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Zürich/Vaduz, 20 July 2017

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Introduction

I. Background

On 29 January 1996, the Security Council expressed its support for the efforts of the Secretary-General to facilitate a comprehensive political dialogue in Burundi with the objective to, ia, promote the rule of law.[1] From this date onward, the Council has invoked the rule of law in 281 resolutions and 163 presidential statements.[2] The rule of law figured most prominently in Council resolutions reacting to situations in conflict- and post-conflict states where the Council furnished several UN peace operations with rule of law mandates aimed at establishing or strengthening rule of law related institutions and procedures.[3] In this context, the Council developed a vocabulary intimately related to the rule of law, invoking guarantees such as due process, separation of powers or judicial independence. Another field in which the Council actively employed the rule of law is the prevention and fight against crimes of a cross-border dimension or with cross-border effects such as terrorism, piracy or sexual violence in conflict. Additionally, in 2003 the Council started holding open thematic debates on the promotion and strengthening of the rule of law in the maintenance of international peace and security, allowing UN member states to deliberate on the elements and implications of the rule of law.[4]

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1 UNSC Res 1040 (29 January 1996) UN Doc S/RES/1040 [2].

2 Full-text search with symbols 'S/RES/' & 'S/PRST' with UN Official Document System search mask ‹https://documents.un.org/prod/ods.nsf/xpSearchResultsE.xsp› accessed 14 July 2017. The present thesis has included resolutions issued until and including 24 June 2017. The first resolution invoking the rule of law was issued in 1961 in response to the situation in the Congo. See, UNSC Res 161 (21 February 1961) UN Doc S/4741 [section B, preamble, indent 2]. It was, however, only in the late 1990 s that the Council started to repeatedly invoke the rule of law in its resolutions.

3 Security Council Report, 'Cross-Cutting Report on the Rule of Law' (28 October 2011) 2; Richard Sannerholm, *Rule of Law after War and Crisis* (Intersentia 2012) 51, 56; Hilary Charlesworth and Jeremy Farrall, 'Regulating the Rule of Law through the Security Council' in Jeremy Farrall, Hilary Charlesworth (eds), *Strengthening the Rule of Law through the UN Security Council* (Routledge 2016) 1, 3.

4 See, 4833rd Council Meeting on Justice and the Rule of Law: the United Nations role, UN Doc S/PV.4833 (24 September 2003) and the related UNSC Presidential Statement 15 (2003) UN Doc S/PRST/2003/15 and 4835th Council Meeting on Justice and the Rule of Law: the United Nations role, UN Doc S/PV.4835 (30 September 2003); 5052nd Council Meeting on Justice and the Rule of Law: the United Nations role, UN Doc S/PV.5052 (6 October 2004) and the related UNSC Presidential Statement 34 (2004) UN

The prominent emergence of the rule of law on the Council's agenda in the 1990s must be contextualised with a view to the general developments in world politics and the international legal order of the time. The post 1989-phase was characterised by an awakening of international cooperation, an increased use of international law to manage international relations, the creation of a variety of multilateral institutions and an increased focus on the legal protection of the individual through international law.[5] The end of the Cold War also put an end to those bipolar political dynamics that had made it impossible for an organ such as the UN Security Council to agree on a model of domestic governance for states – an important corollary of its later engagement in rule of law promotion.[6] Quite generally, the Council had been inhibited during the Cold War era to elaborate on the meaning and scope of those Charter articles that pertain to the maintenance of international peace and security and thus on the tools to fulfil its mandate – such as, eg, the rule of law.[7] The prominent

Doc S/PRST/2004/34; 5474th Council Meeting on Strengthening international law: rule of law and maintenance of international peace and security, UN Doc S/PV.5474 (22 June 2006) and the related UNSC Presidential Statement 28 (2006) UN Doc S/PRST/2006/28; 6347th Council Meeting on The promotion and strengthening of the rule of law in the maintenance of international peace and security, UN Doc S/PV.6347 (29 June 2010) and the related UNSC Presidential Statement 11 (2010) UN Doc S/PRST/2010/11; 6705th Council Meeting on The promotion and strengthening of the rule of law in the maintenance of international peace and security, UN Doc S/PV.6705 (19 January 2012) and the related UNSC Presidential Statement 1 (2012) UN Doc S/PRST/2012/1; 6849th Council Meeting on The promotion and strengthening of the rule of law in the maintenance of international peace and security, UN Doc S/PV.6849 (17 October 2012); 6913th Council Meeting on The promotion and strengthening of the rule of law in the maintenance of international peace and security, UN Doc S/PV.6913 (30 January 2013); 7115th Council Meeting on The promotion and strengthening of the rule of law in the maintenance of international peace and security, UN Doc S/PV.7115 (21 February 2014) and the related UNSC Presidential Statement 5 (2014) UN Doc S/PRST/2014/5.

5 André Nollkaemper, 'The Process of Legalisation After 1989 and its Contribution to the International Rule of Law' (2010) 3 *Select Proceedings of the European Society of International Law* 89, 92f; Heike Krieger, 'Trumping International Law? Implications of the 2016 US Presidential Election for the International Legal Order', EJIL: Talk! (3 January 2017) ‹https://www.ejiltalk.org/trumping-international-law-the-implications-of-the-2016-us-presidential-election-for-the-international-legal-order/› accessed 14 July 2017.

6 Roland Paris, *At War's End* (CUP 2004) 15.

7 José Alvarez, *International Organizations as Law-makers* (OUP 2005) 184f; Brian Frederking, *The United States and the Security Council* (Routledge 2007) 31; Jonathan Graubart, 'NGOs and the Security Council: Authority All Around But for Whose Benefit?' in Bruce Cronin, Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 154, 157; Simon Chesterman, Ian Johnstone and David Malone, *Law and Practice of the United Nations* (OUP 2016) 33 f.

emergence of the rule of law in Council documents during the past twenty years must, thus, be related to the Council's newly gained ability to achieve consensus on previously contentious issues.[8] The increasing involvement of the Council with matters pertaining to the internal governance structure of states, however, also related to another development of the post-Cold War world order. Increasingly, the Council had to deal with internal conflicts as opposed to inter-state conflicts that had traditionally characterised its agenda.[9] Correspondingly, the Council's engagement with the rule of law must be understood as an attempt to create strong state structures in order to address security threats or to prevent threats arising from deficient state institutions.[10]

Another post-Cold War phenomenon relevant for the subject of the present thesis was the rise of human rights in national, regional and international law. Accordingly, human rights also figured more prominently on the Council's agenda.[11] Since Russia and China, however, generally considered human rights an issue outside the ambit of the Council's mandate, the rule of law was a convenient compromise vehicle for Council members to initiate similar activities in the name of a different concept.[12] In academia, the transition from a human rights- to a rule of law discourse has been criticised as a deliberate decision to evade the transformative and emancipatory potential for social change of human rights in favour of the more conservative and normatively less ambitious rule of law agenda.[13] If, however, Council resolutions that invoke the rule of law indeed serve the concealed promotion of human rights as suggested by the not-for-profit organisation Security Council Report, then the substitution of a human rights- by a rule of law discourse would not have a substantial bearing on a level of implementation.[14] The concomitant differences in discourse, however, most likely affect the associated ideation on the rule of

8 Martin Krygier, 'The Rule of Law after the Short Twentieth Century: Launching a Global Career' in Richard Nobles and David Schiff (eds), *Law, Society and Community: Essays in Honour of Roger Cotterrell* (Ashgate 2014) 327–346.

9 Cross-Cutting Report on the Rule of Law (n 3) 2.

10 Nico Krisch, 'The General Framework' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol II (3rd edn, OUP 2012) n 36.

11 See, eg, Katarina Månsson, 'UN Peace Operations and Security Council Resolutions: A Tool for Measuring the Status of International Human Rights Law?' (2008) 26 *Neth. Q. Hum. Rts*. 79-107.

12 Cross-Cutting Report on the Rule of Law (n 3) 14.

13 Balakrishnan Rajagopal, 'Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination' (2008) 49 *Wm. & Mary L. Rev.* 1345, 1359 f.

14 Cross-Cutting Report on the Rule of Law (n 3) 14 ('Incorporating the rule of law into its vocabulary has allowed for the Council to promote the protection of human rights without labelling its actions as such, thus avoiding tensions and criticism by those who view the link between international peace and security and human rights as tenuous.').

law among Council members and those agents interacting with the Council or affected by its decisions and recommendations.

It is in this field of research that the present thesis situates itself by trying to assess the potential of Council documents to affect the emergence of a global understanding of the rule of law. It therefore assumes that the practice of the Council, an organ providing a platform for international legal and political discourse, may be reflective of an emerging consensus among states with regard to certain rule of law elements or result in it as a consequence of the organ's far reaching powers to issue decisions binding upon UN member and non-member states or its potential ability to affect an ideation related to the concept of the rule of law due to its political authority. The fact that binding rule of law measures often interfere deeply with the internal governance structure of affected states and sometimes even with individual rights of their inhabitants, constitutes another reason why it is essential to establish a clearer understanding of the concrete contours of the Council's rule of law understanding and the circumstances of its use.

II. Research Questions and their Relevance

The first research question of the present thesis is whether repeated references to the rule of law in Council documents may indicate the emergence or even existence of a global consensus on the meaning of the concept of the rule of law. The follow-up and second research question then inquires whether the Council itself may be said to have developed an understanding of the rule of law and under what circumstances its practice may contribute to a diffusion of its understanding among states and the wider international society. The research questions' relevance relates to the lack of detailed research with regard to the Council's engagement with the rule of law and to the assumed impact of the Council on the governance structure of states affected by binding rule of law measures as well as on an international ideation process related to the meaning of the rule of law due to its singular function and powers in the international society.

