989) ("Judges individually shall be free, and it shall be their duty, to decide matters before them impartially.").

¹⁰ Despite the strong rhetoric in *Cohens*, 19 U.S. at 494, American federal courts have developed two doctrines—*forum non conveniens* and abstention—that permit courts not to decide particular cases. See, e.g., *Gilbert v. California*, 388 U.S. 263 (1967); *Younger v. Harris*, 401 U.S. 37 (1971). These doctrines are important but exceptional, serving to clarify the general rule that federal courts have a duty to decide cases properly before them. See *Zwicker v. Koota*, 389 U.S. 241, 254 (1967) ("We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective

The UNSC—the only governing body with the legal authority to make binding decisions upon nations regarding matters of international peace and security—has neither a duty to decide nor any other commitment mechanism that clarify its decision-making responsibilities.¹¹ Currently, neither the U.N. Charter nor the UNSC’s own procedural rules address the question of whether or when it must pass decisions.¹² It enjoys wide discretion to do as it pleases. It has no obligation to take up matters in a consistent way or based on defined criteria. Furthermore, Council inaction acts as a decision. These and other decision-making deficits threaten the UNSC’s legitimacy.¹³

This Article proposes that the UNSC can address these challenges by adopting three new procedural duties to improve its decision-making

of its conclusion as to the propriety of the issuance of the injunction.”); *Cameron v. Johnson*, 390 U.S. 611, 615 n.5 (1968) (“In *Zwickler* we held that it was error in the absence of special circumstances to abstain and refuse to render a declaratory judgment We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.”); James C. Rehnquist, *Taking Comity Seriously: How To Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1049 (1994) (“The abstention doctrine prohibits a federal court from deciding a case within its jurisdiction so that a state court can resolve some or all of the dispute. The purported rationale for abstention . . . rests on a single amorphous goal: avoiding friction between federal and state courts.”).

¹¹ U.N. Charter, art. 24, para. 1.

¹² Inaction has costs. One particular danger is that if the UNSC fails to act, other nations or nonstate actors might do so in its stead. NATO, for example, intervened without UNSC authorization in Kosovo. *NATO Could Intervene Without UN SC Decision*, BETA, Oct. 29, 2011, http://www.b92.net/eng/news/world-article.php?yyyy=2011&mm=10&dd=29&nav_id=77085 (NATO Secretary-General Anders Rasmussen stating, “there can be situations when the international community has legal bases to intervene with support of the UN Charter, without a resolution of the Security Council That would not be an ideal situation but we have seen it in Kosovo. The international community intervened there and I believe, looking at it in light of history, that everybody agrees that it was a right thing to do.”).

¹³ For scholarship addressing threats to the UNSC’s legitimacy see IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL* (2007); THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY (Bruce Cronin & Ian Hurd eds., 2008); EDWARD C. LUCK, *UN SECURITY COUNCIL: PRACTICE AND PROMISE* (2006); Wheatley, *supra* note 6; Simon Chesterman, *Reforming the United Nations: Legitimacy, Effectiveness and Power after Iraq*, 10 SING. Y.B. INT’L L. 59 (2006); Murphy, *supra* note 6; David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552 (1993).

process: (1) the duty to decide, (2) the duty to disclose, and (3) the duty to consult. The duty to decide would, as the name suggests, require the Council to affirmatively decide whether or not it will take action in crises within the scope of its authority.¹⁴ If the Council takes no decision in a particular situation, the duty to disclose would require it to publicly state its reasons for not doing so. Lastly, the duty to consult would obligate the Council to engage in broader dialogue with affected parties before taking serious action (for example, instituting sanctions or authorizing intervention) in order to understand the will of the people whom UNSC decisions may affect and integrate their preferences into the UNSC's decision-making process.¹⁵ These duties would serve as a commitment mechanism that would encourage the UNSC to make decisions or explain to the public its justifications for not doing so.

Unlike much of the previous reform scholarship, this Article offers a proposal that is viable. First, the UNSC has the means to adopt new procedural rules within its existing working methods. Procedural matters

¹⁴ U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

¹⁵ The duty to consult has been recognized as a general principle of international law by the Inter-American Court of Human Rights, based on the corresponding right of self-determination, as well as by national courts. *See, e.g.,* *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); *Kichwa Indigenous Community of Sarayaku v. Ecuador*, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 176 (June 27, 2012); UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya* U.N. Doc. A/HRC/12/34, ¶ 44 (Jul. 15, 2009) (“[T]he duty to consult . . . arises whenever their particular interests are at stake, even when those interests do not correspond to a recognized right to land or other legal entitlement.”); International Labor Organization, *Indigenous and Tribal Peoples Convention*, C169 (June 27, 1989) (“The Convention requires that indigenous and tribal peoples are consulted on issues that affect them.”); United Nations Declaration on the Rights of Indigenous Peoples, ¶ 19, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”); Canadian Supreme Court cases recognizing the duty to consult include *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511, *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550, and *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388.

require nine affirmative votes to pass.¹⁶ Second, a P5 member could not block a vote using the veto because the veto does not apply in procedural matters.¹⁷ Third, the procedural format provides the Council with the control and flexibility to adjust the duties in the future if need be, alleviating any concerns about making changes that cannot be modified.

The challenges of reforming the UNSC are significant, and this Article does not purport to address all of them. Procedural reform is not a substitute for the deep structural reforms to the composition of the Council that Kofi Annan identified.¹⁸ Nor is it a replacement for conversations about what the Council's mission ought to be in the post-Cold War, post-9/11 world.¹⁹ The Council will continue to face substantive critiques about its membership structure, veto power, legitimacy, and accountability,²⁰ but attempts to reform these areas will fail to increase the UNSC's effectiveness unless the UNSC begins to address the challenges that plague its decision-making process. Adopting the three aforementioned duties will help the UNSC begin to close its decision-making deficit, and the act of engaging in procedural reform itself may provide a mechanism for addressing the substantive issues facing the Council. Reforming procedures is a first step that can build confidence and support for adopting additional reforms.

By using a legal process approach, this Article makes several contributions to the existing literature on UNSC reform. First, in focusing on enhancing the UNSC's decision-making process, this Article provides a framework for engaging in reform from within, making the Council the central actor in the creation and implementation of changes to its structure and operation. Second, this Article presents a novel, interdisciplinary approach to thinking about why decision-making processes matter for institutions engaged in international governance. Third, by exploring how

¹⁶ Provisional Rules of Procedure of the Security Council, U.N. Doc. Rule 33, S/96/Rev. 7 (Dec. 21, 1982). U.N. Charter art. 27, para. 2 (votes adopting procedural matters require a 9 member vote in favor and the use of the veto does not apply).

¹⁷ In the U.N. vernacular, P5 refers to the five permanent members of the UNSC: China, France, Russia, the United Kingdom, and the United States.

¹⁸ See *supra* note 3 and accompanying text.

¹⁹ Szewczyk, *supra* note 6, at 471.

²⁰ See, e.g., G.A. Drft. Res., ¶¶ 1–8, U.N. Doc. A/59/L.64, (July 6, 2005); Uniting for Consensus, G.A. Drft. Res., ¶¶ 1–11, U.N. Doc. A/59/L.68 (July 21, 2005); Irene Martinetti, *Update on the Discussion on Security Council Reform*, CTR. FOR U.N. REFORM EDUC., Feb. 9, 2007, <http://www.centerforunreform.org/node/239>.

theories from the fields of international legal process,²¹ social psychology and negotiation theory help explain the importance of procedural reform, this Article leads the way in considering the conditions under which elements of the judicial process should be applied to the UNSC. Finally, this Article advances the perspective that law's central role in emerging crises is to structure smart decision-making. Understanding law as process calls attention to its capacity to contribute to complex political decision-making in today's changing world.

The remainder of this Article proceeds as follows: Part II provides an overview of the UNSC's existing decision-making framework, describes the need for reform, and critiques conventional reform proposals. Part III describes the duty to decide, the duty to disclose, and the duty to consult, and articulates how they would be applied in the context of the UNSC. Part IV justifies the proposed reforms by situating them as an example of a framework for reform from within that is supported by informed reasoning from those within the U.N. itself as well as by theoretical support from the disciplines of legal process theory, social psychology, and negotiation. The Article concludes by considering three implications that arise from adopting such duties.

II. Conversations About U.N. Security Council Reform

A. The U.N. Security Council's Decision-Making Framework

How the UNSC operates today is a function of its history, purpose, and context. The U.N. exists to “maintain international peace and security.”²² The U.N. Charter further provides that “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

²¹ See generally ABRAM CHAYES ET AL., *INTERNATIONAL LEGAL PROCESS* (1968); Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334 (1999); OONA A. HATHAWAY & HAROLD HONGJU KOH, *FOUNDATIONS OF INTERNATIONAL LAW & POLITICS* (2005).

²² U.N. Charter art. 1, para. 1 (stating that the purpose of the UN is “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”).

international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”²³ The Council consists of fifteen member states: five permanent members—China, France, Russia, the United Kingdom, and the United States (the P5)—and ten non-permanent members (NP) who serve two-year terms.²⁴ The permanent members have the power to veto Council resolutions, a legacy owed to the central role played by the Allied Powers during the drafting of the U.N. Charter. Within this context, the Council’s powers are broad.²⁵ The U.N. is the international legal system’s “law-enforcing collective security organization” and within it, the UNSC has the unique power to authorize the use of force to engage in peace-enforcement operations.²⁶ Furthermore, the Council is distinct among political bodies in the U.N. in that it is the only organ whose resolutions are legally binding on all member states.²⁷

The scope of situations that come before the Council and require decisions are enumerated in Article 39 of the U.N. Charter. It provides that the Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and

²³ *Id.* at art 24, para. 1.

²⁴ U.N. SECURITY COUNCIL, CURRENT MEMBERS, <http://www.un.org/en/sc/members/> (last visited Mar. 9, 2013).

²⁵ See MATHESON, *supra* note 6, at 33–37 (“[D]ecisions under Chapter VII take precedence over other sources of international law.” The Council also has the authority to “require states to take actions that would otherwise be prohibited by other treaties.”); Frederic L. Kirgis, Jr., *The Security Council’s First Fifty Years*, 89 AM. J. INT’L L. 506, 516 (1995) (the UNSC was “the best (in fact, the only) judge of what amounts to a threat to international peace for purposes of chapter VII”); RUDIGER WOLFRUM & DIETER FLECK, *Enforcement of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 717 (Dieter Fleck ed., Oxford Univ. Press 2d ed. 2008) (“Under Chapter VII of the UN Charter the Security Council is empowered to take far-reaching decisions . . . In doing so, the Council enjoys considerable discretion . . .”).

²⁶ INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT ¶ 6.12 (2001) [hereinafter ICISS]; see also 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) (establishing widespread state support for the principle of R2P); S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006); U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶¶ 8–9, U.N. Doc. A/63/677 (Jan. 12, 2009).

²⁷ U.N. Charter arts. 25, 48.

42, to maintain or restore international peace and security.”²⁸ As the negotiating history of the U.N. Charter reveals in the 1943 Outline Plan, the drafters intended for the Council to have the authority to “determine the existence of a threat or act of aggression, and . . . to institute measures to repress such threat or act.”²⁹ In UNSC Resolution 660, for example, the Council declared Iraq’s invasion of Kuwait a breach of international law, demanded immediate withdrawal, called for immediate negotiations, and set up the United Nations Compensation Commission (UNCC) to process claims and pay for losses resulting from the invasion.³⁰

The rationale behind empowering the Council with such widespread and unconstrained authority is an artifact of the political moment in which the U.N. was established. In the aftermath of WWII, the victorious nations sought to establish an international legal system capable of preserving peace and security. The U.N. Charter, which outlaws the aggressive use of force, and the Council, which possessed the exclusive right to authorize military action to deter such breaches of the peace, were the primary means to this end. The Charter did not, however, include a definition of “peace” or “security,” setting the stage for decades of debate about the meanings of these important terms.³¹

The Council’s decision-making framework is a function of the authority provided under its provisional rules and the U.N. Charter.³² Meetings of the Security Council may take many forms, including public meetings (for which official records are published) and private meetings (for which the Secretary-General keeps one unpublished copy of the official

²⁸ *Id.* art. 39, para. 1 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

²⁹ U.S. DEP’T OF STATE, POSTWAR FOREIGN POLICY PREPARATION, 1939–1945, at 576–81 (1950), *reprinted in* RUTH B. RUSSELL & JEANETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER app. F, at 993 (1958).

³⁰ S.C. Res. 660, ¶¶ 1–4, U.N. Doc. S/RES/660 (Aug. 2, 1990).

³¹ WOLFRUM & FLECK, *supra* note 25, at 718 (noting, for example, that Chapter VII powers were traditionally invoked only in cases of a military breach of peace so the UNSC could undertake efforts to protect human rights and international humanitarian law only in this context).

³² Provisional Rules of Procedure of the Security Council, U.N. Doc. S/96/Rev.7 (Dec. 21, 1982); *see also* U.N. Charter, arts. 24–26.

record).³³ Members of the UNSC also engage in informal consultations that are exclusive to Council members, informal interactive discussions, and Arria-formula meetings to which non-Council members may be invited.³⁴ The Council makes decisions by voting, through consensus, by delegation, and through the use of the veto. For decisions made by voting, Article 24 of the procedural rules states that Council decisions on procedural matters require an affirmative vote of nine to pass.³⁵ For non-procedural matters, decisions require an affirmative vote of nine and a concurring vote from each of the P5 members to pass.³⁶

In certain cases, the Council makes decisions in the form of nonbinding written statements issued following informal consultations that have resulted in a consensus. The President of the Council typically issues a “statement on behalf of the Council” that makes a recommendation or communicates a view about a specific situation.³⁷ Although these statements are nonbinding, they can have a legal effect, where, for example, the UNSC determines that a state has violated its obligations under international law or changes the scope of sanctions.³⁸

The Council also engages in decision-making by delegating its own authority to a subsidiary body, often because it determines that such a body is better suited to make decisions on a particular matter.³⁹ The UNCC, for example, was developed as a subsidiary organ of the UNSC to adjudicate and process claims brought by victims of Iraq’s illegal invasion and occupation of Kuwait. The UNSC has also delegated decisions to its Sanctions Committee, which, as demonstrated in the recent crisis in Libya, has a successful record of making decisions quickly. There, the Committee first approved sanctions against Muammar Gaddafi’s government, and then,

³³ SECURITY COUNCIL AFFAIRS DIV., DEP’T OF POLITICAL AFFAIRS, U.N., 2011 HIGHLIGHTS OF SECURITY COUNCIL PRACTICE, at ANNEX 2: Format of Security Council meetings (2012).

³⁴ *Id.*; see also U.N. SECURITY COUNCIL, WORKING METHODS HANDBOOK (2011), available at <http://www.un.org/en/sc/about/methods/arriaformula.shtml>;

³⁵ U.N. Charter art. 27, para. 2 (“Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.”).

³⁶ U.N. Charter art. 27, para. 3 (“Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . .”).

³⁷ MATHESON, *supra* note 6, at 24.

³⁸ *Id.*

³⁹ *Id.* at 26–31.

when the new provisional government took power in December 2011, rapidly reached a consensus in favor of easing these measures.⁴⁰ In no case has a subsidiary body restricted its own decision-making to the procedural rules, especially the function of the veto power, used by the Council.⁴¹ Thus, outsourcing decision-making through delegation provides the Council with more procedural flexibility than it would otherwise enjoy.

Finally, the veto power can be used to block non-procedural decisions and, by doing so, can become a form of decision-making itself. Only the P5 have veto powers.⁴² The United States, Great Britain, the Soviet Union, and China agreed early on that the veto power would not only safeguard their national interests within the U.N., but also make the nascent organization viable.⁴³ The United States insisted on such powers at the Dumbarton Oaks Conference in 1944 in order to obtain Congressional approval (and thus avoid the mistakes made several decades earlier when the United States Senate refused to accept U.S. participation in the League of Nations).⁴⁴ Other nations resisted the veto or sought to limit its effects.

⁴⁰ S.C. Res. 1970, ¶¶ 9, 10, 15, 17, U.N. Doc. S/RES/1970 (Feb. 26, 2011). The Security Council established a Committee Concerning Libya, which originally passed a series of resolutions imposing an arms embargo, assets freeze, travel bans, and then, in S.C. Res. 2009, ¶¶ 13–21, U.N. Doc. S/RES/2009 (Sept. 16, 2011), eased some restrictions and in S.C. Res. 2016, ¶ 6, S/RES/2016 (Oct. 27, 2011), lifted the no-fly zone. The procedural maneuver the Committee used was to issue resolutions that did not overturn previous ones but sufficiently limited their effect in order to allow for financial and arms assistance to reach Libya after the transition to the new government.