The first reason of the thesis' research relevance pertains to a lack of profound research regarding the scope and implications of the Council's rule of law understanding. Despite the increased engagement of the Council with the rule of law, only few scholars have dedicated their research to an analysis of the UN organ's understanding of the principle. Many authors have written about UN peacebuilding and peacekeeping activities and the Council's role in this field and several publications have focused on rule of law components of UN peace operations without, however, delving into the Council's rule of law

understanding in this context.[15] While several authors have focused on the question to what extent the Council itself is bound by or shall respect the rule of law in the exercise of its powers, very few have attempted to analyse the Council's approach to and understanding of the rule of law.[16]

[15] On UN peace operations see, eg, John T O'Neill and Nicholas Rees, *United Nations Peacekeeping in the Post-Cold War Era* (Routledge 2005); Julia Leininger, 'Democracy and UN Peace-keeping' (2006) 10 *Max Planck Y.B. U.N. L.* 465–530; Michael Doyle and Nicholas Sambanis, 'Peacekeeping Operations' and Roland Paris, 'Post-Conflict Peacebuilding' in Thomas Weiss and Sam Daws (eds), *The Oxford Handbook on the United Nations* (OUP 2007) 323–348, 404–426; Månsson (n 11) 79-107; Susanne Alldén and Ramses Amer, 'The United Nations and Peacekeeping: Lessons Learned from Cambodia and East Timor' in Per Bergling, Jenny Ederlöf and Veronica Taylor (eds), *Rule of Law Promotion: Global Perspectives, Local Applications* (Iustus Förlag 2009) 111–128; Eric de Brabandere, 'UN Post-Conflict Peacebuilding Activities' (2014) 18 *Max Planck Y.B. U.N. L.* 188–216; Jennifer Easterday, 'The Rule of Law at the National and International Levels in Post-Conflict Peace Agreements' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016) 383–408. On rule of law components of UN peace operations see, eg, David Tolbert and Andrew Solomon, 'United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies' (2006) 19 *Harv. Hum Rts. J.* 29–62; Carolyn Bull, *No Entry without Strategy: Building the Rule of Law under UN Transitional Administration* (UN University Press 2008); Stéphanie Vig, 'The Conflictual Promises of the United Nations' Rule of Law Agenda: Challenges for Post-Conflict Societies' (2009) 13 *Journal of International Peacekeeping* 131–258.

[16] For literature on the application of rule of law principles to the Council see, eg, Andreas Stein, *Der Sicherheitsrat der Vereinten Nationen und die Rule of Law* (Nomos 1999); Enzo Cannizzaro, 'A Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 3 *Int'l Org. L. Rev.* 189–224; Kenneth Manusama, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (Martinus Nijhoff Publishers 2006); Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2007); Final Report and Recommendations from the Austrian Initiative 2004–2008, *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-based International System*; Simon Chesterman, 'I'll Take Manhattan: The International Rule of Law and the United Nations Security Council' (2009) 1 *HJRL* 67–73; Hitoshi Nasu, 'Who Guards the Guardian? Towards Regulation of the UN Security Council's Chapter VII Powers through Dialogue' in Jeremy Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (CUP 2009) 123–142; Pavel Šturma, 'Does the Rule of Law also Apply to the Security Council?' (2012) 32 *Polish Y.B. Int'l L.* 299–305; Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (OUP 2016); Matthew Happold, 'United Nations Sanctions and the Rule of Law' in Clemens Feinäugle (ed), *The Rule of Law and its Application to the United Nations* (Nomos 2016) 75–97; Erika de Wet, 'Human Rights and the Rule of Law as Applicable to the UNSC: Implications for the Right to a Fair Hearing' in Clemens Feinäugle (ed), *The Rule of Law and its Application to the United Nations* (Nomos 2016) 181–200;

Various authors who did focus on the implications of Council documents invoking the rule of law have been sceptical of whether they indicate a Council understanding of the principle's meaning.[17] In general, the concept of the rule of law is often described as vague and abstract and as lending itself to the introduction and justification of all kinds of goals, purposes and interests.[18] Nonetheless, several authors have attempted to shed light on the Council's approach to the rule of law by proposing categories that describe the various contexts of its use.[19]

No study, however, has yet attempted to look at the Council's rule of law language in more detail, ie focused on particular guarantees identified as sub-elements of the rule of law in Council documents and examined the circumstances that have triggered their reference. Such a detailed analysis, however, is an indispensable requirement of a legitimate claim that the Council indeed did not develop an understanding of the meaning of the rule of law. To assess the accuracy of the very generalised assumption in legal literature that the Council has not yet developed a coherent understanding of the rule of law, the present thesis examines the purposes the Council claims to be pursuing when invoking the rule of law in order to contextualise its rule of law references and the rule of law requirements identified by the Council for the judiciary as an institution of central importance to the guarantee of the rule of law.

Sherif Elgebeily, *The Rule of Law in the United Nations Security Council Decision-making Process: Turning the Focus Inwards* (Routledge 2017).

17 Helmut P Aust and Georg Nolte, 'International Law and the Rule of Law at the National Level' in Michael Zürn, André Nollkaemper and Randall Peerenboom (eds), *Rule of Law Dynamics in an Era of International and Transnational Governance* (CUP 2012) 48, 55; Farrall, *United Nations Sanctions* (n 16) 24.

18 Joel Ngugi, 'Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse' (2005) 26 *U. Pa. J. Int'l L.* 513, 515f; Simon Chesterman 'An International Rule of Law?' (2008) 56 *Am. J.Comp. L.* 331, 332; Ian Hurd, 'The International Rule of Law: Law and the Limit of Politics' (2014) 28 *Ethics & International Affairs* 39–51; Martin Krygier, 'The Security Council and the Rule of Law' in Jeremy Farrall and Hilary Charlesworth (eds), *Strengthening the Rule of Law through the UN Security Council* (Routledge 2016) 13, 14.

19 Sannerholm (n 3) 55–62 (who categorises the Council's rule of law language into 'broad narratives' and references related to the 'notion of impunity', 'security and law and order', 'judicial and other institutional reforms'); Jeremy Farrall, 'Rule of Accountability or Rule of Law? Regulating the UN Security Council's Accountability Deficits' (2014) 19 *J. Conflict & Sec. L.* 389, 395–397, 401–403 (the categories associated with the phrase 'rule of law' in Council decisions according to Farrall are 'law and order', 'ending impunity for crimes', 'resolving conflict through law', 'protecting and promoting human rights and international humanitarian law', 'countering corruption', 'promoting principled government').

The second reason of the thesis' research relevance relates to the assumption that references to the rule of law in Council documents may reflect or contribute to the emergence of a global concept of the rule of law. Documents of the Council, an organ of an international organisation of almost universal membership, may indicate an already existing or emerging international consensus with regard to certain rule of law elements or the function of the rule of law.

If this assumption cannot be maintained, Council documents may still contribute to the emergence of such a consensus. Due to the Council's important function to maintain international peace and security and its far reaching powers to fulfil this mandate, its actions matter greatly to all UN member states and agencies and to the international society as a whole.[20] Binding rule of law measures that are enforced by UN peace operations or demand implementation by the addressed states may affect those countries' future rule of law understanding via institutional transplantation.[21] If such measures change the governance structure of states based on the Council's enforcement powers, they may constitute interferences with the principles of state sovereignty and self-determination and indirectly affect the rights of individuals subject to the reformed government system.[22] It is, thus, of pivotal interest to determine the legitimacy of the Council's rule of law understanding based on which it interferes with or reforms the governance structure of states as the original 'consent of the Members of the United Nations to submit themselves to the authority of the Security Council on matters of international peace and security through membership of the organization does not absolve the Council from an obligation to provide sufficient justification for the actual exercise of political authority in a particular case'.[23]

Independent of the consequences that legally binding rule of law measures may have on an affected country's rule of law understanding, the Council may

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20 Cora True-Frost, 'The Security Council and Norm Consumption' (2007) 40 *N.Y.U. J. Int'l L. & Pol.* 115, 116.

21 On the complex conditions of successful institutional transplantation, however, see, Martin de Jong and Suzan Stoter, 'Institutional Transplantation and the Rule of Law: How this Interdisciplinary Method can Enhance the Legitimacy of International Organisations' (2009) *Erasmus L. Rev.* 311–330.

22 Jochen Frowein, 'Unilateral Interpretation of Security Council Resolutions – A Threat to Collective Security?' in Volkmar Götz, Peter Selmer and Rüdiger Wolfrum (eds), *Liber Amicorum Günther Jaenicke – Zum 85. Geburtstag* (Springer 1998) 97, 112; Krisch, 'The General Framework' (n 10) para 69 (referring, however, to the most invasive type of rule of law measures by the Council undertaken in the wake of the establishment of territorial administrations).

23 Steven Wheatley, 'The Security Council, Democratic Legitimacy and Regime Change in Iraq' (2006) 17 *EJIL* 531, 544.

also contribute to the emergence of a global concept of the rule of law simply by providing a platform for an international political and legal discourse that enables the evolution of shared understandings and intersubjective meanings of certain concepts and terms.[24] By issuing a substantial amount of documents that amplify the meaning of the constitutional law principle of the rule of law, the Council may further be considered as an agent of a global '(putative) process of constitutionalization'.[25]

It remains an unanswered question at the present time, whether the Council will further entrench its engagement with the rule of law and continue to contribute to an international discourse on the principle's meaning. Several events of the 21st century suggest an end of the post-Cold War era of legalisation, international human rights and increased international cooperation to which the Council's promotion of the rule of law can be counted.[26] The election of the latest US President is symptomatic of a general shift in world politics towards an increased scepticism against law that transcends the national realm. The British decision to leave the European Union, the withdrawal of Russia, South Africa, Burundi and Gambia from the ICC and a growth in popularity of protectionist and nationalist politics in Western liberal democracies are just a few additional examples of this trend.[27] In the wake of these developments, it has also been suggested that Russia and China may replace the US as an international norm shaper.[28]

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24 Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *IO* 887, 899f; Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 *EJIL* 437, 439, 452, 456, 460 f.

25 Anne Peters, 'Global Constitutionalism' in Michael Gibbons and others (eds), *The Encyclopedia of Political Thought*, vol III (3rd edn, Wiley Blackwell 2015) 1484, 1485.

26 See, eg, Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing 2000); Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2003); Ingrid Wuerth, 'International Law in the Post-Human Rights Era' (2017) 96 *Texas L. Rev.* (forthcoming) (on the implications for international law of the decline of human rights).

27 Krieger (n 5).

28 Anne Peters, 'After Trump: China and Russia move from Norm-Takers to Shapers of the International Legal Order', EJIL: Talk! (10 November 2016) ‹https://www.ejiltalk.org/after-trump-china-and-russia-move-from-norm-takers-to-shapers-of-the-international-legal-order/› accessed 14 July 2017. It is no coincidence that the American Society of International Law has launched a live online briefing series for the first 100 days of the Trump presidency under the heading 'International Law and the Trump Administration' scrutinising how the newly elected government treats its existing international law obligations and its future policy choices with regard to international law. ‹https://www.asil.org/100days› accessed 14 July 2017.