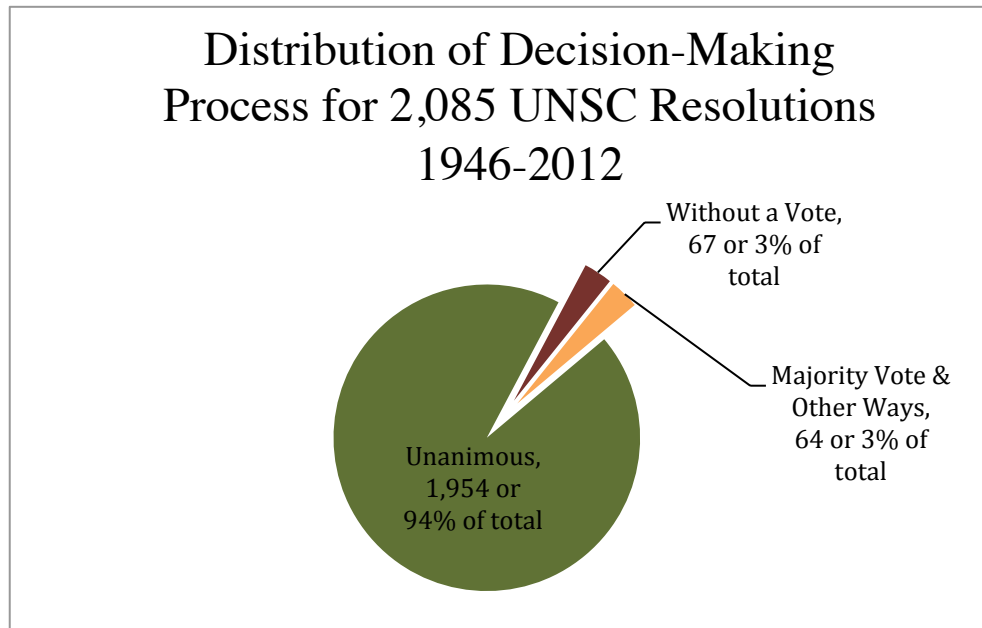
⁴¹ MATHESON, *supra* note 6, at 30 (“One striking aspect of all these delegations of decision-making authority is that the process by which decisions are made by these bodies varies considerably and in no instance conforms to the voting rules of Article 27 of the Charter.”).

⁴² U.N. Charter art. 27, para. 1.

⁴³ FASSBENDER, *supra* note 6, at 165 (“The right of veto emerged as the main feature of a new hierarchy in international relations which had developed in the course of the war and which the major power were determined to maintain.”). *See also* Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council (San Francisco Declaration), June 7, 1945, para. I 9. (“In view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred.”).

⁴⁴ FASSBENDER, *supra* note 6, at 168 (“In view of the traditionally strong isolationist sentiments in the United States, which had prevented the country from joining the League of Nations only twenty-five years ago, the President [Roosevelt] was glad to be able to present the veto as a powerful means which would safeguard American interests in the new

Australia put forth a proposal, supported by many, that the veto power should be limited to cases where the Council was taking enforcement action, and thus should not apply to Chapter VI decisions about dispute settlement.⁴⁵ Egypt argued that a four out of five vote by the P5 in favor of Chapter VII actions should be required.⁴⁶ At the San Francisco Conference, in response to these critiques, the P5 suggested that they would not participate in the U.N. if agreement was not reached on their proposed security provisions and the veto power.⁴⁷



48

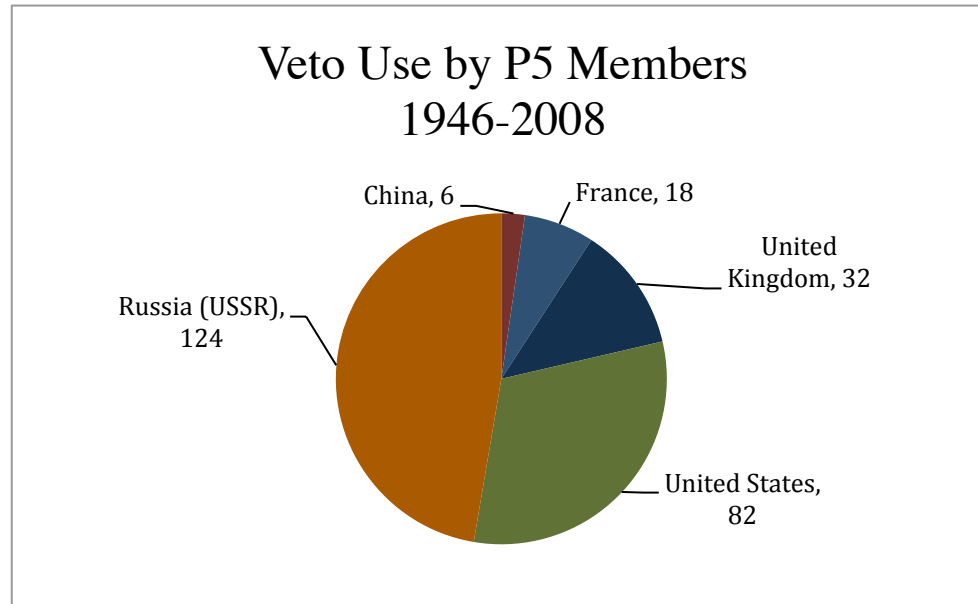
organization as well as the constitutional prerogatives of Congress in foreign and military affairs.”).

⁴⁵ Fifth Meeting of Commission III, Doc. 1150, III/12 XI U.N.C.I.O. Docs. 163 (June 22, 1945).

⁴⁶ Amendments to the Dumbarton Oaks Proposals presented by the Egyptian Delegation, Doc. 2, G/7(q)(1), III U.N.C.I.O. Docs. 453, 458 (May 5, 1945).

⁴⁷ GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 179 n.66 (2004).

⁴⁸ *Resolutions adopted by the Security Council in 2012*, UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/documents/resolutions/2012.shtml>; (source for S.C. Resolutions 1–760); UNITED NATIONS BIBLIOGRAPHIC INFORMATION SYSTEM (2012), <http://unbisnet.un.org/> (source for S.C. Resolutions 761–1,219); *Meetings Conducted/Actions Taken by the Security Council*, UNITED NATIONS DAG HAMMARSKJÖLD LIBRARY, UNITED NATIONS DOCUMENTATION: RESEARCH GUIDE (2012),



49

In addition, the UNSC's decision-making process can be influenced by other U.N. organs in two important ways. First, the UNSC may seek an advisory opinion from the International Court of Justice (ICJ) on questions about the legality of a matter under international law.⁵⁰ And although the Charter does not bind the Council to adopt or abide by such opinions, it may face informal pressures to do so. Second, the UNGA adopted the "Uniting for Peace" resolution in 1950, which empowers the UNGA to "consider the matter immediately with a view to making appropriate recommendations" should the Council fail to uphold its primary

<https://www.un.org/Depts/dhl/resguide/scact.htm> (SOURCE FOR S.C. RESOLUTIONS 1,220–2,085). The UNSC took "No Action" approximately 1,358 times between 1999 and 2012.

⁴⁹ GLOBAL POLICY FORUM, CHANGING PATTERNS IN THE USE OF THE VETO IN THE SECURITY COUNCIL (2008), *available at*

<http://www.globalpolicy.org/component/content/article/102/32810.html#1>.

⁵⁰ U.N. Charter art. 96, para. a ("The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.").

responsibilities under the U.N. Charter.⁵¹ Although questions about the Uniting for Peace resolution remain, ten emergency sessions have been convened by the UNGA.⁵² This, in effect, serves as a commitment mechanism that can prompt the UNSC to make decisions.

B. The Need for Reform

The last time the UNSC underwent significant reform was in 1963 when the UNGA passed a resolution expanding the number of non-permanent members from six to ten.⁵³ Since then, attempts have been made at further reforms without success.⁵⁴ In 1997, the Open-Ended Working Group on the Question of Equitable Representation and Increase in the Membership of the UNSC put forth the Razali Plan, which called for expanding the Council's membership to include the addition of five permanent and four non-permanent seats. Recognizing that the veto power was problematic and should be limited, the Razali Plan also proposed procedural changes to improve the Council's working methods and transparency.⁵⁵ Although this plan was never adopted, it did prompt the UNGA to pass a resolution stating that future resolutions regarding expanding the membership of the UNSC would require a minimum of a two-thirds majority vote to pass.⁵⁶ Then in 2004, Kofi Annan called for comprehensive UNSC reform and, in response, the UNGA issued a report with two proposals focused on altering UNSC membership to favor nations that contribute significant funding to the U.N. and nations with a comparatively large population.⁵⁷

Annan's call for change prompted further conversations about reform, and in 2005 various members of the U.N. put forth three plans. The

⁵¹ Uniting for Peace, G.A. Res. 377, A1 U.N. Doc. A/RES/377 (Nov. 3, 1950).

⁵² *Id.*

⁵³ G.A. Res. 1991 (XVIII), ¶¶ 20–22, U.N. Doc. A/RES/1991(XVIII) (Dec. 17, 1963).

⁵⁴ See JONAS VON FREIESLBEN, REFORM OF THE SECURITY COUNCIL IN MANAGING CHANGE AT THE UNITED NATIONS (2008) (providing a historical overview of reform efforts at the Security Council).

⁵⁵ Chairman of the Open-Ended Working Group on the Question of Equitable Representation and Increase in the Membership of the Security Council and Other Matters Related to the Security Council, Outline presented to the Working Group (Mar. 20, 1997).

⁵⁶ G.A. Res. 53/30, U.N. Doc. A/RES/53/30 (Nov. 23, 1998).

⁵⁷ *A More Secure World*, *supra* note 4, at ¶ 252.

first was the G4 plan, proposed by twenty-seven nations, which called for the addition of six permanent and four non-permanent members.⁵⁸ This plan also recognized that “security and development are intertwined and mutually reinforcing and that development is an indispensable foundation of collective security.”⁵⁹ The second proposal was the Uniting for Consensus plan, also calling for membership reform (adding five new non-permanent seats to the UNSC) as well as restrictions on the veto and changes to the Council’s working methods.⁶⁰ A third reform proposal put forth by African states, the Ezulwini Consensus, proposed granting two African nations permanent membership in order to redress the lack of representation from developing nations on the Council.⁶¹ One year later, Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland put forward the S5 plan, which largely focused on administrative and procedural changes to enhance “accountability, transparency and inclusiveness of [the Council’s] work, with a view to strengthening its legitimacy and effectiveness.”⁶² The S5 plan also called for P5 members to voluntarily abstain from using the veto in matters of “genocide, crimes against humanity and serious violations of international humanitarian law.”⁶³ These reform proposals express both the awareness within the U.N. about the need to reform the UNSC and the difficulty of achieving real reforms that are generated outside of the UNSC itself.⁶⁴

The critiques of the UNSC reflected in these reform proposals are not new. The Council’s very founding was subject to criticism, which has

⁵⁸ G.A. Drft. Res., ¶ 1, U.N. Doc. A/59/L.64 (July 6, 2005).

⁵⁹ *Id.* at 2.

⁶⁰ Uniting for Consensus, G.A. Drft. Res., ¶¶ 1, 7, U.N. Doc. A/59/L.68 (July 21, 2005).

⁶¹ Ezulwini Consensus, G.A. Drft. Res., ¶ c, U.N. Doc. A.59/L.67 (July 14, 2005).

⁶² S5 Drft. Res., ¶ 1 U.N. Doc. A/60/L.49 (Mar. 17, 2006).

⁶³ *Id.* at Annex ¶ 14.

⁶⁴ For additional recent reform proposals put forth within the UN, see Overarching Process Draft Proposal (Mar. 17, 2008), available at <http://www.ReformtheUN.org>; *Informal Consultations on Security Council Reform at the General Assembly continued from 20–23 February 2007*, CTR. FOR U.N. REFORM EDUC. (Feb. 28, 2007) <http://www.centerforunreform.org/node/246#footnote1> (Panama proposes transitional model); Martinetti, *supra* note 20. For a critical account of the process see Edward Luck, *How Not to Reform the United Nations*, 11 GLOBAL GOVERNANCE 407, 409 (2005) (describing six steps: a call for reform by the Secretary-General; the establishment of a commission to study the matter; a proposal of policy steps by the Secretary-General; facilitated talks among members; a culminating event to convene members to approve reform; the adoption of public statements about renewed commitments to reform).

continued to this day.⁶⁵ The global conditions that influence the context in which the UNSC must operate, however, have changed. At its founding, the justification for the Council's power, particularly that held by the P5 members, was the elimination of threats to peace through the ability to use sanctions and even force. At the San Francisco talks, the United States representative argued that "[t]he great powers could preserve the peace of the world if united," but warned that the success of the U.N. Charter, and thus, the prospect of such unity, could not be achieved without the veto power.⁶⁶ At their core, the arguments for reform share the belief that justifications like those voiced at the creation of the Council and the U.N. itself are antiquated, and therefore, the Council must modernize to remain relevant.⁶⁷

There are several dynamics affecting global peace and security that inform the question of UNSC reform. First, the geopolitical balance of power is shifting. Though the P5 members have more political, economic, and military power relative to other countries, they will not all continue to have these in the future.⁶⁸ This has raised concerns about the Council's

⁶⁵ See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 739–41 (2000) (discussing sources of controversy about the UN system since 1945); Wheatley, *supra* note 13; Gross, *The Double-Veto and the Four-Power Statement on Voting in the Security Council*, *supra* note 6; Gross, *Voting in the Security Council: Abstention From Voting and Absence From Meetings*, *supra* note 6; Kelsen, *supra* note 6.

⁶⁶ Permanent Rep. of the United Kingdom to UNSC, Doc. 936, III/1/45 (June 12, 1945), in xi DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO 474 (1945); see also Permanent Rep. of the Soviet Union ("[T]he agreement on [the veto power] would facilitate the creation of a truly effective and efficient international organization for the maintenance of peace."); Permanent Rep. of the United Kingdom ("The present voting provisions were in the interest of all states and not merely of the permanent members of the Security Council. Peace must rest on the unanimity of the great powers for without it whatever was built would be built upon shifting sands, or not more value than the paper upon which it was written.").

⁶⁷ *A More Secure World*, *supra* note 3 (identifying reform based on increased participation in decision-making by nations contributing the most to UN operations; increasing the Council's members; enhancing democratic measures and pursuing measures to increase effectiveness).

⁶⁸ NATIONAL INTELLIGENCE COUNCIL, GLOBAL TRENDS 2030: ALTERNATIVE WORLDS 16 (2012) available at www.dni.gov/nic/globaltrends (displaying charts illustrating how the aggregate power of developing states is set to surpass U.S. power by 2030). See also CHARLES A. KUPCHAN, NO ONE'S WORLD: THE WEST, THE RISING REST, AND THE COMING GLOBAL TURN 74–85 (2012) (documenting the economic and military decline of Western Europe and the rise of Asia); *Global Percentage of Military Spending 2010, Military Expenditure Data, 2001–10*, SIPRI YEARBOOK (2011),

legitimacy, especially in regard to the composition of its members and the way in which the veto power is deployed. The fundamental question is, given that the Council reflects a snapshot in geopolitical time, why should U.N. member states continue to comply with the UNSC's authority in matters of international peace and security?

A second critical change is that the nature of armed conflict has transformed, as has the nature of conflict prevention, conflict resolution, and peacebuilding.⁶⁹ The Council's varied responses to the crises in Bosnia,⁷⁰ Rwanda,⁷¹ Somalia,⁷² Angola,⁷³ Darfur,⁷⁴ and the Democratic

www.sipri.org/yearbook/2011/04/04A (USA 43%; Rest of the World 27%, Western and Central Europe 20%; China 7%; Japan 3%); Song Jingli, *China's Economy to Surpass the U.S. in 2016: IMF*, CHINA DAILY, Apr. 26, 2011, http://www.chinadaily.com.cn/bizchina/2011-04/26/content_12396645.htm ("According to IMF's forecast based on 'purchasing power parities,' China's GDP will rise from \$11.2 trillion in 2011 to \$19 trillion in 2016, while the U.S.' economy will increase from \$15.2 trillion to \$18.8 trillion. Correspondingly, China's share of the global economy will ascend from 14 percent to 18 percent, while the U.S.' share will descend to 17.7 percent.").