The role and evolution of an international rule of law discourse in this allegedly new era is uncertain. If it is indeed considered a convenient substitute for the more transformative potential of the human rights discourse and – as Rajagopal suggests – 'much more empty of content and capable of being interpreted in many diverse, sometimes contradictory, ways', it might still fare well in times characterised by waning international consensus.[29] At the present time at least, the rule of law still figures prominently in Council decisions and informs the mandates of UN peace operations. Accordingly, on 13 April 2017 the Council established the UN Mission for Justice Support in Haiti (MINUJUSTH), which is expected to start its work on 16 October 2017 with the mandate 'to assist the Government of Haiti to strengthen rule of law institutions in Haiti'.[30] The author of the present thesis, thus, hopes that her analysis will remain relevant in the coming years and inform future research on the implications of the Council's engagement with the rule of law.

III. Methodology

The present thesis applies, ia, insights gained by a social-constructivist analysis about the motivation behind and implications of actions by states, international organisations, their organs and other agents of the international society.[31] Social constructivism is a meta-level social theory, which – as opposed to neoliberal and neorealist theories – focuses on 'the social fabric of world politics'.[32] It purports that meaning and knowledge are socially construed and assumes the mutual constitution of agents and the structures they inhabit and that ideas, values and norms determine the identity and interests of agents.[33] Applied to international politics, the agents are traditionally states but may also be other

29 Rajagopal (n 13) 1359.

30 UNSC Res 2350 (13 April 2017) UN Doc S/RES/2350 [6].

31 Thomas Risse, 'Social Constructivism Meets Globalization' in David Held and Anthony McGrew (eds), *Globalization Theory: Approaches and Controversies* (Polity Press 2007) 126, 132.

32 Emanuel Adler, 'Seizing the Middle Ground: Constructivism in World Politics' (1997) 3 *Eur. J. Int. Rel*. 319, 323; Jeffrey Checkel, 'International Norms and Domestic Politics: Bridging the Rationalist—Constructivist Divide' (1997) 3 *Eur. J. Int. Rel*. 473-95; Jeffrey Checkel, 'The Constructivist Turn in International Relations Theory' (1998) 50 *World Politics* 324-48.

33 Peter Berger and Thomas Luckmann, *The Social Construction of Reality* (Penguin Press 1966); Stefano Guzzini, 'A Reconstruction of Constructivism in International Relations' (2000) 6 *Eur. J. Int. Rel*. 147, 149; Thomas Risse, '"Let's Argue!": Communicative Action in World Politics' (2000) 54 *International Organization* 1, 5; Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 171.

international actors such as international or regional organisations or non-state actors such as NGOs, multinational enterprises, individuals, or professional communities.[34] The structure they inhabit is the international society.[35] Social constructivism considers this structure and the identities and interests of its agents as socially construed.[36] In the field of international relations, social constructivism thus provides explanations for the behaviour of states (and other international agents) that differ from materialist or rational choice theories, which assume that states are primarily rationally motivated by goals such as their survival, power or wealth.[37] A strong motivational factor for agents according to a social-constructivist account is rather their identity and perceptions of what counts as appropriate behaviour for an agent of such an identity.[38] To explain state behaviour, one must thus examine 'a complex and specific mix of history, ideas, norms, and beliefs' that motivates these agents.[39] A social constructivist perspective does not deny the existence and relevance of material resources and power in international politics but maintains that their meaning is determined 'through the structure of shared knowledge in which they are embedded'.[40] Social constructivism thus assumes that material causes are 'constituted primarily by ideas and cultural contexts' and that social realities are equally powerful in determining behaviour, as are material realities.[41]

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34 Rey Koslowski and Friedrich Kratochwil, 'Understanding Change in International Politics: The Soviet Empire's Demise and the International System' (1994) 48 *IO* 215, 222 ('Instead of conceiving the international system in terms of distribution of tangible resources and of "invisible" structures working behind the backs of the actors, constructivism views this system as an artifice of man-made institutions, such as, but not limited to states'). See also Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25 *EJIL* 425, 427 (conceiving, eg international lawyers as actors in an international legal discourse contributing to the construction and reconstruction of social reality in the international sphere).

35 Constructivism conceptualises international politics as an international society, not an international system. See, Michael Barnett, 'Social Constructivism' in John Baylis, Steve Smith and Patricia Owens (eds), *The Globalization of World Politics: An Introduction to International Relations* (7th edn, OUP 2017) 144, 145.

36 Social constructivism was introduced to the discipline of international relations by Nicholas Onuf, *World of Our Making* (first published 1989, Routledge 2013).

37 Anne-Marie Slaughter and Thomas Hale, 'International Relations, Principal Theories' (MPEPIL 2013) para 21.

38 Risse, '"Let's Argue!"' (n 33) 4 f.

39 Slaughter and Hale (n 37) para 20.

40 Alexander Wendt, 'Constructing International Politics' (1995) 20 *Int. Security* 71, 73.

41 Wendt, *Social Theory of International Politics* (n 33) 97. See also Martha Finnemore, *National Interests in International Society* (Cornell University Press 1996) 128.

A social-constructivist approach, thus, provides an analytical tool, which allows focusing on the evolution of ideas, which, in the present case, may be initiated in international society by means of Council documents endorsing a particular understanding of the rule of law.[42] Social constructivism assumes that 'knowledgeable agents' construe social reality by relying on social facts whose meaning – and often their related existence – depends on inter-agency agreement.[43] The rule of law is a classical social fact whose existence depends on human agreement as opposed to brute facts such as stones or flowers that exist independent of human perception.[44] Based on the Council's particular function and the implementation of its mandate by recommending or requiring a course of action it considers conducive to the maintenance of international peace and security, it may contribute to the construction of an intersubjective, collective understanding among the members of the international society as to what the rule of law implies and why conformity with it might be valuable.[45] For the present analysis, relevant 'knowledgeable agents' are the Council itself, states that are addressees of its resolutions or involved in Council deliberations, other international or supranational organisations and non-state actors such as NGOs etc, ie essentially all actors of the international society which participate in an idea generation process with regard to the function and content of the rule of law for the maintenance of international peace and security.[46] The evolution of this idea generation process determines, whether an originally domestic norm – the rule of law – becomes an international norm in the sense that it establishes what counts as appropriate state behaviour and consequently shapes state identities and interests.[47] A social constructivist analysis thereby pays attention to motivational mechanisms behind changes in state behaviour beyond coercion, cost-benefit calculations or material incentives that relate to

42 Risse, '"Let's Argue!"' (n 33) 5 ('constructivism points to the constitutive role of ideational factors').

43 Emanuel Adler, 'Constructivism in International Relations: Sources, Contributions, and Debates' in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *Handbook of International Relations* (Sage 2013) 112, 113 f.

44 John Ruggie, 'What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge' (1998) 52 *IO* 855, 856.

45 Adler, 'Constructivism in International Relations' (n 43) 125.

46 True-Frost (n 20) 181.

47 Finnemore and Sikkink (n 24) 893 ('Many international norms began as domestic norms and become international through the efforts of entrepreneurs of various kinds.'). Most probably, the rule of law could also be theorised as an institution understood as a 'habitualized practice of which every member of the social community knows' with habitualised practice taking the form of rules, norms and concepts of world-understanding. See, Oliver Diggelmann and Tilmann Altwicker, 'Is There Something Like a Constitution of International Law? (2008) 68 *ZaöRV* 623, 643 f.

socialisation processes such as, eg, persuasion, discourse or acculturation.[48] Accordingly, it allows to take into account the potential impact of Council documents that do not contain legally-binding decisions on the behaviour of agents (states primarily) and is thus sensitive to the question of how the Council may affect the evolution of a global rule of law understanding only by means of disseminating an idea of the concept's meaning and value.

Another factor making a social-constructivist perspective valuable for the present study – which analyses Council documents and thus Council language – is its interest in the role of communicative and discursive practice and its contribution to the construction of social reality.[49] Social communication depends on language as its vehicle to create, diffuse and institutionalise knowledge, meaning and ideas.[50] It allows agents – in this case the members of the Security Council – to assign meaning to practices, rules and institutions and relate them to the concept of the rule of law. The present thesis assumes 'the political relevance of language beyond the concept of rhetoric as a means to political ends' and that language is a source of change.[51] Following this analysis, Council documents may be considered acts of social communication with the potential to affect the evolution of a collective understanding among agents of the international society about the function, value and content of the rule of law. The social-constructivist focus on language is helpful for the present study to the extent that the Council acts 'through' language only.[52] A social-constructivist analysis accounts for the particular impact of language and is thus particularly valuable for this study which tries to determine whether Council documents – and in particular resolutions – are capable of affecting the emergence of a global understanding of the rule of law independently of their legal bindingness or ensuing implementing measures.[53]

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48 See, eg, Jeffrey Checkel, 'Why Comply? Social Learning and European Identity Change' (2001) 55 *IO* 553-88; Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke L.J.* 621–703; Nicole Deitelhoff, 'The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case' (2009) 63 *IO* 33–65.

49 Risse, 'Social Constructivism Meets Globalization' (n 31) 131.

50 Adler, 'Constructivism in International Relations' (n 43) 125.

51 Thomas Diez, 'Speaking 'Europe': The Politics of Integration' (1999) 6 *J. Eur. Pub. Pol'y* 598, 603; Adler, 'Constructivism in International Relations' (n 43) 125.

52 See, eg, Altwicker and Diggelmann (n 34) 442 (basing one of their strategic assumptions on the construction of progress of international law on 'the belief that language is a key means to shape and pre-structure "reality"').

53 Albert Yee, 'The Causal Effects of Ideas on Policies' (1996) 50 *IO* 69, 94 (observing that 'the ideational capacities or mechanisms that enable ideas and beliefs to affect policies can be illuminated if networks of ideas and systems of beliefs are viewed as languages or discourses').

A further reason why a social constructivist analysis is valuable for the present thesis is its interest in norms and their potential to define identities or prescribe appropriate behaviour.[54] Unlike ideas, which can be private and subjective, norms are always intersubjective, ie shared and social.[55] According to a social-constructivist analysis, norms are 'collective expectations for the proper behaviour of actors with a given identity'.[56] The present thesis proceeds from the assumption that the Council could act as a norm entrepreneur in international society capable of persuading a critical mass of states and other international agents to endorse the rule of law as an international norm that redefines 'appropriate behaviour for the identity called "state" or some relevant subset of states'.[57]

The necessary follow-up question then is, what requirements need to be fulfilled for the Council to contribute to the emergence of the rule of law as an international norm. A pertinent study by Finnemore and Sikkink proposes that norm influence follows a three-stage process, ranging from norm emergence to norm cascade, to norm internalisation.[58] The present thesis focuses on the role of the Council with regard to the first stage, norm emergence, and confines itself to an analysis of the criteria that need to be fulfilled if Council documents shall contribute to the emergence of the rule of law as an international norm. In this vein, the thesis analyses Council resolutions referring to the rule of law in order to determine whether specific criteria that determine the potential emergence of norms are fulfilled.

IV. Thesis Structure

A conclusive examination of the Council's approach to the rule of law would exceed the scope of this thesis. It thus restrains itself to an analysis of the circumstances and purposes that have triggered rule of law references in Council resolutions and focuses on particular sub-elements of the rule of law, ie rule of law requirements for national judiciaries. For reasons of feasibility, the present thesis rests its analysis only on those cases in which the Council

54 Peter Katzenstein, 'Introduction: Alternative Perspectives on National Security' in Peter Katzenstein (ed), *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press 1996) 5.

55 Finnemore (n 41) 22.

56 Katzenstein (n 54) 5; Finnemore (n 41) 22 (who defines norms as 'shared expectations about appropriate behavior held by a community of actors').

57 One relevant subset of states would be, eg, 'liberal' states. See, Finnemore and Sikkink (n 24) 902.

58 For this purpose, the thesis draws on insights gained by ibid 895.

became active and does not take into account the possible implications of a 'negative analysis', ie an examination of those cases in reaction to which the Council did not invoke the rule of law or its sub-elements even though similar circumstances prevailed like in cases where it did so.

Based on the many and varied references to the rule of law in Council documents, future research could also examine Council identifications of actors and institutions linked to the rule of law, the consequences of rule of law deficiencies or rule of law vacuums, challenges to the establishment and guarantee of the rule of law, the relationship of the rule of law to other guarantees and goals (such as human rights, transitional justice or democratic governance), the requirements that rule of law institutions must fulfil to be rule of law compliant or the circumstances triggering references to other sub-elements of the rule of law such as the guarantee of due process, the principle of separation of powers or the civilian oversight of military forces etc.

The thesis is structured as follows: Part I contains the theory chapter on the concept of the rule of law. This chapter shall facilitate an analytical reading of Council decisions with a view to the guarantees, institutions and procedures commonly associated with the rule of law. A subsequent chapter portrays the rule of law understanding of the five permanent members of the Council (UK, USA, France, Russia and China).[59] This comparative analysis shall enable conclusions regarding the room for consensus among Council members on the meaning of specific rule of law elements as referred to in Council decisions. The focus on the five permanent Council members results from their particular impact on the decision-making process within the UN organ but shall also serve as an illustration of how differently rule of law elements may be understood in different states.[60]

Part II of the thesis is dedicated to a portrayal of the Security Council. It depicts the Council's functions and powers as indicators of the legal and political implications of its rule of law language. Its composition and working methods are discussed to determine the representativeness of the body of the wider UN membership. This chapter serves the purpose of assessing how Council resolutions invoking the rule of law may affect the emergence of a global understanding of the principle's content from a legal and political perspective. It further inquires whether the UN body is sufficiently representative so that its documents may indicate an emerging or already existing international consensus. The chapter also applies a social-constructivist

[59] See art 23 (1) Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 145 BSP 805 (UN Charter) for the enumeration of the permanent SC members.

[60] art 27 (3) UN Charter.

perspective to the question of how the Council may affect the evolution of a global understanding of the rule of law.

Part III of the thesis contains a qualitative analysis of Council resolutions invoking the rule of law and determines under which circumstances and for what purposes the Council refers to the principle. It, thus, contextualises Council references to the rule of law and provides an overview in which contexts the Council develops its notion of the principle. As the central part of the present thesis, part III then examines rule of law requirements developed by the Council for national judiciaries. For this purpose, the thesis analyses all Council resolutions containing language of rule of law reform targeting the judicial branch of government and attempts to assess to what extent it reflects a rule of law understanding of the Council and its potential to affect the emergence of a rule of law understanding among UN member states and the international society as a whole.

Part 1 – Defining the Rule of Law – The Rule of Law as a Contested Concept?

I. Introduction

Discussions about the meaning and function of the rule of law have not been settled to the present day. While some have qualified the rule of law as just one of the many virtues of a legal system, others claimed it to be a sine qua non for its very existence.[61] Neither did the discourse on what the principle entails ever come to an end.[62] In the words of John Finnis, the rule of law may be described as the 'state of affairs in which a legal system is legally in good shape'.[63] This, of course, does not yet tell us anything about what it means for a legal system to be 'legally in good shape' since we first need to know what law we are envisioning in order to critically assess this statement. Rule of law concepts are necessarily contingent on what is understood by the concept of law but do not stop there (the concept of law forms one part of a rule of law concept but there are more elements to it that are related to institutions, procedures etc).[64] The concept of law, in turn, is intimately linked to the historical, socio-cultural and political understanding of the individual and its relationship to the community and position in society.[65] These concepts tend to diverge between different political and legal cultures. What unites most political communities no matter how well organised and orderly constituted they are, however, is the need for coercive government to ensure the sustainability of whatever form of social cooperation they have chosen for themselves.[66] The rule of law serves the

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61 Joseph Raz, *The Authority of Law* (2nd ed, OUP 2009) 211, 219; Lon Fuller, *The Morality of Law* (rev edn, YUP 1969) 39.

62 Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *PL* 467.

63 John Finnis, *Natural Law and Natural Rights* (first published 1980, 2nd edn, OUP 2011) 270.

64 Rainer Grote, 'Rule of Law, Rechtsstaat and "État de droit"' in Christian Starck (ed), *Constitutionalism, Universalism and Democracy: A Comparative Analysis* (Nomos 1999) 269, 271, 304; Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Ga. L. Rev* 1, 44 ff.

65 Philippe Mastronardi, 'Recht und Kultur: Kulturelle Bedingtheit und Universaler Anspruch des Juristischen Denkens' 61 (2001) *ZaöRV* 61–83; Gerhard Casper, 'Rule of Law? Whose Law?' in Stephan Lorenz and others (eds), *Festschrift für Andreas Heldrich* (CH Beck 2005) 1109, 1112.

66 John Rawls, *A Theory of Justice* (rev edn, OUP 1999) 211.

purpose of preventing this form of coercion from taking on a life of its own which is no longer related to the facilitation of social cooperation or the guarantee of the rights and liberties of the members of the political community.[67] Common to all rule of law concepts is thus the aspiration to restrain the exercise of public authority in a manner that inhibits arbitrary rule.[68]

It is the array of possible answers to the question of what exactly the rule of law presupposes to fulfil this task, however, that illustrates the complexity of the concept and why it has been qualified as 'essentially contested'. The term 'essentially contested concept' was coined by William Gallie and employed by several scholars in order to approach the analysis of the rule of law.[69] It has been proposed that 'essential contestability' refers to a situation where the participants of an argument about the content of a concept agree on the value of its realisation but disagree on how it shall be realised.[70] This accurately captures the circumstance that the rule of law enjoys great popularity among state and non-state actors as well as within academia, while states with distinct historical experiences follow diverging rule of law models and a great variety of different rule of law conceptions are discussed in legal theory.[71] One reason for its popularity might relate to Jeremy Waldron's observation that the rule of law is 'one of a cluster of ideals constitutive of modern political morality'.[72] Another reason might be exactly the concept's openness to different interpretations and definitions.[73] Elements commonly associated with the rule of law are transparency of governmental action, the separation of powers or checks and balances, equality before the law, due process, minimal guarantees of fairness, fundamental rights protection and judicial review of governmental action.[74]

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67 Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 304.

68 Chesterman 'An International Rule of Law?' (n 18) 342.

69 Richard Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 *Colum. L. Rev.* 1, 7; Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137-64.

70 Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (n 69) 150 f.

71 Ricardo Gosalbo-Bono, 'The Significance of the Rule of Law and Its Implications for the European Union and the United States' (2010) 72 *U. Pitt. L. Rev.* 229, 259.

72 Waldron, 'The Concept and the Rule of Law' (n 64) 3 (mentioning the rule of law in the same breath with human rights, democracy and perhaps the principles of free market economy).

73 Brian Tamanaha, 'The History and Elements of the Rule of Law' (2012) *Sing. J. Legal Stud*. 232; Chesterman 'An International Rule of Law?' (n 18) 332.

74 Anne Peters, 'The Globalization of State Constitutions' in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (OUP 2007) 251, 271. See also Simon Chesterman, 'Rule of Law' (MPEPIL 2007) para 2.

However, not all rule of law conceptions contain all of these elements, nor do all rule of law models interpret and implement them equally.

It is in international fora such as the UN Security Council that contestations about the rule of law may be particularly pronounced but also where bridges can be built to close gaps between diverging understandings.[75] International actors uniting different states to deliberate and decide on questions of politics and international law may provide a platform and procedures that could contribute to the identification of certain elements of the rule of law that enjoy global approval.[76] Beyond the mere identification of such elements, global actors might even figure as platforms that enable an approximation between different understandings of the concrete meaning of certain rule of law elements.

In order to introduce the working concept of the present thesis, the following chapter will discuss different conceptualisations of the rule of law and their implications. This exercise shall allow for an analytical reading of Security Council resolutions that invoke the rule of law and identify sub-elements of the principle. To illustrate the room for consensus among Council members when agreeing on a rule of law vocabulary, the rule of law models observed by the five permanent members of the Security Council are further portrayed by way of example and due to the P5's considerable impact on the content of the Council's deliberations and decisions. Whether the Council's rule of law vocabulary also forms part of an already existing Council understanding of the rule of law, is a separate question that will be addressed at a later stage of this thesis.