⁶⁹ U.N. General Assembly, *Follow-up to the Outcome of the Millennium Summit*, U.N. Doc. A/59/565 (Dec. 2, 2004); see also Richard Butler, *Reform of the United Nations Security Council*, 1 PENN ST. J. L. & INT'L AFF. 23, 35 (2012) ("What constitutes security today, or threatens it, is very different, more complex, and more difficult to handle than the rather more traditional straightforward threats that were seen in the 20th century.").

⁷⁰ S.C. Res. 770, U.N. Doc. S/RES/770 (Aug. 13, 1992); S.C. Res. 787, U.N. Doc. S/RES/787 (Nov. 16, 1992); S.C. Res. 816, U.N. Doc. S/RES/816 (Mar. 31, 1993); S.C. Res. 836, U.N. Doc. S/RES/836 (June 4, 1993); S.C. Res. 1031, U.N. Doc. S/RES/1031 (Dec. 15, 1995).

⁷¹ S.C. Res. 912, ¶ 9, U.N. Doc. S/RES/912 (April 21, 1994) ("Decides to keep the situation in Rwanda under constant review and states its readiness to consider promptly any recommendations which the Secretary-General may make concerning the force level and mandate of UNAMIR in light of the developments.").

⁷² S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992); S.C. Res. 814, U.N. Doc. S/RES/814 (Mar. 26, 1993); S.C. Res. 751, U.N. Doc. S/RES/751 (Apr. 24, 1992) (authorizing Somalia on grounds of humanitarian relief and calling for the delivery of aid under Chapter VII powers to "use all necessary means" to do so).

⁷³ S.C. Res. 864, U.N. Doc. S/RES/864 (Sept. 13, 1993) and S.C. Res. 1173, U.N. Doc. S/RES/864 (June 12, 1998) (stating that the situation in Angola constitutes a threat to international peace and security).

⁷⁴ S.C. Res. 1755, U.N. Doc. S/RES/1755 (Apr. 30, 2007) (the Security Council determined the situation in Sudan was a threat to the peace and condemned violations of international humanitarian law).

Republic of Congo⁷⁵ reveal the difficulty it is having in determining which crises to respond to and how. The majority of armed conflicts taking place in the world today are no longer interstate wars between rival nations.⁷⁶ Instead, they consist of armed conflict events, such as civil wars or cross-border conflicts between nonstate actors.⁷⁷ These types of armed conflicts, recently defined by International Law Association's Commission on the Use of Force as non-international armed conflicts (NIAC), are on the rise.⁷⁸ Furthermore, they are different from traditional international conflicts in several important ways. These conflicts are characterized by asymmetrical warfare methods and the use of illegal warfare (e.g., terrorism, recruitment of child soldiers, genocide, and ethnic cleansing).⁷⁹ The victims of these armed conflicts are overwhelmingly civilians, not soldiers, who suffer

⁷⁵ S.C. Res. 1445, U.N. Doc. S/RES/864 (Dec. 4, 2002) (finding that the situation in the DRC constitutes a threat to the peace); Resolutions 1457 (2003); 1468 (2003); 1493 (2003) (the source of the threat to the peace is both internal and international due to human rights abuses and involvement by external actors).

⁷⁶ See MEREDITH REID SARKEES & FRANK WHELOON WAYMAN, *RESORT TO WAR: A DATA GUIDE TO INTER-STATE, EXTRA-STATE, INTRA-STATE, AND NON-STATE WARS*, 1816–2007 562 (2010) (stating that intrastate wars began to rise by the mid-1960s); *id.* at 70 (defining and describing nonstate war); J. Joseph Hewitt, *Trends in Global Conflict, 1946–2007*, in *PEACE AND CONFLICT* 27 (J. Joseph Hewitt et al. eds., 2010) (graphically demonstrating the negative correlation between extrastate and intrastate war onsets and noting that “[a]t the beginning of 2008 . . . [all armed conflicts worldwide] were civil conflicts between the government of a state, on the one hand, and at least one internal group on the other”); Lotta Harbom et al., *Armed Conflict and Peace Agreements*, 43 *J. PEACE RES.* 617, 618 tbl.2 (2006) (of 121 conflicts occurring between 1989 and 2005 identified 90 as intrastate and seven as interstate); MONTY G. MARSHALL & TED ROBERT GURR, *PEACE AND CONFLICT 2003: A GLOBAL SURVEY OF ARMED CONFLICTS, SELF-DETERMINATION MOVEMENTS, AND DEMOCRACY* 1 (2003), <http://www.systemicpeace.org/PC2003.pdf>.

⁷⁷ SARKEES & WAYMAN, *supra* note 76, at 6 (defining the types of war as interstate conflict, occurring between “[s]tates or members of the inter-state system”; extra-state conflict, occurring between a state and a non-state entity outside of the state’s borders; intrastate conflict, occurring between the state and nonstate entities (civil) or entirely between non-state armed groups (internal) within a state’s boundaries; and nonstate conflict, occurring between nonstate armed groups in non-state territory or across state borders); *id.* at 9 (categorizing armed conflict as events that reached a threshold of at least 1000 deaths directly resulting from battle).

⁷⁸ INTERNATIONAL LAW ASSOCIATION, *FINAL REPORT OF THE USE OF FORCE COMMITTEE: THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW* (2010) (defining the term non-international armed conflict); N. P. Gleditsch et al., *Armed Conflict 1946–2001: A New Dataset*, 39 *J. PEACE RESEARCH* 615 (2002).

⁷⁹ Daniel Thurer, *International Humanitarian Law: Theory, Practice, Context*, in *RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 2008 199–201 (2011) [hereinafter *COLLECTED COURSES*].

psychological trauma and loss of livelihood in addition to physical trauma.⁸⁰ Responding to them requires new approaches and new actors, as traditional military-driven interventions are proving insufficient.

Third, in light of these changes to the geographic concentration of power and the nature of armed conflict, the fundamental meaning of what constitutes a threat to peace and security, and thus, the role of U.N. in redressing those threats, is under debate.⁸¹ At the Council's founding in 1944, the objective of preserving peace and security meant preventing wars between nations, particularly certain P5 members during the Cold War. Neither the U.N. Charter nor the Council, however, has provided a definition for "threats to peace." In addition, the Council has not defined the term "aggression," and has not adopted the UNGA's 1974 definition, which attempts to define the term for the Council.⁸² The Council has also never made a determination finding an act of aggression. In the case of Iraq's invasion of Kuwait, for example, the UNSC described the nature of the threat as a "breach of the peace."⁸³ The absence of precise definitions allows the Council to maintain wide discretion in its approach to defining the terms of its obligations.

Today, emerging crises such as renewed sectarian violence in Iraq, instability in Bahrain, increased conflict in Somalia, sectarian instability and violence in Nigeria, succession issues in North Korea and Venezuela, election-related violence in the Democratic Republic of the Congo, and

⁸⁰ *Id.* at 200. *See generally* U.N. SECURITY COUNCIL, CROSS-CUTTING REPORT NO. 2: PROTECTION OF CIVILIANS (Oct. 14, 2008); MILTON LIETENBERG, DEATHS IN WARS AND CONFLICTS IN THE TWENTIETH CENTURY (2003) (providing estimates for the number of human deaths in wars and armed conflicts in the 20th century); KENNETH WATKIN, *Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict*, in NEW WARS, NEW LAWS: APPLYING THE LAWS OF WAR IN TWENTY-FIRST-CENTURY CONFLICTS 139–141 (David Wippman & Matthew Evangelista eds., 2005) (discussing the legal ambiguities surrounding the targeting of humans during armed conflict in international humanitarian law).

⁸¹ *See, e.g.*, NEW WARS, NEW LAWS: APPLYING THE LAWS OF WAR IN TWENTY-FIRST-CENTURY CONFLICTS (David Wippman & Matthew Evangelista eds., 2005); MARY KALDOR, NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA (1999); Nicolas Lamp, *The 'New War' Challenge to IHL*, 16 J. CONFLICT & SEC. L. 225, 227 (2011).

⁸² G.A. Res. 3314, U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3314 (Dec. 14, 1974).

⁸³ S.C. Res. 660, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/660 (Aug. 2, 1990) (determining "that there exists a breach of international peace and security" and "condemn[ing] the Iraqi invasion of Kuwait").

resurgence of ethnic violence in Libya,⁸⁴ raise questions of which conflicts invoke UNSC responsibility and, more fundamentally, of whom the Council is obligated to protect. These examples serve to illustrate the problems that surround the Council's ambiguous responsibilities. The crises that threaten peace and security are numerous and diverse. In addition to international wars, they include non-international armed conflicts, civil wars, and sectarian violence. Some may threaten global peace and security because they stand to destabilize regional security and may lead to spillover events. International crimes are being committed in others. Since the UNSC cannot address all instances of armed conflict in the world, which ones should it prioritize, how should it do so, and why? And if the Council takes no action, does such inaction constitute a violation of international law?⁸⁵

The practice of the UNSC in recent years reveals the inconsistencies and controversies surrounding these critiques. Decisions about intervention are ad hoc. There is no consistency across purported purpose (preventing acts of aggression vs. protection of nationals) or type of conflict.⁸⁶ Traditionally, the UNSC has interpreted its Article 39 authority to include authorization to restore peace (Somalia), to protect a nation against an illegal invasion into its sovereign territory (Iraq's invasion of Kuwait), and to respond to systematic maltreatment of minorities (South Africa).⁸⁷ However, the Council's recent practice of determining that certain armed conflicts constitute threats to the peace⁸⁸ and its recent authorization of the use of force in Libya to protect humanitarian concerns show a departure from the

⁸⁴ COUNCIL ON FOREIGN RELATIONS, PREVENTATIVE PRIORITIES SURVEY (2012), <http://www.cfr.org/conflict-prevention/prevention-priorities-survey-20>.

⁸⁵ Natalino Ronzitti, *The Current Status of Legal Principles Prohibiting the Use of Force and Legal Justifications of the Use of Force*, in REDEFINING SOVEREIGNTY, *supra* note 7 (considering if a political body like the UNSC can violate international law due to inaction and noting that the ICJ has determined that it cannot as neither the U.N. Charter nor pre-Charter customary international law provide a basis for such violations).

⁸⁶ Declaration on Principles of IL Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. Definition of Aggression, Art. 8, G.A. Res. 26/25 (XXV) (Oct. 24, 1974).

⁸⁷ Michael Bothe et al., *Report from Rome on Redefining Sovereignty: The Use of Force after the End of the Cold War: New Options Lawful and Legitimate?*, in REDEFINING SOVEREIGNTY, *supra* note 85, at 3, 4.

⁸⁸ ALEXANDER ORAKHELASHVILI, COLLECTIVE SECURITY 168–69 (2011) (discussing the Council's determination that the situations in Angola, DRC and Haiti constituted threats to the peace while the situation in Zimbabwe did not).

previous practice.⁸⁹ As posited by the International Law Commission, “[t]he question of whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law” remains.⁹⁰ Though the UNSC values its ability to remain flexible to take any and all actions necessary to respond to crises, its continued ad hoc approach creates uncertainty that comes with costs.⁹¹

In addition to the concerns expressed by U.N. members in their various calls for reform, external constituents that rely on the UNSC also have vested interests in how the UNSC operates. As former U.N. High Commissioner for Human Rights Louise Arbour explained, “if the international community is NOT going to intervene, then R2P [the Responsibility to Protect] includes the responsibility to tell protesters on the ground that help will not be forthcoming, so that they can make their own plans accordingly.”⁹² These many examples illustrate the broad consensus within the U.N. and beyond that the time has come to reform the UNSC. The questions that remain are how such reform is to be undertaken and toward what purpose.

C. The Problem with Conventional Reform Proposals

⁸⁹ See S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). *But see* Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.) I.C.J. 134, ¶ 269 (1996); Natalino Ronzitti, *The Current Status of Legal Principles Prohibiting the Use of Force and Legal Justifications of the Use of Force*, in REDEFINING SOVEREIGNTY, *supra* note 7, at 91, 102. Before the U.N. Charter, the legality of humanitarian intervention was under debate with supporters relying on justifications of self-defense. But more than 77 nations contested its legality, which the ICJ upheld in *Nicaragua*.

⁹⁰ INTERNATIONAL LAW COMMISSION, REPORT ON WORK OF FIFTY-THIRD SESSION, U.N. GAOR, 56th Sess., Supp. No. 10, at 205, U.N. Doc. A/56/10 (2001).

⁹¹ Natalino Ronzitti, *The Current Status of Legal Principles Prohibiting the Use of Force and Legal Justifications of the Use of Force*, REDEFINING SOVEREIGNTY, *supra* note 7, at 91, 108–109 (“A more acceptable proposal would be the adoption of a resolution by the Security Council formulating criteria for intervention.”); *see also* Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after Nicaragua*, 14 E.J.I.L. 867 (2003).

⁹² Anne-Marie Slaughter, *How the World Could—and Maybe Should—Intervene in Syria*, THE ATLANTIC (Jan. 23, 2012) (citing Louise Arbour, President and CEO, International Crisis Group).

Conventional scholarly approaches about how to reform the UNSC abound.⁹³ Yet, many of them share the following two features. First, they propose solutions aimed at substantive problems, such as improving legitimacy and transparency, addressing membership and representation, narrowing the use of the veto, or enhancing the Council's effectiveness⁹⁴ as do their critiques.⁹⁵ Second, conventional reform proposals fail to address the question of viability, assuming they will be adopted without explaining how or why.⁹⁶ Proposals that call for amending the U.N. Charter, for example, are politically unfeasible because doing so would require the agreement of two-thirds of the 193 nations that make up the UNGA.⁹⁷ These two characteristics shared by much of the scholarship on UNSC reform lead to unsatisfactory proposals.

Butler, for example, identifies core areas in need of reform (membership, decision-making process, P5 dominance, weapons of mass destruction) and argues that the way to achieve reform is for the "United States to give up its veto and propose a new decision-making methodology."⁹⁸ As Dinstein points out, however, "[t]here have been many academic proposals to abolish the veto power. Such proposals remain an academic—and entirely moot—exercise. There is no indication whatever

⁹³ See, e.g., Anderson, *supra* note 6; Wheatley, *supra* note 6; Chesterman, *supra* note 13; Blum, *supra* note 6; Cardenas, *supra* note 6; Glennon, *supra* note 6; FASSBENDER, *supra* note 6; Murphy, *supra* note 6.

⁹⁴ FASSBENDER, *supra* note 6, at 1 ("Reform proposals mainly address two questions – the composition and the decision-making process of the Council."). For a description of reform proposals see Blum, *supra* note 6.

⁹⁵ See, e.g., Brian Cox, *United Nations Security Council Reform*, 1 S.C.J. OF INT'L L. 89, 125 (2009) (arguing that principles of democracy and legitimacy are not the appropriate criteria by which to reform the UNSC because the central reform should be to clarify and accept a common purpose for the Council's existence); Szewczyk, *supra* note 6, at 466 ("Reform proposals based purely on power are unsatisfactory, since they fail to respond to the legitimacy critique."); *id.* at 470 ("The conventional reform proposal based on expanding membership is flawed, because it has given insufficient attention to the underlying purpose of the Council . . .").

⁹⁶ See Toro, *supra* note 7.

⁹⁷ U.N. Charter art. 108 ("Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.").

⁹⁸ Butler, *supra* note 69 (describing his proposal, nevertheless, as "naïve").

that the five permanent members might be willing to consider divesting themselves of the veto power.”⁹⁹

Another common critique is that the Council’s fifteen-member state composition does not reflect the interests or perspectives of the diverse international community of states today.¹⁰⁰ In response, Kreykes suggests that a way to improve the Council’s inadequate representation is to increase outside participation in Council decision-making—particularly in the form of delegating Chapter VII powers to regional organizations—in order to address the Council’s lack of representation, collective action problems, and legitimacy.¹⁰¹ Likewise, Hoffman proposes increasing the Council’s membership to twenty and allowing regional seats to control the renewal or re-election process.¹⁰² Hartwig proposes modifying the Council’s membership based on representativeness of population and economic power.¹⁰³ But, again, all of these proposals fail to explain how such reforms could be implemented given strong P5 resistance to any changes that would dilute their veto power or make decision-making less effective, even if such changes would improve overall representation.