II. Contestations about the Rule of Law in Legal Discourse

Paul Craig is given credit in legal literature for coining the widely popularised categories of *formal* and *substantive* rule of law concepts in order to enable a structured discussion about different ways to conceptualise the principle. The differentiation is based on the observation that formal theories focus on the way laws are promulgated, on the ability of norms to guide people's behaviour and the question whether laws have been enacted prospectively or retrospectively.[77] Substantive theories build upon these formal requirements but derive substantive rights from the rule of law whose realisation by the law serves as a point of reference to distinguish between 'good' and 'bad' law.[78] They often

75 Johnstone, 'Security Council Deliberations' (n 24) 439.
76 Finnemore and Sikkink (n 24) 899 f.
77 Craig (n 62) 467.
78 ibid 467.

include the protection of human rights or a specific (eg democratic) form of government in their conception of the rule of law. Since the theoretical distinctions between various rule of law models are manifold and often more complex than captured by the dichotomy of formal and substantive concepts, the categories mainly serve as a tool to simplify a structural analysis and discussion about different rule of law theories. Along these lines, the ensuing chapters will illustrate in more detail, what formal and substantive theories of the rule of law imply and discuss related concepts such as procedural and functional understandings of the rule of law.

A. Formal Rule of Law

Proceeding from the assumption that law consists of rules, formal theories of the rule of law require that sovereign power be exercised in accordance with rules that satisfy certain formal standards and have been enacted in line with particular procedures.[79] Formal theories are thus characterised by their focus on the intrinsic qualities of rules and the process of their creation and application. According to a formal understanding, the rule of law may also be described as the 'law of rules' to the extent that the whole concept of the rule of law may be reduced to a theory about the ideal qualities of rules and their implementation.[80]

One of the first proponents of a formal understanding of the rule of law was the 19th century constitutional theorist Albert Venn Dicey. For Dicey, the constitutional principle of the rule of law consisted of three elements, which for him were only existent in English law: First, the law should be supreme in order to rule out all forms of arbitrary (at that time royal) power.[81] By subordinating the royal prerogative to the law – and favouring general rules over delegated discretion – the criteria amounted to an endorsement of parliamentary sovereignty.[82] Second, no one should be above the law and the law should apply equally to all, private

[79] Margaret Radin, 'Reconsidering the Rule of Law' (1989) 69 *B.U. L. Rev.* 781, 787; Waldron, 'The Concept and the Rule of Law' (n 64) 7.

[80] Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *U. Chi.L. Rev.* 1175-88; Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 97 ('Philosophical and sociological analyses of rules and rule-following highlight the same considerations and elements as the formal version of the rule of law. In the end there is nothing distinctive about the formal rule of law as a separate ideal. It is about (legal) rules.').

[81] Albert Venn Dicey, 'Lectures Introductory to the Study of the Law of the Constitution' in J.W.F. Allison (ed), *Lectures Introductory to the Study of the Law of the Constitution*, vol I (OUP 2013) 97.

[82] Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 275; Martin Loughlin, 'Grossbritannien' in Armin von Bogdandy and Peter Huber (eds), *Handbuch Ius Publicum Europaeum*, vol I (CF Müller Verlag 2007) § 4, para 81.

individuals and government officials alike.[83] This required that there should not be any special laws for state officials, ie at the time public law did not exist and private law applied equally to citizens and members of the government. Third, the general principles of the constitution should be discovered in judicial decisions that determine the rights of individuals in particular cases.[84] Thus, the 'law of the constitution' was not regarded as 'the source but the consequence of the rights of individuals, as defined and enforced by the courts'.[85] This was meant to reflect the fact that the English constitution grounded in the ordinary law of the land and on remedies provided for by the ordinary courts rather than on individual rights established by a written constitutional document.[86] All three elements focus on formal or procedural features of the law rather than on its content: The law shall be supreme, apply equally to all and if general constitutional principles for the protection of individual rights are to be established, they should be the result of a particular law-making procedure.

The elements of supremacy of the law, equality before the law and compliance with specific procedures for the recognition of rules or rights are also found in more recent formal theories. In their essence, formal theories expect the rule of law to allow people to plan their affairs and to do so by means of rules that guarantee the predictable exercise of public authority.[87] Achieving a degree of legal certainty that allows people to plan their affairs facilitates individual freedom as it enables the individual to exercise its autonomy.[88] The aspiration that law be capable of guiding human conduct, however, establishes a demanding standard. Various scholars have provided different accounts of what qualities the law needs to fulfil in order to provide such guidance.[89]

Friedrich Hayek, eg, proposed a minimalist understanding of the qualities law needs to fulfil in order to allow people to plan their affairs. He required that

83 Dicey (n 81) 100.

84 ibid 115.

85 ibid 119.

86 Gary Slapper and David Kelly, *The English Legal System* (Routledge 2013) 25.

87 The idea was famously advanced by F.A. Hayek who described the rule of law ideal as follows: 'stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge'. Friedrich August von Hayek, *The Road to Serfdom* (London 1944) 54.

88 Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *EJIL* 315, 338.

89 Margaret Radin condensed Lon Fuller's eight rule of law elements to two principles: that there are rules and that they are capable of being followed. This illustrates the extent to which the idea of law's capacity to guide human conduct informs this formal theory of the rule of law. Radin (n 79) 785.

the rules of a rule of law-abiding legal system be general, equal, certain as well as enacted and published before their application to a particular case.[90] Compliance of rules with these virtues is associated with the concept of 'formal legality', which from a positivist perspective already comprises all that shall be expected from the rule of law.[91]

One of the most popular 'laundry lists' of qualities to be satisfied by rules in order for them to guide human conduct was proposed by Lon Fuller.[92] Fuller discussed eight principles of legality as part of an 'inner morality of law' that need to be satisfied in order for a system of rules to attain perfection.[93] The rule of law is accomplished if the rules of a legal system satisfy these principles. As the most basic requirement, Fuller claimed that in order for a legal system to guide human conduct, there need to be rules in the first place that apply to a general set of situations and people. He discussed this element under the heading of 'generality'.[94] He further called for laws to be adequately published, prospective, intelligible and non-contradictory; they should neither require the impossible, nor be subject to frequent change and be administered in accordance with their announcement by those entrusted with the exercise of public authority.[95] It is important to note that Fuller proposed these elements as a standard to measure excellence in legality. He did not claim that all requirements needed to be perfectly fulfilled in order for the rule of law to be satisfied. The elements would rather serve as a yardstick to measure the performance of a legal system between two extremes: The non-existence of a legal system and an 'utopia of legality'.[96] Fuller's theory resonates with the insight that the compliance of a legal system with the rule of law is always a matter of degree. Legal systems never fully comply with all desiderata of a given rule of law concept. Nevertheless, legal systems will be considered as systems governed by the rule of law as long as deviations from the ideal are not too extreme.[97]

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90 Friedrich August von Hayek, *The Political Ideal of the Rule of Law* (National Bank of Egypt 1955) 34.

91 Tamanaha, *On the Rule of Law: History, Politics, Theory* (n 80) 94.

92 Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (n 69) 155.

93 Fuller (n 61) 41.

94 ibid 46–47.

95 ibid 39. Under the congruence element, Fuller elaborates on the difficulty of interpretation of unclear statutes by judges as one of the central problems of the cooperative task of maintaining legality.

96 ibid 41–42.

97 Nigel Simmonds, 'Law as a Moral Idea' (2005) 55 *U. Toronto L.J.* 61, 63; Waldron, 'The Concept and the Rule of Law' (n 64) 44 f. The same idea was addressed by Raz and Rawls. See, Raz (n 61) 215 and Rawls (n 66) 207 f.

The idea that law must be capable of guiding the behaviour of its subjects also informed Joseph Raz's conception of the rule of law.[98] It was clear to Raz that in order for the rule of law to achieve this goal, it had to be conceptualised following a formal understanding.[99] In order to guide human conduct, laws thus needed to be prospective, open, adequately publicised, clear and relatively stable.[100] Raz's rule of law concept did not generally disapprove of specific legal orders but required that they be enacted according to general, open, stable and clear rules that confer the authority to issue such orders and define the scope of this authority.[101] To this extent, Raz seemed to derive very similar requirements from the concept of the rule of law as did Fuller.

Raz further included procedural and institutional elements in his rule of law conception, which resonate with Fuller's requirement of congruence between official action and the announced law. He called for an easily accessible, independent judiciary, authorised to ensure the application of the law to particular cases and to review the conformity of legislative and administrative action with the rule of law.[102] In order to ensure the correct application of the law, the principles of natural justice should to be satisfied, guaranteeing open and fair hearings and the absence of bias.[103] Additionally, Raz required that crime-preventing agencies be prevented from the arbitrary application of the law.[104] The latter elements are meant to institutionalise the efficacy of rules and to ensure that their particular qualities are realised in their administration and application.[105]

Other authors have drawn up similar rule of law narratives, also deriving their normative aspiration from the idea that law should be capable of guiding peoples' behaviour. John Finnis, eg, characterised the rule of law as the specific virtue of legal systems and proposed a set of rule-qualities that clearly take their inspiration from Fuller's and Raz's doctrines. He required rules to be prospective, capable of being performed, promulgated, clear, coherent with one another and sufficiently stable.[106] If specific decrees and orders were to be enacted, their enactment should follow rules satisfying these qualities.[107] In addition, he postulated that those in charge of making, administering and

98 Raz (n 61) 214, 218.
99 ibid 214.
100 ibid 214–215.
101 ibid 215 f.
102 ibid 216-17.
103 ibid 217.
104 ibid 218.
105 ibid.
106 Finnis (n 63) 270.
107 ibid.

applying the rules, should be accountable for their compliance with the rules regulating their authority and should administer the law consistently and in line with its content.[108] These latter requirements resonate with Raz's procedural and institutional elements in that they also acknowledge that ideal rules depend on their adequate enforcement in order to benefit the individual and satisfy the rule of law.[109]

Legal theorists following so-called thin rule of law conceptions such as Raz or Fuller consider the fulfilment of formal and procedural requirements as encompassing all that is needed for the law to rule and to guide human actions. It is further argued that formal legality, taken alone, already guarantees ideals such as self-directed action and a distinct form of justice.[110] Nothing more shall be expected from the rule of law in order to avoid it being overcharged with contentious decisions about social values and rendering it meaningless as a distinctive concept.[111] Its political neutrality is expected to garner more consent in pluralist societies than substantive concepts, this argument being particularly relevant for an international notion of the rule of law.[112]

However, even though it is true that the idea that law be capable of guiding human conduct captures a particular conception of human dignity, rule of law narratives only informed by this rationale are theoretically compatible with laws of the most egregious content.[113] This circumstance has motivated some

108 ibid 270 f.