Other areas of reform scholarship focus on the Council’s legitimacy. Glennon is concerned about what he describes as the erosion of the Council’s authority as evidenced by states’ recourse to the unilateral use of force without first seeking Council authorization (for example, the U.S. invasion of Iraq in 2003).¹⁰⁴ He proposes constraining the Council’s power, for example, by pursuing measures to increase procedural fairness, in order to enhance its legitimacy.¹⁰⁵ Glennon fails, however, to articulate the case for how such changes would practically occur. He poses the question “Why do the powerful have any incentive to obey the law?” but provides neither

⁹⁹ Yoram Dinstein, *Sovereignty, The Security Council and the Use of Force*, in REDEFINING SOVEREIGNTY, *supra* note 85, at 111, 117.

¹⁰⁰ Blum, *supra* note 6, at 632; Thomas G. Weiss, *The Illusion of Security Council Reform*, 26 THE WASHINGTON Q. 147 (2003); Anderson, *supra* note 6, at 57–58.

¹⁰¹ Bryan D. Kreykes, *A Case for Delegation: The U.N. Security Council, Regional Conflicts, and Regional Organizations*, 11 TOURO INT’L L. REV. 1, 6 (2008).

¹⁰² Walter Hoffman, *Special Paper No. 8: A Competing Model: A Security Council with 20 Members*, CENTER FOR U.N. REFORM (Feb. 1, 2006), available at <http://www.centerforunreform.org/node/52>.

¹⁰³ Richard Hartwig, *Squaring the Circle: A Regional/Economic Proposal for Reform of the United Nations Security Council*, CRITICAL CURRENTS No. 4, 43 (2008).

¹⁰⁴ Glennon, *supra* note 6, at 94–100.

¹⁰⁵ *Id.*

an answer nor a basis for how such reforms might practically take place.¹⁰⁶ Wheatley's critique is that the Council lacks democratic legitimacy as demonstrated by the Council's adoption of Resolutions 1483, 1511, and 1546, which he argues negated the principle of self-determination.¹⁰⁷ He argues that the Council should be "able to demonstrate sufficient justification for the exercise of political authority in a particular case" and proposes to use adjudication to resolve the legal conflicts he describes.¹⁰⁸

Johnstone, who is skeptical of reforms aimed at membership or veto powers, instead argues that the Council suffers from a deliberative deficit that threatens its legitimacy and, therefore, its effectiveness.¹⁰⁹ He suggests reform to the deliberative process to "militate against extensive deliberation."¹¹⁰ Johnstone focuses on the quality of deliberations as a means to improve legitimacy and effectiveness¹¹¹ and makes the following specific recommendations: inclusive consultations with the UNGA, public justification to increase transparency and accountability, and an independent review of Council decisions by an internal panel or ombudsman within the Secretariat.¹¹² His work comes closest to the approach taken in this Article, as he calls for a procedural change to the Council's decision-making process that would facilitate measures to improve deliberation (for example, open meetings and increased consultations with non-UNSC members) with the aim of improving "the prospect for substantive agreement and, when that is not possible, mak[ing] it easier to live with disagreement."¹¹³ Though Johnstone goes further than other reform proposals, as Johnstone himself notes, his approach is "less applicable to the traditional crisis management role of the Security Council,

¹⁰⁶ *Id.* at 106.

¹⁰⁷ Wheatley, *supra* note 6, at 534–35.

¹⁰⁸ *Id.* at Abstract.

¹⁰⁹ Ian Johnstone, *Legislation and Adjudication in the U.N. Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT'L L. 275 (2008).

¹¹⁰ *Id.* at 276.

¹¹¹ *Id.*

¹¹² *Id.* (finding a direct correlation between decreased deliberation and decreased effectiveness). In particular, Johnstone looked at the case of Resolution 1267 authorizing sanctions against individuals associated with Al Qaeda or the Taliban, which the European Court of Justice rejected on grounds that it violates fundamental human rights in Case T-315/01, *Kadi v. Council of the E.U.*, 2005 E.C.R. II-3649, and Joined Cases C-402 & 415/05 P, *Yusuf & Al Barakat v. Council of the E.U.*, 2005 E.C.R. II-3533. *See id.*

¹¹³ Johnstone, *supra* note 109, at 276.

where the need ‘to ensure prompt and effective action’ militates against extensive deliberation.”¹¹⁴

Arguably, no scholarly critique can address all the problems that plague the Council. The limited view afforded to those on the outside creates difficulty in diagnosing the UNSC’s challenges and inhibits the ability to develop proposals that address comprehensive reform. Acknowledging these challenges, this Article takes a different approach. This Article engages the question of UNSC reform from the perspective of international legal process theory. It takes the view that reforming the UNSC is a process that must be led by the Council itself, specifically by improving the procedures by which it operates.¹¹⁵ Applying this view, this Article contends that the central aim of reform efforts must focus on how to improve the Council’s decision-making processes, particularly during times of crisis.¹¹⁶

The validity of this approach is supported by the observations of those who work with or at the UNSC. A P5 legal adviser at the UNSC (who wishes to remain anonymous) recently commented that “the primary problem at the UNSC goes to the real resentment about the powers that the P5 have and the real difficulty in doing anything about it.”¹¹⁷ Dr. Raffi Gregorian, Director of Peace Support Operations, Sanctions and Counterterrorism at the U.S. Department of State described how, in his experience, nations who contribute more funding to the UNSC have an increased expectation that they should have more influence over the Council’s decision-making outcomes.¹¹⁸ He advised that the Council would do well to improve its decision-making mechanisms for responding to crises, noting the need for better resolutions, a planned strategy that covers post-conflict measures, improved process for drafting resolutions.”¹¹⁹ Edward

¹¹⁴ *Id.* at 275.

¹¹⁵ See *infra* note 201 and accompanying text (defining legal process theory).

¹¹⁶ In taking this approach, I recognize the contributions of scholars, particularly Johnstone, *supra* note 109, and Wheatley, *supra* note 6, that treat considerations about decision-making in UNSC reform.

¹¹⁷ Telephone interview with P5 Legal Adviser to the U.N. Security Council (requesting anonymity), New York, NY (Nov. 28, 2012).

¹¹⁸ Interview with Dr. Raffi Gregorian, Director, Office of Peace Support Operations, Sanctions and Counterterrorism, U.S. Department of State, in Washington, D.C. (Nov. 9, 2012).

¹¹⁹ *Id.*

Luck, Special Advisor to U.N. Secretary-General Ban Ki-moon, summarizes these and other observations in his view that, contrary to Kofi Annan's statements on the need for structural reform, the UNSC's real problems stem more from political aspects, and therefore reforms that ignore these (such as simply aiming to balance the UNSC's power) miss the mark.¹²⁰ He says the "very fact that none of this has been resolved after more than a decade of General Assembly deliberations testifies not to inattention but to the importance of the matters at stake, to the divergent perspectives and interests among member states, and to the value capitals place on the work of the council."¹²¹

The focus on approaching UNSC reform through process has real potential to address some of these observed challenges. Though the P5 are not going to give up their veto power and the UNSC is unlikely to increase or change its membership any time soon, the Council is more likely to consider adopting new procedural rules aimed to enhance its decision-making practices, in part because these measures are less-threatening and allow the Council to maintain control over itself. Some of these reforms have the potential to ameliorate power imbalances, resentments and other political aspects that frustrate good decision-making. However difficult, now is the time for the Council to consider how the aforementioned changes in geopolitical balance, armed conflict, and the global economy threaten its ability to make decisions. Whatever else its obligations, the world relies on the UNSC to make responsible decisions, and doing so requires making them in a responsible way.

III. Appropriating Duties

This Part proposes three new procedural duties—the duty to decide, the duty to disclose, and the duty to consult—that the UNSC should adopt in order to address some of its decision-making challenges. These duties would obligate the Council to take the following course of decision-making actions: (1) it would decide whether or not to take action to address a crisis;

¹²⁰ Luck, *supra* note 64, at 409–10. Writing in 2005, during the height of the reform season at the UN, Luck brings an important critique to the debate that is linked to the historical and political context. He argues that the reform frenzy was driven in part by then-U.N. Secretary-General Kofi Annan's call for radical structural reform, which came after the mid-2003 controversy over the United States' use of force in Iraq. Luck argues that Annan framed the problem as structural and institutional but missed its political aspects. *Id.*

¹²¹ *Id.* at 410.

(2) should the Council fail to take up a matter, it would have a duty to disclose its reasoning; and (3) if the Council decides to take action, it would have a duty to consult the appropriate stakeholders and integrate such findings into its plans for addressing the situation. After describing these three duties, this Part demonstrates the application of these duties in a hypothetical crisis and then explains how the UNSC can adopt these procedural rules using its existing working methods.

A. The Duty to Decide

Judicial bodies have numerous duties with regard to how they engage in judicial decision-making.¹²² Among these is the duty to decide cases within their jurisdiction.¹²³ This duty to decide originates from procedural justice doctrines that emphasize due process and fair, reasoned judicial decision-making.¹²⁴ The duty of judicial bodies to decide claims presented to them is related to the corresponding rights afforded by due process to the citizenry.¹²⁵ A judicial body may dismiss a claim in accordance with pre-existing substantive or procedural rules. Otherwise, it

¹²² See, e.g., *Cohens v. Virginia*, 19 U.S. 264, 404 (1821); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 604 (2008) (“English judges had a duty to decide in accord with the law of the land.”).

¹²³ *Nuclear Tests Case*, *supra* note 9; *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, *United Nations*, *supra* note 9; Singhvi Declaration, *supra* note 9; *Missouri v. Illinois*, 200 U.S. 496, 519–20 (1906); Harlan Abrahams & Brian Mattis, *The Duty to Decide vs. the Daedalian Doctrine of Abstention*, 1 UNIV. OF PUGET SOUND L. REV. 1, 5 (1977) (“Accordingly, the federal judiciary should perform its tasks by fulfilling its duty to decide cases, while Congress should perform its responsibilities by ‘provid[ing] legislation to help expedite justice in our Federal courts’ (citing 123 CONG. REC. S204 (daily ed. Jan. 10, 1977) (remarks by Sen. Mathias)))”; see generally Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573, 581–82 (1985).

¹²⁴ See Lawrence Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

¹²⁵ See Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) at 30–32 (understanding that duties correlate to rights defined as a well-founded claim recognized or secured by law and further noting that “while attempts at formal definition are always unsatisfactory . . . the promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of . . . correlatives”); Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1916) at 717–18 (defining the terms right and duty and their relationship to one another); *Lake Shore & M.S.R. Co. v. Kurtz*, 10 Ind. App. 60, 37 N.E. 303, 304 (1894) (“A duty or a legal obligation is that which one ought or ought not to do. ‘Duty’ and ‘right’ are correlative terms. When a right is invaded, a duty is violated.”).

has a duty to decide or “say what the law is.”¹²⁶ The duty to decide prevents courts from engaging in arbitrary treatment of claims or ignoring a claim indefinitely. The International Court of Justice (ICJ) has recognized that it has a duty to decide legal disputes within its jurisdiction, which creates a right for states to submit their disputes against one another to the ICJ.¹²⁷

To date, there has been no significant scholarly attention to the question of how such a duty might be applied to the UNSC, or whether it should be applied in the first place.¹²⁸ Although the UNSC is not a judicial body, it does perform quasi-judicial functions, such as making determinations of law that are binding and setting precedent.¹²⁹ In its decisions, the Council makes determinations about the legality of certain actions and in so doing provides authoritative guidance about what the law is.¹³⁰ Therefore, just as courts have judicial duties that accompany their

¹²⁶ *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

¹²⁷ Gilmore, Grant, *The International Court of Justice*, 55 YALE L.J. 1049, 1061 (1946) (noting that “the [ICJ] would have the duty to decide whether the actions of any member state violate the Covenant.”).

¹²⁸ For a rare example of a scholarly article on international law that mentions the phrase ‘duty to decide’ in relation to the UNSC see Brian Lepard, *Protecting the Human Family*, 13 J. OF BAHÁ’Í STUDIES 33, 41 (2003) (“While the U.N. Charter imposes upon the Security Council an apparent duty to decide on measures necessary ‘to maintain and restore matters of international peace and security’ it is completely silent on the question of whether there is any kind of obligation, legal or moral, of states or the UN to intervene in the case of gross human rights violations.”).

¹²⁹ U.N. Charter, ch. VII. Resolutions passed under Chapter VII, referred to as decisions, are binding. See Matheson, *supra* note 6, at 39 (arguing that since UNSC decisions are not subject to judicial review by the ICJ, it is “all the more important for the Council itself to pay attention to legal constraints and considerations in making Chapter VII decisions and, in particular, to take seriously its duty to make reasonable judgments about threats to the peace and to act in a manner consistent with the requirements of the Charter”); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Reports 16 (June 21) (as the sole example of where the UNSC requested an advisory opinion from the ICJ on the legal effect of its treatment of terminating South Africa’s mandate over South-West Africa (Namibia)); Matheson, *supra* note 6, at 36–37 (noting that even in this circumstance, the ICJ’s advisory opinion is not legally binding on the UNSC); Marko Oberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EJIL 879 (2005) (describing the binding and nonbinding nature of UNSC decisions);

¹³⁰ See, e.g., S.C. Res. 662, U.N. Doc. S/RES/0662 (Aug. 9, 1990) (determining that Iraq’s annexation of Kuwait was illegal).

judicial powers, so too should the UNSC. And though no formal duty to decide exists for many legislative bodies and administrative governance bodies, there are other commitment mechanisms that prompt decision-making. The U.S. Congress, for example, has never failed to exercise its Constitutional power to decide on authorizations of war.¹³¹

The task at hand is to consider how to apply the duty to decide to a quasi-judicial body that also has political duties. For example, in the judicial context, the concept of a duty is defined by the presence of a corresponding and legally enforceable right.¹³² Whether and to what extent UNSC duties create corresponding rights for U.N. member states and, perhaps, others will require balancing both judicial and political considerations.

Presently, neither the U.N. Charter nor the UNSC's own Provisional Rules of Procedure (PRP) clarify the Council's specific obligations regarding when it must take up decisions pertaining to peace and security.¹³³ Issues, proposed resolutions, and decisions are initiated

¹³¹ U.S. CONST., art. 1, § 8 ("The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Capture on Land and Water; To raise and support Armies"; "To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces."); see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2077 (2005) ("Congress has authorized the President to use force in many different situations . . . Congress's power to authorize the President to use force, whatever its scope, arguably could not be exercised without specifying (at least implicitly) an enemy or a purpose."); JENNIFER K. ELSEA & RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL 31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS, at Summary (2011), <http://www.fas.org/sgp/crs/natsec/RL31133.pdf> ("From the Washington Administration to the present, Congress and the President have enacted eleven separate formal declarations of war against foreign nations in five different wars. Each declaration has been preceded by a presidential request either in writing or in person before a joint session of Congress."); CQ PRESS, GUIDE TO CONGRESS 249–250 (2008) ("Congress has formally declared war in only five conflicts: the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II . . . Congress has approved eleven separate formal declarations of war in all: against Great Britain in 1812, Mexico in 1846, Spain in 1898, Germany in 1917, Austria-Hungary in 1917, Japan in 1941, Germany in 1941, Italy in 1941, Bulgaria in 1942, Hungary in 1942, and Rumania in 1942.").

¹³² See Hohfeld (1913), *supra* note 125, 30–32; Hohfeld (1916), *supra* note 125, 717–18 (both defining rights and duties and positing that in order for one to exist, so must the other.).

¹³³ The UNSC adopted provisional rules of procedure at its first meeting on Jan. 17, 1946, which have been subsequently revised but not finalized. Provisional Rules of Procedure of the UN Security Council, S/96/Rev.7 (1983); see also CHINMAYA R. GHAREKHAN, THE

when put forth by one or more members of the Council or at the request of the Secretary-General. The UNSC makes decisions in the form of resolutions on matters presented in its regular agenda of work, which is created by the President of the Council and the Secretary of the Council, or by a UNSC member.¹³⁴ Non-UNSC members and outside bodies, such as the African Union or Arab League, cannot, on their own, compel the Council to take up a matter. Thus, the Council has the power, but not the duty to make decisions. It may take up decisions on matters pertaining to peace and security. Or it may not. The costs of such inaction were noted during the Rwanda genocide.¹³⁵

A duty to decide would obligate the UNSC to engage in a new course of procedures regarding its decision-making.¹³⁶ Crises arising under Article 39 of the U.N. Charter, which requires that the Council “shall determine the existence of any threat to the peace, breach of the peace or act of aggression,” would trigger the duty to decide.¹³⁷ There are also instances when the duty to decide should not be triggered. For example, many issues that come before the UNSC are not critical in nature but remain on the Council’s formal agenda for decades for political reasons. Thus, limiting the scope of the duty to decide to Article 39 situations may help to avoid unnecessary decisions.

HORSESHOE TABLE 13–43 (2006) (providing an overview of the UNSC’s procedures and practices); Caron, *supra* note 6.

¹³⁴ GHAREKHAN, *supra* note 133, at 27 (describing how the resolution-making at the UNSC developed, noting that the P5 would circulate drafts and once they “had taken care of one another’s concerns, the draft would be made available to the second-class members”).

¹³⁵ COLIN KEATING, RWANDA: AN INSIDER’S ACCOUNT, *in* THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY (David M. Malone, ed., 2004) (former UNSC member from New Zealand discussing the Rwandan genocide and the UNSC’s initial treatment of it as a civil war and dissenting with the Council’s approach arguing instead that the UNSC “not only had a right to know about the details of its peacekeeping but also had a right and a duty to decide the issues when human life was at stake”).

¹³⁶ See Hohfeld (1913) *supra* note 125 at 44. Following Hohfeld’s view, creating a duty would also require creating a corresponding right. While describing specifically how this would work is outside of the scope of this Article, in adopting a duty to decide, the UNSC will also need to consider who (for example, U.N. members, all nations, non-state actors) would have a right to put issues to the Council to be decided upon and how.

¹³⁷ U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measure shall be taken in accordance with Articles 41 and 41, to maintain or restore international peace and security.”).

B. The Duty to Disclose

In addition to the duty to decide, the Council should adopt a duty to disclose that would require it to provide a public justification in the event that it fails to make a decision. Although the Council already provides written resolutions when formal decisions are reached and a myriad of other public statements and press releases, it does not, as a matter of procedure or practice, publicly disclose instances of inaction. In other words, if a matter arose that triggered Article 39 obligations, such as a threat or breach of the peace, and the Council took no action, such inaction is not required to be announced or recorded. Though there may have been informal consultations among some of the Council members, there are no public records of such discussions. Furthermore, there is no requirement that the Council publicly acknowledges its instances of inaction or provide a justification.

The purpose of establishing a duty to disclose is to address this gap in the UNSC's decision-making procedure. The rationale for the duty to disclose is based on the Council's obligations regarding its accountability and transparency as a global governance body. As Richard Falk explains, "[i]f some tasks of global governance entrusted to the United Nations are to evolve in a constitutionally responsible way, then the minimum to expect is an honest disclosure of intent by member states."¹³⁸ The duty to disclose would be triggered after the duty to decide, whereupon the Council has decided not to take up a matter before it. The duty to disclose would then require the Council to issue a public statement intended to inform the public, in a timely manner, of instances where it did not take up a matter and provide a justification explaining why. This scenario differs from a situation where the Council decides to take action. It also differs from a situation where the Council decides to take no action or to "remain seized of the matter." In both cases, the Council has actively taken up matters and issued decisions, which are recorded publicly through UNSC Resolutions or in press releases. The duty to disclose would require the Council to be responsive to situations that it currently disregards.

¹³⁸ Richard Falk, *Libya After Muammar el-Qaddafi's Execution*, CITIZEN PILGRIMAGE BLOG, Oct. 30, 2012, <http://richardfalk.wordpress.com/tag/united-nations-security-council> (discussing the matter of decisions pertaining to intervention).

C. *The Duty to Consult*

Obligating the UNSC to take up decisions is not enough. The Council must also adapt the way it does so. Thus, in addition to a duty to decide and a duty to disclose, the UNSC should also observe a duty to consult. This duty has been increasingly recognized in recent years in the context of environmental and cultural rights for minority and indigenous populations and, in those contexts, requires governments to consult with communities about legal actions that will affect them based on the corresponding right of self-determination.¹³⁹ For example, the Inter-American Court of Human Rights recently held that the duty to consult with indigenous communities has become a general principle of international law.¹⁴⁰ The duty to consult has also been recognized by the Supreme Court of Canada, the International Labor Organization (ILO) and the U.N. Declaration on the Rights of Indigenous Peoples.¹⁴¹

In a 2012 press release, then-Secretary of State Hillary Clinton stated: “There is no guarantee that we are going to be successful [in Syria]. I

¹³⁹ See, e.g., Lorne Sossin, *The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights*, 23 CAN. J. ADMIN. L. & PRAC. 93 (2010); D. Mullan, *The Duty to Consult Aboriginal Peoples—The Canadian Example*, 22 CAN. J. ADMIN. L. & PRAC. 107 (2009); Veronica Potes, *The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?*, 17 J. ENVTL. L. & POL’Y. 27 (2006).

¹⁴⁰ *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172 (Nov. 28, 2007); see also *Kichwa Indigenous Community of Sarayaku v. Ecuador*, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 176 (June 27, 2012).

¹⁴¹ See, e.g., *Situation of Human Rights and Fundamental Freedoms of Indigenous People*, *supra* note 15, ¶ 44 (“[T]he duty to consult . . . arises whenever their particular interests are at stake, even when those interests do not correspond to a recognized right to land or other legal entitlement.”); Indigenous and Tribal Peoples Convention, *supra* note 15, at art. 6 (requiring that indigenous and tribal peoples be consulted on issues that affect them); G.A. Res. 61/295, *supra* note 15 (“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”). Canadian Supreme Court cases recognizing the duty to consult include: *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511, *Taku River Tlingit First Nation v. British Columbia* [2004] 3 S.C.R. 550, and *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388. *But see Pulp Mills in River Uruguay* (Arg. V. Uru.), 2010 I.C.J. 135, ¶¶ 215–16 (April 20, 2010) (finding that no legal obligation exists to consult affected populations but recognizing that the parties agreed that consultations should be undertaken).

just hate to say that.”¹⁴² The duty to consult is intended to counteract views like this that imply that peace and security will come to a crisis from the outside.¹⁴³ Lessons learned from peacebuilding efforts in post-conflict societies continually show that effective intervention must place authority and resources with local actors while providing political and economic support from the outside.¹⁴⁴ As Rachel Kleinfeld explains, “[b]y now, it should be clear that second-generation reform starts from the realization that outsiders can’t create change in another country—locals are always going to be the conduit through which reform occurs.”¹⁴⁵ This emerging area of research explains why the duty to consult is vital to effective intervention efforts and provides support for encouraging the UNSC to embrace new models through which it can integrate the preferences of local peoples with those of the nations responsible for global peace and security.

Though recognizing the necessity of a duty to consult is an important first step, the challenge is to determine exactly what this duty will require the UNSC to do. In other contexts where the duty to consult has been adopted, difficulties have arisen in defining the duty. The ILO Convention No. 169, for example, requires governments to “consult the peoples concerned, through appropriate procedures . . . whenever consideration is being given to legislative or administrative measures which may affect them directly.”¹⁴⁶ However, this standard does not provide

¹⁴² Jill Dougherty, *Clinton: World May Not Succeed in Syria*, CNN, July 1, 2012, http://articles.cnn.com/2012-07-01/middleeast/world_mcast_syria-unrest_1_syrian-revolution-local-coordination-committees-syrian-crisis?_s=PM:MIDDLEEAST.

¹⁴³ CHARLES A. KUPCHAN, *NO ONE’S WORLD* 6 (2011).

¹⁴⁴ See generally RESTORING CIVIL SOCIETIES: THE PSYCHOLOGY OF INTERVENTION AND ENGAGEMENT FOLLOWING CRISIS (Kai J. Jonas & Thomas A. Morton eds., 2012) (discussing emerging research in the theoretical approaches and application of post-conflict intervention).

¹⁴⁵ RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD* 110 (2012).

¹⁴⁶ International Labor Organization, Convention Number 169, Indigenous and Tribal Peoples Convention, Art. 6, June 27, 1989, (“1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose. 2. The consultations carried out in application of this Convention shall be

adequate guidance about who must be consulted or how. Similarly, the general obligation put forth in Article 9 of the Inter-American Commission on Human Rights provides that “States are under the obligation to consult with indigenous peoples and guarantee their participation in decisions regarding any measure that affects their territory, taking into consideration the special relationship between indigenous and tribal peoples and land and natural resources.”¹⁴⁷ General obligations, though helpful, do not provide adequate guidance about the process of consultation leading to challenges during the implementation stage. For example, in efforts to implement the duty to consult recognized by the Supreme Court of Canada, difficulties have arisen in agreeing upon which groups must be consulted, what consultation requires of a state, what counts as participation, and what recourse, if any, a protected group has to disagree with and prevent a state from taking a course of action.¹⁴⁸

The UNSC can and should learn from these and other challenges of early adopters. As the UNSC creates and defines its duty to consult, it may help to base the definition on the following central aim. The purpose of a duty to consult is to integrate the preferences of those who will be acted upon by the UNSC with those of UNSC members themselves in order to better inform the Council so that it may improve the quality of its decisions and thereby ensure global peace and security. Thus, a potential distinction between the Council’s duty to consult and those articulated in other international legal instruments is that the former prioritizes the aim of ensuring peace and security. Consultation is a means by which to do that. A secondary, but also important, aim of the duty to consult is to provide local actors with some means for increased participation and self-determination. At a minimum, the duty to consult should require the Council to consult directly with the people who will be most affected by a proposed UNSC

undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”).

¹⁴⁷ Inter-American Commission on Human Rights, Norms and Jurisprudence of the Inter-American Human Rights System, art. 9, para. 273, Feb. 17, 2011, *available at* <http://cidh.org/countryrep/Indigenous-Lands09/Chap.IX.htm>

¹⁴⁸ Email from Professor Lawrence Susskind, MIT to Professor Anna Spain, Associate Professor, Univ. of Col., (Jan. 24, 2013) (In January 2013, Mapuche human rights lawyers in Chile explained to Professor Susskind “why the Cree decision (via majority referendum and council vote) to participate in and support a major hydro project in Quebec did not constitute adequate consultation because there was still a faction of the Cree nation strongly opposed.”).

resolution regarding use of force and intervention. The duty to consult will also need to specify the process by which the Council will elicit information from those who will be consulted.

The following outline provides an illustration of how the Council could design a consultation process to promote consensus-based decision-making.¹⁴⁹ First, the Council should seek to identify who the key stakeholders—those most affected by the decisions to be taken—are in a given situation. Doing so will require developing a methodology for determining how to identify which peoples (whether elected officials, political parties out of power, non-governmental actors, or actors from outside the region) constitute the group to be consulted depending on the context of the crisis. Following the principle of subsidiarity, which advises that those closest to a problem are best suited to understand it, the process should include an assessment of stakeholders' rights, interests, and needs, which should be inclusive of representatives from all levels of the affected areas in order to expose differing priorities and allow for the determination of areas of discord as well as areas of agreement.¹⁵⁰

Second, the Council should undertake a situational assessment that analyzes the nature, context, and other particulars of the crisis.¹⁵¹ Civil wars, for example, often present a dynamic where people are fighting for their survival against a state that is fighting for its continued existence. State elites “are hardly likely to initiate an external process that effectively limits their freedom to choose and use the ruthless though time-tested methods of control and management of the people in their territory.”¹⁵² Designing a decision-making process capable of determining how to promote peace will

¹⁴⁹ THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Lawrence Susskind et al. eds., 1999) (describing the following steps of consensus building in detail).

¹⁵⁰ ANNE MARIE SLAUGHTER, A NEW WORLD ORDER 30 (2004) (defining subsidiarity as “a principle of locating governance at the lowest possible level—that closest to the individuals and groups affected by the rules and decisions adopted and enforced”).

¹⁵¹ Rosalyn Higgins, *Internal War and International Law*, in THE INTERNATIONAL REGULATION OF CIVIL WARS 82 (Evan Luard, ed., 1972).

¹⁵² Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 14 (2000).

require power sharing among overlapping authorities with different normative priorities.¹⁵³

Elements of the consultation process might include a requirement that the Council consults: 1) in advance of its decision-making so that the information learned can be incorporated; 2) in good faith; 3) without bias; 4) with appropriate measures of confidentiality to protect those providing information, and; 5) in a manner that respects the right of self-determination. As a practical matter, the UNSC could use its existing ability to authorize fact-finding missions as a way to conduct stakeholder analysis and situational assessment. At present, states, NGOs, and individuals initiate such missions because the Council does not have its own independent, internal fact-finding group to rely on.¹⁵⁴ It is vital that the Council considers whether and under what conditions a subsidiary body of the Council, an involved state, an NGO, or an independent body should conduct such fact-finding. The Council's existing Arria-formula meetings, which allow for the Council to invite nonstate actors to participate in Council meetings, could also be used for the purpose of consultation.¹⁵⁵ Alternatively, the Council could use its existing Informal Interactive Discussion format, but expand it to include nonstate participants.¹⁵⁶

Designing an appropriate consultation process will be challenging.¹⁵⁷ Which stories, for example, should count? The Council will need to consider how to handle situations where multiple stakeholder groups have oppositional views on what the Council should do or where elected officials

¹⁵³ SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW 111 (Tomer Broude & Yuval Shany eds., 2008).

¹⁵⁴ WOLFRUM & FLECK, *supra* note 25, at 718 ("The Security Council should initiate fact-finding missions to conflict areas with a view to identifying the specific requirements for humanitarian assistance, and in particular obtaining safe and meaningful access to vulnerable populations.").

¹⁵⁵ See UN Security Council Working Method Handbook, "Arria-formula" Meetings, available at <http://www.un.org/en/sc/about/methods/arriaformula.shtml>.

¹⁵⁶ See UN Security Council Working Method Handbook, Informal Interactive Dialogues and Other Informal Meetings of the Security Council, available at <http://www.un.org/en/sc/inc/pages/pdf/methods/dialogues.pdf>.

¹⁵⁷ See, e.g., NCP Mediation Manual, Consensus Building Institute (last updated July 2012) available at http://www.cbbuilding.org/sites/cbi.drupalconnect.com/files/CBI_NCP_Mediation_Manual_July2012.pdf (describing the consultation process for how the OECD handles situations where there are violations of human rights and corporate social responsibility standards).

disagree with the interests of NGOs. Furthermore, resources and time provide a very real constraint on how much the Council can practically do. In figuring out these and other challenges, the Council should be guided by the objective that the duty to consult seeks to fill: to locate the will of the stakeholders, in upholding their right to some degree of self-determination, and integrate such preferences, however pluralistic, with those of the UNSC member states responsible for making decisions. This occurs by structuring decision-making in a manner that allows for the disintegration of authority and control to substate and suprastate decision makers, when those entities are essential to smart decision-making.¹⁵⁸ Doing so promotes a vision of global governance that identifies the diverse priorities of the international community, nations, and people and incorporates those into the decision-making process.¹⁵⁹ This is a practical way, as former ICJ Judge Dame Roslyn Higgins described, to “assist the political leaders to identify what is the new consensus about acceptable and unacceptable levels of intrusion.”¹⁶⁰

D. The Duties Applied

It is worth providing a hypothetical to illustrate how the duties to decide, disclose, and consult might work. Take the crisis of an armed conflict occurring inside one sovereign nation that is a U.N. member. The conflict begins as a series of political protests against the government of that nation. The government responds with force on the basis that it is entitled to maintain effective control and to end public disorder. Reports vary, but allegations of arbitrary arrests, torture, and other human rights abuses by the government against protesting civilians emerge. Groups of civilians begin to arm themselves on the grounds of self-defense. As tensions escalate,

¹⁵⁸ See Paul Williams, *Earned Sovereignty: The Future of Sovereignty-Based Conflict Resolution*, in PERSPECTIVES ON INTERNATIONAL LAW IN AN ERA OF CHANGE 128–29 (2012) (describing the inception of this approach in the Northern Ireland peace process and its subsequent use in Serbia, East Timor, Kosovo and South Sudan); Neil Brenner, *Beyond State-Centrism? Space, Territoriality, and Geographical Scale in Globalization Studies*, 28 THEORY AND SOC’Y 39, 47 (1999); LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES 1400–1900, 226–288 (2010) (defining ‘quasi-sovereignty’ as a term that encompasses arrangements of shared or limited sovereignty).

¹⁵⁹ POWER IN GLOBAL GOVERNANCE 3 (Michael Barnett & Raymond Duvall eds., 2005); Antje Wiener, *Contested Compliance: Interventions on the Normative Structure of World Politics*, 10 EUR. J. INT’L REL. 189, 190 (2004) (explaining how social behaviors change the normative structure of law through a “reflexive” approach).