109 ibid 271.

110 Fuller (n 61) 210; Finnis (n 63) 273. John Rawls maintained that '(. . .) we can say that, other things equal, one legal order is more justly administered than another if it more perfectly fulfills the precepts of the rule of law. It will provide a more secure basis for liberty and a more effective means for organizing cooperative schemes. Yet because these precepts guarantee only the impartial and regular administration of rules, whatever these are, they are compatible with injustice. They impose rather weak constraints on the basic structure, but ones that are not by any means negligible'. Rawls (n 66) 208. Formal requirements, eg, are part of Ronald Dworkin's concept of justice: Ronald Dworkin, *A Matter of Principle* (reprinted 1992, OUP 1986) 12 ('Any political community is better, all else equal, if its courts take no action other than is specified in rules published in advance, and also better, all else equal, if its legal institutions enforce whatever rights individual citizens have').

111 Martin Krygier, 'Rule of Law' in Michel Rosenfeld and András Sajó (eds), *Comparative Constitutional Law* (OUP 2012) 233, 239; Tamanaha, *On the Rule of Law: History, Politics, Theory* (n 80) 113.

112 Robert Summers, 'A Formal Theory of the Rule of Law' (1993) 6 *Ratio Juris* 127, 136.

113 Waldron, 'The Concept and the Rule of Law' (n 64) 28 (stating that 'the action-guiding character of law with its emphasis on self-application and its reliance on agency and voluntary self-control' is reflective of the dignity of the people). On the position that a formal understanding of the rule of law does not prevent abusive laws, see Richard Epstein, 'Beyond the Rule of Law: Civic Virtue and Constitutional Structure' (1987) 56

legal theorists to propose rule of law concepts that establish more demanding standards.

B. Substantive Rule of Law

Substantive theories concur with formal understandings of the rule of law to the extent that they also require the law to fulfil certain formal qualities and that the enactment as well as the administration and application of law follow a predetermined set of procedures. In addition, however, substantive theories expect the law and legal systems to satisfy certain standards regarding their content.[114] Substantive conceptions of the rule of law require that the law and legal systems incorporate and enforce ideals such as democracy and human rights or more abstract concepts such as justice, dignity or individual freedom.[115] Substantive rule of law concepts are thus not only concerned with how laws are enacted or whether they satisfy certain formal criteria but have a vision of what an ideal legal system shall guarantee to its subjects in terms of content such as, eg, the promotion of the rights of disadvantaged members of a society.[116]

Like all rule of law conceptions, substantive approaches depend on a particular vision of what legitimately qualifies as law. They are informed by the idea that law and morals must not be separated and that rules only qualify as law if they comply with certain qualified moral ideals and principles.[117] A prominent advocate of a substantive understanding of the rule of law and a fierce opponent of a positivist theory of law was Ronald Dworkin. For Dworkin, the rule of law represented a distinctly substantive ideal, 'the ideal of rule by an accurate public conception of individual rights'.[118] He distinguished between 'rule-book' and 'rights-conceptions' of the rule of law. The rule-book conception, which resembles formal understandings of the rule of law, requires that state power be

Geo. Wash.L. Rev. 149, 153 ('The hard questions of social organization involve more than generality and clarity. (. . .) A rule that says "all persons over eighteen may marry" has no greater generality than one that says "no persons over eighteen may marry". Yet while the former is an essential component of our civil liberties, the latter is totalitarian excess, made all the more dangerous by its uncompromising clarity and generality.'); Dworkin, *A Matter of Principle* (n 110) 12 (holding that '(. . .) compliance with the rule book is plainly not sufficient for justice; full compliance will achieve very great injustice if the rules are unjust').

114 Tamanaha, *On the Rule of Law: History, Politics, Theory* (n 80) 102.

115 Casper (n 65) 1109; Chesterman 'An International Rule of Law?' (n 18) 340.

116 Dworkin, *A Matter of Principle* (n 110) 12.

117 Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (n 69) 22.

118 Dworkin, *A Matter of Principle* (n 110) 11 f.

exercised in accordance with rules on the books that are made public and available to all and amendable only in line with rules satisfying the same standards.[119] Rule-book conceptions are concerned with the content of rules but view this aspect connected to the ideal of substantive justice, which shall be dealt with independently from the principle of the rule of law.[120] Dworkin adhered to the rights conception, which builds upon the rule-book conception but further assumes that 'citizens have moral rights and duties with respect to one another, and political rights against the state as a whole'.[121] These rights should be reflected in positive law in order for courts or similar institutions to enforce them upon individual complaint. Thus, whereas the source of the citizens' extra-legal moral rights is to be found in the community itself, the rules on the rule-book are understood to reflect the 'community's effort to capture moral rights'.[122] Any legal system and the laws that constitute it will thus be measured against the question of whether and to what extent they embody and realise the moral and political rights of the individual.[123] If the rules on the rule-book do not provide any or only competing answers to a question arising in a particular case, Dworkin demanded that judges trying to arrive at the right decision be guided by the aspiration to realise the moral and political rights of the parties rather than the merely speculative will of the legislative.[124] Dworkin did not describe the content of these moral and political rights or how they are to be identified in cases where a community does not agree on their scope or existence and was thus criticised for relocating contentious moral and social issues from the community to the judiciary.[125]

John Rawls is another legal philosopher often ranked among proponents of a substantive theory of the rule of law. Akin to formal approaches he theorised the rule of law according to the idea that law should organise human conduct and manage the legitimate expectations of its subjects.[126] He proposed four general precepts of a rule of law-abiding legal system, which in their essence closely correlate with the above-discussed concepts of Fuller, Raz and Finnis. For Rawls, 'ought' implied 'can' which means that the law shall not require the impossible and that impossibility be accepted as a legal defence.[127] Further, similar cases should be treated similarly in order to restrict official

119 ibid 11.
120 ibid.
121 ibid.
122 ibid 17.
123 ibid 12 f.
124 ibid 16.
125 ibid 13; Tamanaha, *On the Rule of Law: History, Politics, Theory* (n 80) 104.
126 Rawls (n 66) 207 f.
127 ibid 208.

discretion.[128] There should not be an 'offence without a law' from which follows that laws be known, clear, expressly promulgated, general and prospective and the precept of natural justice must be satisfied which requires judicial enforcement of the laws in a manner consistent with some form of due process, including principles such as judicial independence as well as fair, unbiased and open trials.[129] What renders Rawls' rule of law narrative substantive in the view of several commentators, is the justification he provided for his proposed requirements: they are meant to assist in the accomplishment of the greatest equal liberty of all members of a given society.[130] The ostensibly formal and procedural requirements of the rule of law are thus understood as a vehicle to realise a maximum of individual liberty.[131] This, it is claimed, distinguishes Rawls' understanding of the rule of law from traditional formal conceptions, which are primarily concerned with the effectiveness of rules.[132]

In theory, a central difference between formal and substantive rule of law theories is that the latter aspire for law and legal systems to accomplish more than the mere restraint of sovereign power but to guarantee a particular vision of society.[133] According to substantive conceptions, the rule of law thus means government based on rules that are meant to realise the aspirations of the social contract such as liberty or justice.[134] A legal system falling short of guaranteeing the precepts of the social contract does not comply with the rule of law. A common way of trying to achieve this ideal is to require the law and all agents of sovereign authority to respect and enforce political and civil rights. The panoply of rights may also extend to the guarantee of economic, social and cultural rights or even include environmental protections.[135] This understanding

128 ibid 208 f.

129 ibid 209 f.

130 Radin (n 79) 788–790; Daniel Rodriguez, Mathew McCubbins and Barry Weingast, 'The Rule of Law Unplugged' (2010) 59 *Emory L.J.* 1455, 1470.

131 Rawls (n 66) 210–213.

132 Radin (n 79) 783, 790; Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (n 69) 8, 15.

133 Ronald Dworkin, *Law's Empire* (3rd impr, Fontana Press 1990) 413 ('Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have.').

134 Radin (n 79) 792.

135 For the inclusion of the guarantees of a social state and environmental protection standards into the German constitution, see Paul Tiedemann, 'The Rechtsstaat-Principle in Germany: The Development from the Beginning Until Now' in James Silkenat, James Hickey and Peter Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal*

of the rule of law was prominently criticised by Joseph Raz who argued that '[i]f the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy' which would strip the term of its independent and useful function.[136]

C. Procedural Rule of Law

Not a separate theory but rather a different perspective, one may also speak of procedural notions of the rule of law. The 'regular and impartial administration of public rules' has been qualified as representing a concept of formal justice as applied to legal systems.[137] When legal theorists such as Raz or Finnis propose procedural or institutional mechanisms as elements of the rule of law, they acknowledge that the mere existence of ideal rules does not yet satisfy the principle.[138] It is the realisation of the inherent qualities of these rules by a legal system that determines whether the rule of law is effective. This requires impartiality and fairness on behalf of those who administer and apply the rules.[139] Guarantees such as the independence of the judiciary, access to courts, transparency of state action, due process, judicial review or the separation of powers aspire to create the institutional conditions necessary to ensure the impartial and fair management of rules.[140] They can be qualified as procedural elements of the rule of law, which in their richest manifestation may also include participation rights in the exercise of public authority.[141] A rich procedural understanding of the rule of law demarcates the borderline between formal and substantive theories of the rule of law to the extent that the inclusion of extensive participation rights adds aspects of the concept of democracy to the rule of law, thereby rendering its alignment substantive.[142] These considerations

State (Rechtsstaat) (Springer 2014) 171, 188 ff, 190 ff. On the French Charter for the Environment of 2004 as a standard of review of the constitutionality of French laws, see Sophie Boyron, *The Constitution of France: A Contextual Analysis* (Hart Publishing 2013) 42f, 161.

136 Raz (n 61) 211.

137 Rawls (n 66) 206 f.

138 Waldron, 'The Concept and the Rule of Law' (n 64) 7.

139 ibid.