¹⁶⁰ ROSALYN HIGGINS, THEMES AND THEORIES 283 (2009).

government use of military-grade violence against now-armed rebel groups turns into a civil war. Outsiders, in support of both sides, pour money and weapons into the nation. Allegations of international crimes emerge. The fighting crosses over into neighboring countries, causing a spillover effect. These countries must decide whether to respond with force under the justification of self-defense. The situation becomes a “threat to the peace” on grounds of humanitarian need, presence of international crimes, and cross-border armed conflict.

This hypothetical crisis triggers the UNSC to respond under Article 39.¹⁶¹ The Council could, for example, task the Security Council Affairs Division (SCAD), to keep apprised of ongoing situations and make an initial determination that a situation has triggered the duty to decide.¹⁶² The duty to decide would require that the Council take up the matter to determine: 1) the exact nature of the threat or breach to the peace, and 2) whether this requires the UNSC to take action and if so, of what nature. If the UNSC is unable or unwilling to take up the matter, the duty to disclose would require the Council to issue a public statement admitting so and providing a justification explaining why.

The duty to decide would trigger the duty to consult. Upon undertaking a decision about how to define the situation and what actions should be taken, the UNSC will begin its process of consultation with the groups to be affected by a potential decision. There are several methods by which the Council could fulfill this duty. The Council could undertake fact-finding about the crisis through a stakeholder and situational assessment as described above. The Council would also elicit information from non-Council members in the U.N., which could take the form of an open debate in person or via virtual means, which the Council has already considered

¹⁶¹ Linking the duty to decide to Article 39 provides a limiting principle on the duty to avoid triggering it in situations that are not a crisis or do not provide an immediate threat to peace and security. The duty to decide might be avoided, for example, in cases where nations seek to place issues on the Council’s agenda for political reasons that remain there for years. However, this should not preclude revisiting this limitation in the future as new threats to the peace not envisioned under Article 39 (e.g., international terrorism) arise.

¹⁶² U.N. Security Council Affairs Division (SCAD) is a division of the Department of Political Affairs tasked with assisting the UNSC. A description of SCAD is available at U.N. Department of Political Affairs, Security Council Affairs, http://www.un.org/wcm/content/site/undpa/main/issues/security_council_affairs.

doing. The Council could use Arria-formula meetings to invite outside experts in to consult the Council.

Once the requisite consultations have taken place, Council members would discuss the situation informally and circulate questions, concerns, and initial proposals about what needs to be done. The matter could then be delegated to a subsidiary body (which would need to include representatives from the P5 nations) to generate a formal proposal to be presented at a public UNSC meeting.¹⁶³ The Council would then vote as to whether or not it will take action in a particular situation. The duty to decide operates to ensure that the Council determines whether it will take some action or not. The outcome would be recorded as a UNSC Resolution per existing policy.

This stage of the decision-making process will prove to be tricky. The procedural remedies that the duties to decide, to disclose, and to consult aim to provide will not address some of the substantive issues that reform scholarship has readily identified. For example, there are two types of power imbalances that the procedural duties are unable to fix. One type of power imbalance exists between those on the UNSC and those who are not (both U.N. member states and nonstate actors). The duty to consult will address this imbalance in part. It will remedy current practice by ensuring that information flows from those on the outside to the UNSC in every situation triggering the duty to decide. Although making new information available to the Council does not provide any direct authority for outsiders to influence what the Council decides, it will help to increase public awareness and, therefore, accountability. However, even as the Council engages in consultations, more work will need to be done to address the imbalance of authority between decision makers and non-decision makers as well as among the decision makers themselves.

A second, and often more problematic, power imbalance occurs within the Council, between the P5 members, who enjoy veto powers, and the NP10 members, who do not. Proposals to limit the use of the veto power (such as forbidding it in cases of genocide or other international crimes) seek to remove P5 members' ability to privilege their national interests over those affecting collective peace and security. The duties to decide, to disclose, and to consult do not remedy this dynamic. However, in this circumstance, the duty to decide would operate to force the entire Council to take up a

¹⁶³ *See id.*

decision as to whether or not it would take action. Thus, even if a P5 country indicated that it intended to veto a particular action (such as sanctions or an authorization of use of force), that veto power would not provide a means to prevent taking up a duty to decide vote. If a P5 member, wanting to block progress on a crisis, decided not to vote on whether or not the Council would take action, their inaction would be publicly recorded. If, for some reason, the entire Council decided not to decide, then the duty to disclose would be triggered. This would require that the Council publicly state, through a press release or other mechanism, that it was not taking up the matter and to explain why.

This hypothetical illustration of the duties to decide, to disclose, and to consult provides a conceptual framework for understanding how new decision-making obligations might influence how the UNSC functions. However, gaps remain. This Article takes the approach that the UNSC is best suited to determine the details about how these duties should be implemented and, thus, resists building in that layer of detail here. However, the hypothetical does show how the duties would change the UNSC decision-making process and provide the following two benefits. First, the duties work to ensure that those on the ground relying upon the UNSC for their peace and security are better informed about whether or not they can expect assistance and in what form. Second, the duties prompt the UNSC, as decision makers, to equip themselves with the tools they need (i.e., an external commitment mechanism to make a decision and more diverse information about the crisis, who is involved, and the array of interests and needs) to make better decisions about how to protect peace and security.

E. Establishing the Duties

The UNSC already has within its existing working methods the means by which to establish the duty to decide, duty to disclose, and duty to consult. The President of the Council may call a meeting at the request of any Council member to meet on agenda items drawn up and approved by the U.N. Secretary-General and the UNSC President.¹⁶⁴ The Council may adopt procedural matters with a vote of nine out of the fifteen Council

¹⁶⁴ Provisional Rules of Procedure of the U.N. Security Council, Rule 2, Rule 6 and Rule 7, S/96/Rev.7 (1983) *available at* <http://www.un.org/en/sc/about/rules/chapter1.shtml>.

members.¹⁶⁵ Further, the veto does not apply to votes on procedural matters. Thus, the duties described could be adopted by Council vote even if one of the P5 Council members opposed it. In terms of drafting the document that will be voted on, it may be advisable for the Council to consider each duty separately and not as a package, as many previous comprehensive reform packages have a history of failure.¹⁶⁶

Even though the UNSC could adopt these duties, it remains to be argued why it should. Though arguments addressing the viability of this reform proposal are set forth in Part IV, it is worth summarizing several of the key points here. First, there is robust support within the UNGA and among some of the non-permanent UNSC members for engaging in procedural reform. The relevant question is whether or not the P5 members will support such reform. As Chart 2 shows, the two P5 members that have employed the use of the veto the most are Russia and the United States. But since these reforms fall under the procedural category, the veto will not be applicable. Informally, a UNSC member may attempt to prevent a vote to adopt one or more of the duties. It is certainly the case that many UNSC members, especially the P5, have benefited from the Council's dysfunctional decision-making process, particularly when inaction serves national interests. Thus, improving decision-making may be viewed as a threat to a country's own national interests because, as Dr. Raffi Gregorian observed, it could infringe upon their ability to influence the outcomes of UNSC decisions.¹⁶⁷ But these considerations must now be tempered against the growing pressure in the UNGA (discussed in the next Part) that the Council needs to be reformed. P5 members may be persuaded to embrace procedural reforms in order to bridge the gap between maintaining the status quo and completely overhauling the UNSC.

IV. The Case for Reform from Within

This Article has argued that the UNSC should establish that it has duties to decide, to disclose, and to consult in order to improve its decision-making process and address some of the conditions prompting the need for its reform. It has further explained how the Council can do so, using its

¹⁶⁵ U.N. Charter, art. 27, para. 4. ("Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.").

¹⁶⁶ Luck, *supra* note 64, at 411.

¹⁶⁷ Dr. Gregorian Interview, *supra* note 118.

existing working methods, through adopting new procedural rules. This Part turns to a more challenging matter: Why should the UNSC undertake such reform from within? To make the case, this Part considers statements made by UNSC members as well as other U.N. members that suggest that the proposed reforms would enjoy some support and, at a minimum, would not trigger circumstances that have resulted in UNSC rejection in previous cases. It also draws upon legal process theory, social psychology, and negotiation theory to explain why the proposed reforms matter and how they might make a real difference at the UNSC.

A. Support from Within the U.N.

This Article proposes a series of procedural reforms to the UNSC's decision-making framework. It further proposes, as this Section explains, that such reforms must come from within: that is, the UNSC must choose to adopt them itself. If the UNSC is going to undertake its own reform, the main purpose of such reform is both constrained and motivated by the Council's mandate under the U.N. Charter to "promote the establishment and maintenance of international peace and security."¹⁶⁸ Further, the Council members can at least agree on their central purpose and use that as a guiding principle for reform. Though the key terms defining the UNSC's mandate ("international peace and security") are themselves undefined by the U.N. Charter, there is not as much ambiguity about the Council's purpose as some scholars contend.¹⁶⁹ Individual Council members have clear, and often strong, views about the Council's purpose. The challenge the Council faces is developing consensus among diverse and divergent views.

Recent statements made by the UNSC and other U.N. members demonstrate why UNSC adoption of procedural reforms is more viable than the substantive reforms that have been suggested previously. One of the venues where information about UNSC reform can be found is in the Open Debates on Security Council Working Methods. These forums began

¹⁶⁸ U.N. Charter art. 26.

¹⁶⁹ See, e.g., Szcwczyk, *supra* note 6, at 471 (contending that "[t]he primary question for the Security Council is what common values, purposes, or interests its power should serve. Only then can one address whether it has sufficient or inadequate power, and how such power should be exercised").

as a result of the 2005 World Summit Outcome¹⁷⁰ and are the responsibility of the Council's Informal Working Group on Documentation and Other Procedural Questions.¹⁷¹ The Open Debate forums have been well attended by non-Council members who express deep concerns and, at times, resentment about the structure of the UNSC, particularly its P5 membership and the use of the veto power. On November 26, 2012, the UNSC held its fifth Open Debate on the Working Methods of the Council, where non-Security Council members were invited to participate and comment at the meeting.¹⁷² The representative of India (who holds the Council's presidency) and Portugal (Chair of the Informal Working Group on Documentation and Other Procedural Questions) prepared a joint concept paper to inform the open debate, which identified the following principal themes for discussion: transparency, interaction with non-members, efficiency, and improving the Council's regular operations through time-management, technology, and cost-saving measures.¹⁷³

Debate at the forum, which is admittedly just one venue for assessing the willingness of the Council to engage in reform from within, revealed a shared consensus about the following. First, that the UNSC is, as Annan suggested in 2004, in need of serious reform to address structural problems as well as power imbalances. Many of the non-UNSC U.N. members that attended the Open Debate expressed frustration and even outright anger about the Council's power, which some view as outdated and illegitimate. Second, there was common recognition that the UNSC, and especially the P5 members, were not going to engage in serious structural reform. Third, procedural reform is viewed as possible, if not probable, and thus has

¹⁷⁰ G.A. Res. 60/1, ¶ 154, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) (recommending that the Security Council "adapt its working methods so as to increase the involvement of States not members of the Council in its work").

¹⁷¹ SECURITY COUNCIL REPORT, INC., SECURITY COUNCIL TRANSPARENCY, LEGITIMACY AND EFFECTIVENESS: EFFORTS TO REFORM COUNCIL WORKING METHODS 1993–2007, SPECIAL RESEARCH REPORT 2007 NO. 3 (Oct. 18, 2007), *available at* <http://www.securitycouncilreport.org/special-research-report/lookup-c-glKWLeMTIsG-b-3506555.php>

¹⁷² Video: Open Debate on the Working Methods of the U.N. Security Council, Statement by the Azerbaijan Representative to the UNSC (Nov. 26, 2012) [hereinafter UNSC Video], <http://webtv.un.org/meetings-events/watch/part-1-debate-on-working-methods-security-council-6870th-meeting/1990533718001>.

¹⁷³ See UNSC Concept Note for the Security Council Open Debate on Working Methods, at 4, U.N. Doc. S/2012/853 (Nov. 26, 2012) [hereinafter Concept Note]; UNSC AFFAIRS DIVISION, 2011 HIGHLIGHTS OF SECURITY COUNCIL PRACTICE (2012).

become the channel for discussing broader concerns. This occurs in two important ways. Non-UNSC members state their frustrations and disapproval. UNSC members, particularly the P5, acknowledge these concerns and then reframe or dismiss them. The following account of the meeting demonstrates these points.

The meeting opened with Portugal, as Chair of the Informal Working Group, identifying the areas in need of reform, including moving more business from the informal consultations format to the public meeting format to improve transparency, offering more open debates, promoting efficiency, and improving consensus building within the Council.¹⁷⁴ Azerbaijan followed, discussing both the need and the unwillingness among some on the Council to increase wider U.N. member participation, and taking note of the need to improve early warnings, crisis prevention, the substantive quality of Council reports, and:

the Council's conduct over the implementation over its own decisions. It is unacceptable when the resolution of the Security Council containing imperative demands for concrete action are being ignored or interpreted in a way to avoid their implementation. . . . [T]he silence of the Security Council's apparent disregard on its resolution of issues pertaining to international and regional peace and security and attempts to substitute them by ambiguous considerations are dangerous and cannot constitute an accepted practice of the Council's working methods.¹⁷⁵

The representative concluded by stating that the Council needs a “change in approach toward the primacy of general and collective interests over the national and individual ones.”¹⁷⁶

India expanded upon reforms at the working level, suggesting that the Council fully implement U.N. Charter Articles 30 and 31, that there is a “right to participate,” which compels offering U.N. members systematic access to UNSC documents, allowing countries with a specific interest in an

¹⁷⁴ UNSC Video, *supra* note 172, Statement by the U.N.G.A. Representative from Azerbaijan.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

enforcement action to be consulted before the Council reaches an outcome, pursuing Chapter VI measures before taking up Chapter VII options, and seriously working to improve cooperation with regional organizations, particularly the African Union, including offering assistance on a regular basis (not only when the P5 deem it in their interest).¹⁷⁷

Statements by Germany built on earlier comments calling for enhanced participation by all U.N. members in the Council's work on the basis that the Council benefits from the input from nonmember states.¹⁷⁸ Germany also argued for widespread reform:

We must not stop at addressing working methods. What is required is structural reform of Security Council that makes it more representative of the world we live in today The desire for real meaningful reform is evident more than ever. The overwhelming majority of states . . . see that true structural reform is the best way forward. Anything else will only address the symptoms and not the root causes.¹⁷⁹

This sentiment was echoed in the general debate that followed opening statements. Brazil, for example, said that the Council needs to adapt to the "new international reality" and that "[o]nly a real reform of the Council's structure will" suffice.¹⁸⁰ Japan asked whether the P5 was seriously ready to listen to proposals for reform.¹⁸¹ Singapore said that "[t]he P5's continued resistance to reforms on working methods does not serve interests of international community or the P5 itself."¹⁸²

¹⁷⁷ UNSC Video *supra* note 172, Statement by the U.N.G.A. Representative from India.

¹⁷⁸ Germany made specific recommendations, including circulating early drafts and statements by the Council to all nonmembers and continuing to conduct informal consultations and report to Council members on suggestions by nonmembers.

¹⁷⁹ UNSC Video *supra* note 172, Statement by the U.N.G.A. Representative from Germany.

¹⁸⁰ UNSC Video *supra* note 172, Statement by the U.N.G.A. Representative from Brazil.

¹⁸¹ UNSC Video *supra* note 172, Statement by the U.N.G.A. Representative from Japan.

¹⁸² UNSC Video *supra* note 172, Statement by the U.N.G.A. Representative from Singapore ("The Council has binding authority on all member states but we have no way to inform decisions, even on decisions that affect a country directly.") The Representative went on to say that compliance is expected and while the P5 expressed support for reform this year and last year, it is puzzling because the P5 blocks attempts to improve working methods. The Representative noted that UNSC legal opinions are leaked to P5 members before they become available to others and criticized the P5's lack of support for refraining

Malaysia stated that “[i]t has been 30 years since provisional rules have been amended. They are a relic of WWII and the Cold War. The UNSC has refused to move with [the] times.”¹⁸³ Malaysia went on to say that UNSC members have to rise against entrenched national interests and that it is:

time for the Council to move beyond weak arguments focused solely on maintaining the status quo Look at what has happened in the Middle East. Can the Council claim to be at the forefront of taking responsibility for what has happened in Palestine and Syria? No. Why is this so? Because the provisional rules of procedure and subsequent working methods of the Council have failed the international community. . . . To get the right answer, we have to put ourselves in the shoes of the victims.¹⁸⁴

Malaysia added that the use of the veto is the problem and it should be prohibited in cases of genocide, war crimes, and crimes against humanity: “The Council seems to operate today in a time warp, refusing to acknowledge all the changes that have happened since the end of the Second World War.”¹⁸⁵

In contrast to these and other statements by both UNSC non-permanent members and non-UNSC U.N. members, the statements by the P5 representatives, while acknowledging the need for certain improvements to working methods, were more guarded about widespread reform, albeit for different reasons. The United Kingdom stated that:

Council members must be careful not to give an impression that they are more interested in process than the product. The key test of the Security Council will always be its effectiveness in preventing and addressing armed conflict. . . . Our main responsibility is to make a difference on the

from using the veto in matters of genocide and crimes against humanity, especially given that certain P5 expressed moral outrage against such actions. *Id.*

¹⁸³ UNSC Video, *supra* note 172, Statement by the U.N.G.A. Representative from Malaysia.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

ground and to save innocent men, women and children from suffering.¹⁸⁶

The U.K. then suggested the adoption of two guiding principles: the ruthless pursuit of effectiveness, and the need to make swift decisions. The United States emphasized the need for the Council to act quickly with high levels of flexibility and expressed the need to ensure that greater transparency does not inhibit effectiveness.¹⁸⁷ France stated that “[t]he Council determines its agenda and its procedures. They are provisional and enable practice to vary according to needs. That is to the Council’s advantage, which can adapt itself to new requirements.”¹⁸⁸ However, France went on to recognize the need for significant reform to the Council’s working methods to increase transparency, participation, delegation of authority to subsidiary bodies support for the reform. France supported having “the permanent members of the Council voluntarily and jointly foregoing the use of the veto in situations under the Council’s consideration in which mass atrocities are being committed and, more generally, which pertain to the responsibility to protect.”¹⁸⁹

Russia expressed its distaste for the Council’s increasing willingness to invoke the use of sanctions that have uncertain humanitarian side effects on the populations of target countries.¹⁹⁰ Russia was also critical of the Council’s involvement in issues that are the prerogative of other U.N. bodies.¹⁹¹

China noted that it “supports, and attaches importance to, the continuous improvement of the Council’s working methods so as to enhance the authority, efficiency and transparency of the Council and allow it to better implement the mandate conferred upon it by the Charter of the

¹⁸⁷ UNSC Video, *supra* note 172, Statement by the U.N.S.C. Representative from the United States.

¹⁸⁸ Mr. Gerard Araud, Permanent Representative of France to the United Nations, Statement for Open Working Session on Security Council Working Methods in New York (Nov. 26, 2012).

¹⁸⁹ *Id.*

¹⁹⁰ UNSC Video, *supra* note 172, Statement by the U.N.S.C. Representative from Russia (translated).

¹⁹¹ *Id.*

United Nations.”¹⁹² China was concerned with the Council’s treatment of issues outside of its mandate, as well as the “forcing through” of proposals without adequate time for consideration.¹⁹³ Instead, China called for increases in the use of mediation, good offices, and diplomatic measures before resorting to sanctions and the use of force.¹⁹⁴

This account of recent debate at the U.N. about UNSC reform reveals that procedural reform has become the mechanism for debate about substantive concerns. It also reveals that despite the concerns and resistance of the P5, procedural reform is within the realm of possibility because it remains within the Council’s ability to control what reforms are adopted and to amend them in the future if need be.¹⁹⁵ Though this approach will not satisfy those who want comprehensive reforms, it is the only approach that is politically, and therefore practically, viable in the near-term.

B. Why Procedural Reform is Viable

Having established the benefits of procedural reform, the secondary question is whether the duties to decide, to disclose, and to consult are the right kinds of reforms to undertake. The answer depends on the goal. If the goal is to address the Council’s decision-making process, then adopting these duties works in favor of achieving that for the following reasons.

First, the adoption of the duties to decide, to disclose, and to consult would, at the very least, provide the UNSC with a broader, better informed, and more carefully reasoned basis for making decisions. Regularizing decision-making processes and creating a record of the Council’s non-decisions along with its resolutions will increase the Council’s accountability to the U.N. and to the public. These aspects then act as a commitment mechanism to encourage the P5 to seek compromise, as originally

¹⁹² Statement by Ambassador Li Baodong at the Security Council Open Debate on the Working Methods of the Security Council (Nov. 26, 2011), <http://www.china-un.org/eng/gdxw/t993924.htm>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ U.N. Secretary-General, *Renewing the United Nations: A Program for Reform, Report of the Secretary-General*, 14, U.N. Doc. A/51/1950 (July 14, 1997); *A More Secure World*, *supra* note 3 (“Reform is not an event; it is a process”); Luck, *supra* note 64, at 411 (“Sharpening the tools of management, implementation, and agenda setting should be a full-time, year-round, and well-integrated task . . .”).

envisioned in the negotiations that led to the development of the Council.¹⁹⁶ Second, the Council is not simply a political body. Its quasi-judicial nature bears certain responsibilities and duties that arise with its authority to pass decisions that are legally binding.¹⁹⁷ One of these is the duty to decide.¹⁹⁸ Third, the consequences for the Council are not overwhelmingly burdensome. The primary reason for this is that determining the exact nature of the duty is within the Council's control. It also need not threaten the underlying reasons for the veto power, which originated from the P5 members' desire "to make it impossible for a majority of other states to increase or vary a state's obligations without its own consent, in short, to safeguard the co-operative basis of their cooperation."¹⁹⁹ Fourth, the duty to decide would increase effectiveness as measured by the ability to make decisions in a timely manner because it would impose a deadline, prompting the Council to take action. The need for speedy action was a concern expressed by both the U.S. and U.K. representatives at the Open Debate.

Those skeptical of establishing decision-making duties might argue that the original justification for not having them still applies. One interpretation of the purpose of Article 27 of the U.N. Charter is that it "hopes for unanimity but deals with disagreement," recognizing that when the P5 are unable to reach agreement, then nothing happens.²⁰⁰ Under this view, it is better for the Council to avoid taking up a decision (using informal consultations as an alternative) than to make a decision that may alienate a member and break up the Council. And though this concern was more salient in a world where the Council's role was to prevent war

¹⁹⁶ FASSBENDER, *supra* note 6, at 165–166 (“[T]here was hope that the codification of the principle [of unanimity] would encourage the respective states to try vigorously to compromise when they did not agree.”).

¹⁹⁷ MATHESON, *supra* note 6, at 33–37 (2006) (describing the legal character of UNSC decisions); Geoffrey Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT’L L.J. 1, 33 (1993) (“The U.N. Charter is, in one sense, a constitutive document; it establishes the organs of U.N. government, it lays down rules of governmental procedure, and it provides some substantive norms for international conduct. In another sense, the Charter is just another treaty . . .”).

¹⁹⁸ See Colin Keating, *An Insider's Account*, in *THE U.N. SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 503 (David M. Malone ed., 2004) (“My position was that the Council not only had a right to know the details about its peacekeeping but also had a right and duty to decide the issues when human life was at stake.”).

¹⁹⁹ J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 106–07 (1963).

²⁰⁰ FASSBENDER, *supra* note 6, at 168.

between powerful nations, modern threats to the peace are both more diverse and prolific. The original flexibility and latitude that the Council enjoyed has proved to be a disincentive in many cases where certain members do not want to take up an issue due to their individual national interests and priorities. The Council as a whole has no incentive to take up decisions based on particular criteria unless it adopts a mechanism that holds it accountable for not doing so. Furthermore, we must see past the illusion. The Council's refusal to decide is itself a decision. Inaction by the Council creates a void of leadership that other actors fill. The establishment of a duty to decide at the UNSC has many worthwhile benefits and, thus, must be taken seriously.

C. Theoretical Explanations

In addition to assessing the views from within the U.N. regarding the need for procedural reform, it is important to understand the theoretical justifications for why such reform matters. This Section considers research from legal process theory, social psychology, and negotiation that informs thinking about the role of process in decision-making. This overview is not intended to provide an exhaustive account of these theories; it recognizes that further research needs to be done. Rather, it seeks to introduce to the UNSC and others the value that such theories have for understanding the relationship between process and decision-making.

1. Legal Process Theory

Legal process theory is premised on the view that law informs human behavior through how it functions, through its procedures and through the normative influence of its processes. Henry Hart and Albert Sacks pioneered thinking about a dynamic public law that considered law's purposiveness, the coordination of institutions and the legitimizing role of processes through a method, which became known as the American Legal Process (ALP) school.²⁰¹ This method emphasized the "centrality of process"

²⁰¹ HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* liii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

in determining what law is and what it ought to be.²⁰² It adopted the view that “law comprises (although it may not be confined to) a series of institutionalized processes for settling by authority of the group various types of questions of concern to the group.”²⁰³ Hart and Sacks introduced the principle of institutional settlement:

The alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision. The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are changed.²⁰⁴

Influenced by these earlier theories, Harvard Law School Professors Abram Chayes, Thomas Erlich, and Andreas Lowenfeld introduced International Legal Process (ILP) theory in the 1960s.²⁰⁵ They sought to examine the extent to which international legal processes influenced decision-making in international affairs.²⁰⁶ Subsequent ILP theorists argued that process matters in international law because it creates and changes norms.²⁰⁷

²⁰² *Id.* at xciv (a procedure “which is soundly adapted to the type of power to be exercised is conducive to well-informed and wise decisions. An unsound procedure invites ill-informed and unwise ones”).

²⁰³ Henry M. Hart, *Note on Some Essentials of a Working Theory of Law* (Hart Papers, Box 1, Folder 1, 1950); see also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 25–27 (1979). HART & SACKS, *supra* note 201, at 646–47. Their work influenced and was influenced by the New Haven School, where Myres McDougal and Harold Lasswell highlighted policy approaches that focused on the role of public law and human dignity as a measure for state actions. HAROLD D. LASSWELL & MYRES S. MACDOUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* xxi (1992).

²⁰⁴ HART & SACKS, *supra* note 201, at xcv.

²⁰⁵ CHAYES ET AL., *supra* note 21, at xi. See THE METHODS OF INTERNATIONAL LAW 6, 85 (Anne-Marie Slaughter & Steven Ratner eds., 2004).

²⁰⁶ CHAYES ET AL., *supra* note 21, at xi.

²⁰⁷ LOUIS HENKIN, *WHY NATIONS OBEY* (1979); CHAYES ET AL., *supra* note 21; THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

Though the theories of ALP and ILP did much to explain how law works, they were later criticized for neglecting considerations about law's normative purpose and failing to ask what the law should aim to achieve.²⁰⁸ In response, the New International Legal Process (NILP) theory emerged as scholars sought to address how process interacts with normative purpose.²⁰⁹ Koh writes that these scholars "saw the law's legitimacy as resting not just on process but also on its normative content."²¹⁰ NILP is well suited for understanding the process by which the UNSC makes decisions. The NILP approach envisions that decision makers will assume their role in a manner that reflects the range of values "still to be distilled from many different participants in the international community and will thus make new law."²¹¹ When this occurs, decision makers are better empowered to address problems that should be informed by normative concerns and global values.²¹²

With this overview of legal process theory as prologue, the critique in regard to the UNSC is that its decision-making fails to reflect the diverse range of global values. NILP highlights two variables that may help account for this failure. First, it calls attention to the question of function. What is the function of the Council's decision-making process? Assessing this requires recognizing that the Council operates at several levels of decision-making: the Council as a whole, coalitions of Council members, the country members themselves, and the individuals who represent their countries. Second, it seeks to identify the normative purpose of the Council's decision-

²⁰⁸ Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review). For scholarship addressing norms see Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 888 (1998); Ann Towns, *Norms and Social Hierarchies: Understanding International Policy Diffusion "from Below"*, 66 INT'L ORG. 179 (2012); Jeffrey T. Checkel, *Norms Institutions and National Identity in Contemporary Europe*, 43 INT'L STUD. Q. 83, 87 (1999) (arguing that norms are more likely to be adopted from an international to a domestic level when there is a cultural match between the norm and the place of adoption); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379 (1999) (arguing that norms are more likely to be adopted when the initiator of the norm enjoys legitimacy).

²⁰⁹ O'Connell, *supra* note 21, at 85–87; LOUIS HENKIN, *HOW NATIONS BEHAVE* (1979).

²¹⁰ Harold Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 188 (1996); See also Mary Ellen O'Connell, *New International Legal Process*, in *THE METHODS OF INTERNATIONAL LAW*, *supra* note 205, at 85 (Steven Ratner & Anne-Marie Slaughter eds., 2004) [hereinafter NILP in the Methods of International Law] (describing the NILP approach to legal prescription).

²¹¹ NILP in the Methods of International Law, *supra* note 210, at 256.

²¹² *Id.* at 259, 263.

making process. Again, this must be assessed at the various levels at which decisions are made. As this Article has explained, the Council's decisions reflect many competing normative purposes. The original rationale for why the Council should make decisions a certain way is being challenged by the changing context of global peace and security. The central normative question is whether the Council will serve to protect the collective peace and security for the international community as a whole or whether it will remain a Council that acts based on the priorities of the P5 countries. This analysis from the NILP perspective is brief, yet it shows the promise of understanding the question of UNSC reform through the wisdom provided by legal process theory.

2. Social Psychology

In the field of social psychology, theories about procedural justice and social behavior inform questions about how people make decisions.²¹³ Though these theories do not seek to explain how countries, and of relevance here, members of the UNSC, think and behave, they do provide insights into how process influences the behavior of individuals. This type of information can be useful to UNSC members, who are not immune to interpersonal dynamics in their work, as they begin to think about reform from within. For example, Thaibaut and Walker's work on procedural justice in legal process explores how process design affects outcomes. They contend, for example, that people are more satisfied and more likely to accept outcomes when they are involved in the process by which those outcomes were reached.²¹⁴ Increasing participants' process control improves their perceptions about the fairness and legitimacy of the outcome.²¹⁵ These and other theories help explain why the duty to consult – which calls for enhanced participation in UNSC decision-making by outside stakeholders – matters.²¹⁶

²¹³ See TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 75–102 (1997) (defining procedural justice, discussing the state of research in the field of social psychology, and providing an overview of important research findings).

²¹⁴ See JOHN WALTER THAIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 117–124 (1975).

²¹⁵ *Id.*

²¹⁶ See, e.g., E. ALLAN LIND AND TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 63–83 (1988).

Leventhal, Karuza, and Fry's allocation preference theory predicts that people prefer procedures perceived to be the most helpful in attaining their goals.²¹⁷ This theory helps explain the importance of transparency and why it matters that people understand how the UNSC makes decisions.

Perhaps most relevant to the matter of UNSC decision-making reform and the proposals presented in this Article is the framework for procedural justice created by Leventhal that identifies the following eight criteria that promote effective decision-making:²¹⁸

1. Consistency—equal treatment across persons and over time;
2. Bias suppression—avoiding self-interest or ideological preconceptions;
3. Accuracy—using good, accurate information and informed opinions;
4. Correctability—opportunities for review;
5. Representatives—everyone is involved in decision-making; and
6. Ethicality—compatible with fundamental moral and ethical values.

Another relevant framework, created by the legal philosopher Lon Fuller, identifies eight criteria for failure in a legal system:²¹⁹

1. The lack of rules or law, which leads to ad-hoc and inconsistent adjudication;
2. Failure to publicize or make known the rules of law;
3. Unclear or obscure legislation that is impossible to understand;
4. Retroactive legislation;
5. Contradictions in the law;
6. Demands that are beyond the power of the subjects and the ruled;
7. Unstable legislation (for example, daily revisions of laws); and
8. Divergence between adjudication/administration and legislation.

²¹⁷ Gerald S. Leventhal, Jurgis Karuza & William R. Fry, *Beyond Fairness: A Theory of Allocation Preferences*, in JUSTICE AND SOCIAL INTERACTION 167–218 (Gerold Mikula, ed., 1980).

²¹⁸ ALLEN LIND, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 131–32 (1988). See also Gerald S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27–55 (Kenneth J. Gergen et al., eds., 1980).

²¹⁹ LON L. FULLER, THE MORALITY OF LAW 33–38 (1964).