140 Finnis (n 63); Waldron, 'The Concept and the Rule of Law' (n 64) 8; Vera Gowland-Debbas and Vassilis Pergantis, 'Rule of Law' in Chetail Vincent (ed), *Post-conflict Peacebuilding: A Lexicon* (OUP 2009) 320, 323; Rodriguez, McCubbins and Weingast (n 130) 1458; Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (n 88) 317; Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65 *Int'l & Comp. L.Q.* 277, 282.

141 Waldron, 'The Concept and the Rule of Law' (n 64) 8–9.

142 Gowland-Debbas and Pergantis (n 140) 328.

illustrate that the differentiations between formal and substantive theories of the rule of law are often blurred and seldom rigid.

D. Functional Rule of Law

Functional approaches to the rule of law do not have a predetermined inclination for a substantive or formal conceptualisation of the principle but rather focus on its instrumental value. According to a functional approach, the principle's content is fleshed out based on the function it is supposed to serve such as, eg, human rights protection, the maintenance of public security, sustainable economic development or peaceful conflict management.[143] This approach builds upon an instrumentalist understanding of law, according to which law is understood as a tool to realise public goods or achieve social change.[144] It does not provide a principled theory about how the rule of law shall be conceptualised but rather operates like an instruction that assists in determining what rule of law definition shall apply in order to achieve a particular outcome.

At first sight, a functional approach seems like an appealing method to determine the concrete content of the rule of law due to its alleged context-sensitivity: The substance of the rule of law is not developed in the abstract as a political ideal but rather finds orientation in the concrete needs of a political community or a particular actor (eg international organisations trying to improve the prospects of sustainable development in a recipient country). This, however, seems to belie the fact that functional conceptions do not necessarily sort out the doctrinal tensions between formal and substantive rule of law theories. Once the goal to be realised by the rule of law has been identified, the views on how to get there might diverge drastically among proponents of rich or thin rule of law theories. Furthermore, conditioning the content of the rule of law on the identification of a desired political goal, introduces new unresolved questions: Who legitimately decides what goals are to be achieved in a political community? How can it be guaranteed that the right goals are chosen? And, thirdly, identifying the goal does not in itself provide clear guidelines on what measures should be pursued in order to achieve it.

A common criticism of a functional approach to the rule of law is that law – understood as a tool – may be of any content as long as it efficiently promotes a

143 Chesterman 'An International Rule of Law?' (n 18) 341; ibid, 'Rule of Law' (n 74) para 15.

144 Brian Tamanaha, 'The Tension between Legal Instrumentalism and the Rule of Law' (2005) 33 *Syracuse J. Int'l L. & Com.* 131. For an analysis of the implied risks of an instrumentalist understanding of law for the rule of law, see ibid, *Law as a Means to an End: Threats to the Rule of Law* (CUP 2006).

desired outcome.[145] Such a conceptualisation of law might conflict with substantive as well as with formal theories of the rule of law.[146] Consequently, a functional approach might be the preferred avenue for actors who in practice are less accountable to the recipient political community such as, eg, non-state or international development actors whose support might be contingent on the introduction of certain legal measures that are considered beneficial for future economic investment. Even though rule of law concepts thus conceptualised may suffer from a lack of legitimacy, they might be highly authoritative for a state that depends on foreign aid and thus have a lasting impact on the concrete design of its legal and political system.[147] Chesterman observed that international actors such as the UN or the World Bank, employ the rule of law as a means to advance goals such as human rights protection, development or peace, rather reflecting political exigencies than a real commitment to the evolution of a legal culture and an international rule of law.[148]

Despite justified criticism of a functional approach to the rule of law, however, one must keep in mind the reservation that every rule of law conception eventually depends on the purposes pursued by its proponents, be it legal philosophers, governments, international organisations or NGOs.[149]

Another variation of a functional conception of the rule of law measures the realisation of a particular function of a legal system, such as the restraint of governmental discretion, the transparency of governmental decision-making or the enforcement of judicial decisions.[150] The focus of this approach differs

145 Tamanaha, 'The Tension between Legal Instrumentalism and the Rule of Law' (n 144) 132 ('At the systemic level the tension arises because the idea that law is an instrument is, in itself, devoid of any limits on the content of law.').

146 Chesterman 'An International Rule of Law?' (n 18) 341 f.

147 Bogdandy and others have proposed that public authority can also be exercised through non-binding standards whose non-observance might involve overwhelming disadvantages (eg not receiving much needed development aid) that render non-compliance an illusionary freedom. See, Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010) 3, 12–13.

148 Chesterman, 'Rule of Law' (n 74) para 46.

149 Randall Peerenboom, 'Competing Conceptions of Rule of Law in China' in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S.* (Routledge 2004) 113, 135.

150 Erik Wennerström, *The Rule of Law and the European Union* (Iustus Förlag 2007) 82. See also, eg, Matthew Stephenson, 'Rule of Law as a Goal of Development Policy' (Washington D.C., World Bank Research 2005) ‹http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20763583~menuPK:1989584~pagePK:148956~piPK:216618~theSitePK:1974062~isCURL:Y,00.html› accessed 14 July 2017.

from the above-discussed functional as well as from formal and substantive conceptions on a level of application.[151] Whereas the latter serve to conceptualise the rule of law, this approach works more like a measuring standard that assesses the performance of particular elements of a rule of law definition.

E. Use(fulness) of Distinctions

While the use of categories such as 'formal', 'substantive', 'procedural' or 'functional' provides some orientation for the discussion about different theories of the rule of law, its analytical capacity shall not be overestimated. Richard Fallon rightly pointed out that categories such as 'formal', 'substantive' or 'procedural' are ideal-types and that most rule of law theories do not neatly fit into just one category.[152]

Most crucially, all substantive understandings of the rule of law build upon formal concepts and formal theories often contain substantive assumptions.[153] Classical elements of formal rule of law narratives such as the generality, prospectivity or clarity of rules relate to the substantive value of general fairness and procedural or institutional guarantees aimed at the enforcement of rules such as access to courts, open and fair hearings or judicial independence are guaranteed as human rights in many legal systems nowadays.[154]

It does not come as a surprise, then, that many legal theories on the rule of law are not easily classified. John Rawls has been considered as advancing elements of a formal theory, while he was also characterised as a proponent of a substantive rule of law understanding based on his rationale that all rule of law elements serve the ideals of liberty and justice.[155] Following this line of thinking, however, many formal theorists may be qualified as advancing a substantive rule of law understanding to the extent that they consider the rule of law to serve the purpose of guiding human conduct and thus realising a particular conception of human dignity. These observations attest to the inherent ambiguity of such doctrinal distinctions.

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151 Wennerström (n 150) 82 f.

152 Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (n 69) 10 f.

153 Tamanaha, *On the Rule of Law: History, Politics, Theory* (n 80) 92; Chesterman 'An International Rule of Law?' (n 18) 341.

154 Wennerström (n 150) 83.

155 Radin (n 79) 788–790; Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (n 69) 16; Rodriguez, McCubbins and Weingast (n 130) 1470.

III. Rule of Law Models observed in Different Legal Systems

A. Introduction

The rule of law has been characterised as 'a fairly empty vessel' whose content may strongly vary depending on the prevailing legal culture and history of a state.[156] Despite sharing the common goal of organising and restraining political power with recourse to the rule of law, different legal cultures have different understandings of what the rule of law requires. The common law understanding of the rule of law exhibits a strong focus on procedural questions.[157] It is thus not necessarily tied to the concept of the state and theoretically better equipped to restrain forms of public authority not exercised by the state but, eg, by international organisations such as the UN.[158] This is the case since the focus of the rule of law lies on the qualities of rules and legal systems rather than on the relational link between law and the state. As an organisational principle, the rule of law may thus conceptually also lend itself for its application to legal systems of a supra- or international character.[159] Concepts such as 'Rechtsstaat' or 'état de droit' on the other hand, are clearly tied to the idea of the state and its relationship to law.[160] If the Security Council, an organ whose decisions rest on the consensus of at least nine states – the tacit consent of the P5 always implied –, invokes the concept of the rule of law, it is thus to be assumed that at least nine different understandings of the concept's meaning underlie the respective reference.

The present chapter provides a summary overview of the rule of law models observed by the five permanent Council members.[161] Focusing on the rule of law models of the five permanent Council members is justified by their seating- and voting privileges in the Council and their related enhanced responsibility for the maintenance of international peace and security.[162] Additionally, the P5 have historically exerted significant influence on the decision-making process within

156 Casper (n 65) 1110.

157 Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 299; Michel Rosenfeld, 'Rule of Law versus Rechtsstaat' in Peter Häberle and Jörg Paul Müller (eds), *Menschenrechte und Bürgerrechte in einer vielgestaltigen Welt* (Helbing & Lichtenhahn 2000) 49, 58.

158 cf Rosenfeld (n 157) 50.

159 Nick Barber, 'The Rechtsstaat and the Rule of Law' (2003) 53 *U. Toronto L.J.* 443, 452.

160 Rosenfeld (n 157) 49; Mastronardi (n 65) 65.

161 See art 23 (1) UN Charter for the enumeration of the permanent SC members.

162 UNGA Report of the Secretary-General, 'Implementing the Responsibility to Protect' (2009) UN Doc A/63/677 [61] (where the Secretary-General observed that '[w]ithin the Security Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter' with regard to the responsibility to protect).

the UN organ.[163] This comparative analysis shall enable conclusions regarding the room for consensus among Council members on the meaning of the rule of law and serve as an illustration of how differently the rule of law may be conceptualised in different states.[164]

B. The Rule of Law in the United Kingdom

The idea that political (and at the time royal) power needs to be restrained by law of a certain kind can be traced back to medieval times in English law. As a historical milestone, the Magna Carta of 1215 contained a concept that resonates with the rule of law principles of legality and legal equality.[165] The Bill of Rights of 1689 also served as a restraint to royal power and introduced the principle of parliamentary supremacy.[166] Today, the rule of law is considered an integral part of the uncodified democratic constitution of the United Kingdom and explicitly acknowledged in statutory law.[167]

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163 At a Council meeting on working methods, South Africa observed the 'numerous constraints that result from the current configuration, which affords dominance and permanence to the non-elected members' for elected Council members, ia because 'three permanent members are penholders on almost every country-specific issue on the Council's agenda' and as 'resolutions and decisions of the Council are often drafted in small groups and presented as faits accomplis to elected members'. See, 6870th Council Meeting on working methods, UN Doc S/PV.6870 (26 November 2012) [17].