The UNSC, in its form as well as its function, lacks many of Leventhal's criteria and exhibits many of Fuller's. The UNSC is not representative of all nations or peoples. It is composed of five permanent and ten non-permanent members that make decisions that affect millions of people. This dynamic raises concerns about procedural justice. Research shows, for example, that "people's evaluations of group authorities, institutions, and rules have been found to be influenced primarily by procedural-justice judgments."²²⁰ So if a decision-making authority is concerned with implementation and compliance, it also needs to be concerned about process-driven fairness.²²¹

Both Leventhal and Fuller's frameworks reveal additional procedural problems, which have been raised by U.N. members themselves. Resolutions advanced by the UNSC lack consistency. Decisions are driven by biased views. There is no opportunity for review of UNSC resolutions by an outside authority. It can be difficult to get accurate information in emerging crises. In such crises, conditions often favor the UNSC not making any decision, often due to imperfect information or political risk.

For example, the UNSC's varied approaches to questions about whether to intervene in an armed conflict where there were allegations of genocide illustrate how its decision-making suffers from a lack of consistency, problems with accuracy, and challenges of ethicality. In the case of Rwanda, the Council did not decide to invoke Chapter VII authorization to achieve certain humanitarian protections of civilians until June 22, 1994 when much of the genocide had already taken place.²²² In Sudan, the Council, acting under its Chapter VII measures, authorized several measures such as the deployment of international monitors, but fell short of deciding to permit the "all necessary means" measures it eventually approved in Rwanda despite allegations by then-U.S. Secretary of State Colin Powell that genocide was occurring.²²³ In Libya, the UNSC authorized intervention

²²⁰ TYLER ET AL., *supra* note 213, at 83.

²²¹ *Id.* ("Procedural issues have an important independent influence on people's reactions to organizational decisions.").

²²² S.C. Res. 929, ¶ 3, U.N. Doc. S/RES/929 (June 22, 1994).

²²³ S.C. Res. 1556, ¶ 6, U.N. Doc. S/RES/1556 (July 30, 2004); *See, e.g., Powell Calls Sudan Killings Genocide*, CNN, Sept. 9, 2004, http://articles.cnn.com/2004-09-09/world/sudan.powell_1_larger-monitoring-force-darfur-arab-janjaweed?_s=PM:WORLD.

quickly and decisively,²²⁴ whereas the UNSC's response to the crisis in Syria has suffered from delay and disagreement. The reasons behind the Council's disparate treatment of these cases are complex and varied. The UNSC is justified in its reluctance to authorize intervention, even when it is aware of what is happening, if it has low confidence that such intervention would remedy the situation.²²⁵ However, if the Council is to maintain its U.N. Charter-based mandate as having the primary responsibility for matters of international peace and security, it would benefit from developing a framework that moves from ad-hoc decision-making to criteria-based decision-making. The lack of an obligation to make decisions, consistency in making them and disclosure of the reasoning behind resolutions, among other things, hinders the UNSC's legitimacy if not its ability to effectively serve as the lead international organization for promoting global peace and security.

While many of these theoretical insights are intuitively realized by Council members and other U.N. members alike, as voiced by their calls for increased participation, representation, and transparency, adapting these theoretical frameworks to the context of the UNSC may provide clarification and support for understanding exactly when and why procedural reform matters.

3. Negotiation Theory

Negotiation theory can help explain the UNSC's decision-making deficits and how, through reform, it might improve its ability to move past impasse when it occurs and reach consensus when it matters the most.²²⁶

One aspect of negotiation theory that is useful in this context is the concept of commitment mechanisms. Commitment mechanisms are means by which to stimulate or force a deal and are used in a variety of contexts, from international agreement formation to business meetings to informal

²²⁴ S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

²²⁵ Anderson, *supra* note 6, at 77 (discussing the challenges of nation-building in Congo, Afghanistan and Iraq).

²²⁶ See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) (describing how the process of negotiation influences the development of international treaties and state behavior regarding compliance).

decision-making processes.²²⁷ Two recent public examples where commitment mechanisms worked to produce an outcome are the Job Protection and Recession Prevention Act of 2012, which emerged out of last minute negotiations in the U.S. Congress aimed at avoiding the “fiscal cliff” and the Copenhagen Accord, which was a nonbinding political agreement formed as the outcome of the U.N. Framework Convention on Climate Change, Conference of the Parties 15 in 2009.²²⁸ In both cases, the presence of a publicly declared decision-making deadline pushed the parties to reach a decision. Commitment mechanisms also arise in the context of new democracies where constitutions may refer to customary international law and treaty obligations to create national legal commitments to certain principles.²²⁹

In addition to prompting decision-making, commitment mechanisms offer a means for participants to show that their commitments are credible.²³⁰ Commitment mechanisms can provide strong incentives for parties to comply with agreements. For example, contingent commitments, whereby parties agree in advance to penalize themselves for not complying with an agreement, work to strengthen the likelihood of compliance.²³¹ Commitment mechanisms can be created by unilateral action, as Tom

²²⁷ See SUSSKIND & CRUIKSHANK, *BREAKING ROBERTS RULES* (2006); LAWRENCE SUSSKIND, *ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS* 105 (1994).

²²⁸ Job Protection and Recession Prevention Act of 2012, H.R. 8, 112TH CONG. § 101 (2012); Copenhagen Accord, FCCC/CP/2009/L.7 (Dec. 18, 2009), *available at* <http://unfccc.int/resource/docs/2009/cop15/eng/107.pdf>; see Dylan Matthews, *What Negotiation Theory Can Teach Us About the Fiscal Cliff Talks*, WASH. POST. WONKBLOG (Dec. 21, 2012, 12:37 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/21/what-negotiation-theory-can-teach-us-about-the-fiscal-cliff-talks/> (also noting that artificial deadlines may make reaching substantive deals more difficult).

²²⁹ Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201 (2008); Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment and International Law*, 38 N.Y.U.J. INT'L L. & POL. 707, 752 (2006).

²³⁰ HAROLD HOUBA & WILKO BOLT, *CREDIBLE THREATS IN NEGOTIATIONS: A GAME-THEORETICAL APPROACH* 175, 176 (2002) (describing Spanish conquistador Hernan Cortés' famous command that all but one ship be destroyed, thereby committing his troops to fight and not retreat in the conquest of Mexico as a commitment mechanism).

²³¹ See SUSSKIND & CRUIKSHANK, *supra* note 227 at 40, 143–44 (describing how contingent commitments work to create self-enforcing agreements).

Schelling describes in his Last Clear Chance theory.²³² The classic example is the car game of chicken where two parties have the ability to avoid a mutually undesirable result until one takes an action (such as losing control of the steering wheel) that eliminates her ability to do so and thereby forces the other party to commit.²³³

The duty to decide is intended to act as a commitment mechanism to stimulate UNSC members to commit, in advance, to engaging in and reaching decisions of importance to global peace and security. The duty to disclose, where a decision is not made, further incentivizes the duty and commitment to making a decision.

V. Implications

Having described and justified the decision-making framework established by adopting the duties to decide, to disclose and to consult at the UNSC, this Part considers three implications that this proposal has for debates about governance and decision-making within international legal scholarship and beyond.

A. Judicial Duties for Non-Judicial Bodies

While adopting the proposed duties might imply that judicial procedural rules and principles can and should apply to non-judicial bodies, the application of judicial decision-making guidance to the UNSC is a unique case. The UNSC is the only governing body of its kind. It is authorized with executive, legislative, and judicial functions with limited guidance under the U.N. Charter and limited formal oversight. Thus, should the UNSC choose to adopt procedural measures traditionally reserved for courts, this would not set a precedent for other governance organizations.

However, the theoretical implications of such a maneuver raise the following important questions that are worthy of continued scholarly debate. What is the role of procedural law in political decision-making? Can procedural reform aimed at addressing dysfunctional decision-making do so on its own without also engaging in substantive reform? What is the

²³² THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 83–94 (1960).

²³³ *Id.*

relationship between the norms embedded in the substance of decisions (for example, views on whether or not to intervene into a country) and the norms embedded in the process of making decisions (such as consensus, effectiveness, and transparency)? Finally, when does the creation of procedural duties create corresponding rights, and for whom?

While many of these questions have been considered in the context of judicial bodies, their significance in the area of international governance bodies remains a novel area of inquiry.²³⁴ By raising such questions in the context of the UNSC, this Article aims to encourage and contribute to a larger debate about the role of decision-making in public governance and the value of legal process theory within this context.

B. Toward Inclusive and Participatory Governance

The demand for participatory governance has taken off as national governments, local authorities, and corporations are faced with a public that demands increased participation in making decisions that affect them. By adopting the duties to decide, disclose, and consult, the UNSC would signal that it, too, is embracing the norms of the new era. The proposed procedural reforms provide a proactive role for Council members, as decision makers, to both uphold their mandate under the U.N. Charter and to embrace increase participation in matters of public importance to the public. In adopting such reforms, the Council would send the message that people should be a part of how law shapes and changes their behavior.

The question to ask regarding inclusive and participatory governance is not “if” but “when.” One can imagine that in certain crises,

²³⁴ One of the best-known schools of thought in this area is the New Haven School. See, e.g., Michael Reisman, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 576 (2007) (defining law as a process of decision that is both authoritative and controlling.); see also, Michael Reisman, *The View from the New Haven School of International Law*, in INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (1992); MYRES S. MCDUGAL ET AL., STUDIES IN WORLD PUBLIC ORDER (1987); HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY Volume II (1992); Myres Smith McDougal, *Law and Power*, 46 AM. J. INT'L L. 102 (1952) (“[T]he most viable conception of law . . . as revived by the American Legal Realists [is] that of a process of authoritative decision by which the members of a community clarify and secure their common interests.”); OONA HATHAWAY, THE CONTINUING INFLUENCE OF THE NEW HAVEN SCHOOL (1997); Laura Dickinson, *Toward a ‘New’ New Haven School of International Law*, 32 YALE J. INT'L L. 547, 548 (2007).

such as the proliferation of nuclear weapons, an authoritative Council that moves quickly with little transparency might be the best approach for ensuring global peace and security. Alternatively, there are other matters that are not time sensitive in nature where a duty to decide may create undue haste. Thus, in adopting reforms, the Council must critically assess which situations, now and in the foreseeable future, will benefit from the proposed duties and which will not.

A second challenge is to consider the appropriate level or amount of participation and inclusiveness. There are situations where the efforts of outsiders to consult with local stakeholders have been met with significant resistance, suggesting that the duty to consult has to be met with the desire, on the receiving end, to inform.²³⁵ For example, one of the challenges that emerged in U.N.-led peace efforts in the Democratic Republic of Congo was the difficulty in finding and communicating with the various armed groups.²³⁶ Many of the groups were difficult to contact and some did not want to communicate with outsiders, whether the UNSC or the press. Another challenge that the situation in Syria illustrates is about the difficulties of verifying information, even when it is accessible.²³⁷ Is the UNSC prepared to rely on the accounts of local stakeholders' as authoritative and legitimate? If not, what alternatives are available? These are some of the questions that will arise should the UNSC undertake the process of engaging in multi-actor decision-making about matters of peace and security.

C. Global Peace and Security: Collective or Selective?

The debate about UNSC reform rests on a central normative question. Is the UNSC willing to assume primary responsibility for ensuring collective peace and security in today's world? During the negotiations that led to the creation of the U.N., it was the view of then-U.S. Secretary of State Hull that the UNSC's purpose was to inaugurate a system of general security "with a view to joint action on behalf of the community of

²³⁵ See, e.g., BUILDING PEACE, CREATING CONFLICT? 8 (Hanne Fjelde & Kristine Hoglund eds., 2011) (discussing the challenges in modern peacebuilding where attempts create conflict) [hereinafter BUILDING PEACE]

²³⁶ Interview with Christopher Moore, Partner, CDR Associates, in Boulder, CO. (Sept. 17, 2012); interview with Dr. Linda Bishai, Senior Program Officer, U.S. Institute of Peace, Washington, D.C. (Nov. 9, 2012).

²³⁷ *Id.*

nations.”²³⁸ As the Open Debate showed, many U.N. members assume that the Council is concerned with regional security, civil wars and other threats to the peace that did not fall within the scope of situations envisioned in Article 39 at the end of WWII. Such expectations are based on the presumption that the Council is responsible for collective peace and security globally. Other statements by both Council and non-Council members discussed the importance of the UNSC's role in building capacity for conflict prevention and peacebuilding. Yet, when there is difficulty at the Council in reaching consensus, when no action is taken in a given crises, national interests take precedence over collective interests.²³⁹ Russia's statements at the Open Debate about the importance of respecting sovereignty go to this point.

The Council cannot ignore this political reality. But if the UNSC is not going to be the locus for collective peace and security then we may be entering an era where other organizations such as NATO and individual nations will intervene into armed conflicts in the Council's absence.²⁴⁰ Such fragmentation in authority and action may benefit some, but will arguably cause harm to many more, destabilizing the U.N. system along the way. Thus, the Council must confirm, and define, its responsibility for global peace and security. The approach for engaging in procedural reform proposed in this Article provides a starting point. However, it is not a substitute for the necessary normative discourse about the meaning and purpose of peace and security that the Council, and all those concerned about global stability, must have.

Given this, it is time to revisit the first principle of peace. In today's world, peace is everyone's responsibility. As Kelsen and Franck have identified, we have shifted from a world in which peace had to be secured between states to one in which peace must be secured within the state, between peoples.²⁴¹ Peace promotion must be led from within but supported from the outside.²⁴² This requires integrating the preferences of those making decisions about peace at the UNSC with those responsible for

²³⁸ RUSSELL & MUTHER, *supra* note 29, at 135.

²³⁹ HANS MORGENTHAU, *LA NOTION DU POLITIQUE ET LA THEORIE DE DIFFERENDS INTERNATIONAUX* 65–71 (1933) (arguing that international law privileges stability).

²⁴⁰ Anderson, *supra* note 6, at 62–64.

²⁴¹ HANS KELSEN, *PEACE THROUGH LAW* (1944); FRANCK, *supra* note 207.

²⁴² See Birger-Heldt, *Peacekeeping and Transitions to Democracy*, in *BUILDING PEACE*, *supra* note 235, at 68.

ensuring long-term peace at the local level. Promoting peace today requires problem-solving, participatory decision-making, and collaboration.²⁴³ As the President of the U.N. General Assembly, Nassir Al-Nasser, in discussing the crises in Libya and Syria, said: “We should allow more room for mediation before conflicts erupt or situations worsen.”²⁴⁴ Given these changing circumstances, should peace, as Kelsen posited, be the Grundnorm of international law that binds all other norms together?²⁴⁵ Paramount questions such as this about the relationship between peace and law spawned the development of our international legal system and of the U.N. That such questions remain should bolster, not preclude, our every effort to seek their answers.

Conclusion

The UNSC is in need of reform. This Article has proposed a model of reform that targets improving the Council’s decision-making practices through the adoption of three new procedural duties. It has also proposed a framework that highlights the Council’s central role and emphasizes the need for engaging in such reform from within. The focus on decision-making, rather than on any one area of substantive reform, presents a novel approach whose aim is to strengthen the UNSC’s ability to build consensus

²⁴³ For scholarship addressing post-conflict approaches, see, e.g., Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT’L L. 76 (2001); Eric De Brabandere, *The Responsibility of Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept*, 43 VAND. J. TRANSNAT’L L. 119 (2010); JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE (Carsten Stahn & Jann K. Kleffner eds., 2008); Roland Paris, *Post-Conflict Peacebuilding*, in THE OXFORD HANDBOOK ON THE UNITED NATIONS 404 (Thomas G. Weiss & Sam Daws eds., 2007); THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 894–900 (M. Cherif Bassiouni ed., 2010) (study on approaches to international criminal justice identifying certain criteria for effectiveness, such as inclusiveness (of victims in particular) and prioritizing elements that will support long-term resolution, reconciliation, and peacebuilding).

²⁴⁴ *General Assembly President Calls for Early Conflict Mediation to Avoid Violence*, U.N. NEWS SERVICE, Feb. 28, 2012, available at <http://www.un.org/app/news/printnews.asp?nid=41375>.

²⁴⁵ HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., 1967); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1949) (identifying the theory of a Grundnorm or basic norm that provides the basis for a legal system through which other laws are legitimized and interpreted and which, in international law, could serve as superior to the normative interests of individual states); KELSEN, *supra* note 241. *But see* H.L.A. HART, *THE CONCEPT OF LAW* (1961) (arguing against Kelsen’s Grundnorm on several grounds).

and, therefore, to increase its overall capacity to ensure peace and security. Engaging in a process-based approach to reform does not preclude or supersede reforms aimed at substantive change. In fact, it serves as a supportive corollary for achieving many of the same ends through different, and more viable, means.