164 Susan Hulton, 'Council Working Methods and Procedure' in David Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner 2004) 237, 239 (on the circumstance that Council members act on national instructions and that consensus is only possible if Council members are instructed accordingly from capital administrations).

165 Tom Bingham, *The Rule of Law* (Allen Lane Penguin 2011) 10–13 (the text reads as follows: '39. No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land. 40. No one will we sell, to no one deny or delay right or justice.').

166 Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (3rd edn, Hart Publishing 2016) 73.

167 Constitutional Reform Act 2005, s 1 (establishing that the Act 'does not adversely affect (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle'. This provision is to be understood in the light of the fact that the role of the Head of the Judiciary of England and Wales was transferred from the Lord Chancellor to the Lord Chief Justice by virtue of the Constitutional Reform Act). See, Jeffrey Jowell, 'The Rule of Law' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, OUP 2015) 13, 14.

1. Constitutional Restraint

Public – originally royal – authority had been subjected to some kind of fundamental law in England since the 17th century.[168] Royal courts were authorised to review royal and parliamentary acts for their conformity with the common law, which was considered supreme.[169] The basic idea behind the common law, ie the protection of individual liberty in the form of personal freedom, property and contract rights as well as individual interests in physical integrity and reputation, was subsequently captured by a modernised concept of the constitution.[170]

For a long time, the United Kingdom had lacked a written constitution. This situation changed to a certain extent with the enactment of the Human Rights Act of 1998, giving effect to the European Convention on Human Rights.[171] Sources of constitutional law are further found in statutory-, common- and EU law, legal treaties, the law and customs of parliament and, eventually, the royal prerogative.[172] Constitutional conventions, custom-like rules that determine certain aspects of state conduct, add to the sources of English constitutional law.[173] Accordingly, even though the United Kingdom does not have a single codified constitution, it still features various sources of substantive constitutional law.

2. Parliamentary Sovereignty & Judicial Review

For much of its existence, the general constitutional principle of parliamentary sovereignty largely defined the structure of the English legal system.[174] This salient feature of the English legal order has important ramifications for the rule of law principles of separation of powers and judicial review. An Act of Parliament is generally considered valid if it was enacted according to the applicable legislative procedure and obtained royal consent.[175] English courts

168 Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 274 f.

169 ibid 273 f.

170 Stanley Bailey, Jane Ching and Nick Taylor, *The Modern English Legal System* (5th edn, Sweet & Maxwell 2007) ch 1, paras 1-004; Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 273 f.

171 Matt Qvortrup, '"Let Me Take You to a Foreign Land": The Political and the Legal Constitution' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change* (Hart Publishing 2013) 55, 56.

172 Leyland (n 166) 26–32.

173 David Feldman, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change* (Hart Publishing 2013) 93-119.

174 UKHL, *Jackson and others v Her Majesty's Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [102] (Lord Steyn).

175 Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016) 122.

do not enjoy the legal authority to declare legislative acts inapplicable or void and the rule of law was for a long time primarily identified with formal ideals related to the virtues of legislation such as legal certainty or predictability.[176] The primary corrective of the legislature's law-making power was seen in its political accountability to the electorate.[177] English courts traditionally reviewed public authority acts exclusively for their compliance with formal rule of law principles. One standard of review was the compliance of public authority acts with parliamentarily delegated powers, whereby the courts effectuated the rule of law principle of formal legality.[178] Procedural concerns such as unbiased decision-making and the granting of a fair hearing in advance to deprivations of rights and significant legal interests provided another basis of review.[179] The most substantive traditional ground for review, only conservatively implemented by the courts, was the reasonableness-test which public authority acts needed to withstand.[180] Incrementally, however, the English courts expanded their review powers over administrative and royal executive action in order to strengthen the protection of individual rights against encroachments by the state.[181] The initially predominantly procedural standards of judicial review, focusing on the conformity of state action with correct procedure, were further augmented by substantive standards as a result of the United Kingdom's accession to the European Union and the enactment of the Human Rights Act of 1998.[182]

3. Human Rights Protection

With the enactment of the Human Rights Act of 1998, the rights and fundamental freedoms of the European Convention on Human Rights became directly applicable in the English legal order.[183] As a consequence, the Act binds courts and tribunals to the judgments, decisions, declarations and advisory opinions of the European Court of Human Rights and requires that primary and secondary legislation be read and given effect to by courts in accordance with the

176 Rainer Grote, 'The German Rechtsstaat in a Comparative Perspective' in James Silkenat, James Hickey and Peter Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer 2014) 193, 203.

177 Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 296; Barnett, *Constitutional & Administrative Law* (n 175) 118, 131 f.

178 Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 298 f.

179 Jowell (n 167) 30.

180 Michael Fordham, *Judicial Review Handbook* (6th edn, Hart Publishing 2012) 569–576.

181 Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 298 f.

182 Fordham (n 180) 101, 116.

183 Human Rights Act of 1998, s 1(2).

Convention.[184] In addition, the Human Rights Act requires that public authorities act in conformity with Convention rights and provides a remedy in domestic courts in cases of non-compliance.[185] The Act, however, still respects the constitutional principle of parliamentary sovereignty to the extent that the latter obligation does not bind 'either House of Parliament or a person exercising functions in connection with proceedings in Parliament'.[186] In addition, all public authority acts based on primary legislation or acts that are giving effect to primary legislation that cannot be read or given effect to in accordance with the Convention, are exempted from the requirement of Convention conformity.[187] If the courts find an act of primary or subordinate legislation incompatible with the Convention, they are not authorised to invalidate it but may only issue a 'declaration of incompatibility' of a provision with the Convention.[188] A soft power of the courts to ensure the compliance of parliamentary legislation with the Convention, however, is their authority to read and give effect to primary and subordinate legislation in a way compatible with Convention rights.[189]

Another factor that resulted in a de facto limitation of parliamentary sovereignty was the accession of the United Kingdom to the European Union.[190] With the enactment of the European Communities Act of 1972, Community law was to be given legal effect and to be applied in the United Kingdom without further national enactment.[191] European Union law was not only considered to become part of but also to rank above domestic law as a consequence of the European Communities Act.[192] In its ultimate consequence, the EU membership, thus, expanded the scope of judicial review of English courts in order to ensure the compatibility of Acts of Parliament with EU law.[193] This included the EU Charter of Fundamental Rights, which was deemed to extend human rights protection substantively and procedurally beyond the scope of the Human Rights Act of 1998 in cases involving the implementation of EU law.[194] The European Union Act of 2011, which made the post-Lisbon treaties applicable,

184 Human Rights Act of 1998, ss 2(1) and 3(1).
185 Human Rights Act of 1998, ss 6 and 7.
186 Human Rights Act of 1998, s 6(3).
187 Human Rights Act of 1998, s 6(2).
188 Human Rights Act of 1998, ss 4(2) and (4).
189 Human Rights Act of 1998, s 3(1).
190 The United Kingdom joined what was originally the European Economic Community in 1973.
191 European Communities Act 1972, s 2(1).
192 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 [1; 69] (Lord Justice Laws).
193 Slapper and Kelly (n 86) 703.
194 Fordham (n 180) 103.

however, established that the application of EU law ultimately depended on parliamentary assent and introduced the popular referendum for the adoption of any future EU treaties or amendments to the existing treaties.[195] This arrangement reinforced the principle of parliamentary and popular sovereignty in an age characterised by the rise of binding substantive regional, supra- and international law. The UK exit of the European Union and plans of recent years by the conservative party to repeal the Human Rights Act of 1998 in order to replace it with a Bill of Rights for the United Kingdom of Great Britain and Northern Ireland are further reasons for concern with regard to the future scope and effectiveness of human rights protection in the UK.[196]

4. Separation of Powers & Judicial Independence

Historically, the English legal system did not provide for a robust separation of powers. Rather, the powers of the governmental branches overlapped considerably.[197] In the early 2000s, however, the introduction of the Constitutional Reform Act of 2005 initiated substantial reforms in order to more meaningfully separate the governmental powers.

Until the enactment of the Constitutional Reform Act of 2005, it was particularly the office of the Lord Chancellor – combining executive, legislative and judicial functions –, which sat uncomfortably with the rule of law principle of separation of powers.[198] Before the reform, the Lord Chancellor, a cabinet minister, had been sitting as a judge in the House of Lords and in the Judicial Committee of the Privy Council.[199] Additionally, he had been involved in the parliamentary law-making procedure as the Speaker of the House of Lords.[200] Since the 2005 reform, the Lord Chancellor heads the newly created Ministry of Justice, being responsible for the administration of the court and prison system in this capacity, and no longer acts as the Speaker of the House of Lords nor functions as a judge.[201]

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195 European Union Act 2011, ss 6 and 18.

196 UNCESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights on the United Kingdom of Great Britain and Northern Ireland (14 July 2016) UN Doc E/C.12/GBR/CO/6 [9f]; UNHRCee, Concluding Observations of the Human Rights Committee on the United Kingdom of Great Britain and Northern Ireland (17 August 2015) UN Doc CCPR/C/GBR/CO/7 [5]; LSE Commission on the Future of Britain in Europe: Overview and Summary of Reports (August 2016) 10 f.

197 Leyland (n 166) 72.

198 Lord Windlesham, 'The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change' (2005) *PL* 806, 812.

199 Leyland (n 166) 75.

200 ibid 75.

201 Barnett, *Constitutional & Administrative Law* (n 175) 79.

Another former peculiarity of the English legal system regarding the separation of powers was the placement of the highest appellate court of the country in the House of Lords. This arrangement was abolished with the creation of the UK Supreme Court, a central reason behind the court's creation being the need for a 'free-standing' Supreme Court 'separating the highest appeal court from the second house of Parliament and removing the Lords of Appeal in Ordinary from the legislature'.[202] Before the enactment of the Constitutional Reform Act of 2005, the Appellate Committee of the House of Lords, the highest court of the United Kingdom, had been sitting in Parliament and the Lords of Appeal in Ordinary were involved in the law-making procedures of the House of Lords.[203] The UK Supreme Court was then established as a 'superior court of record' and authorised to 'determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment'.[204] Regarding the principle of judicial review, however, the creation of the Supreme Court has not contributed to a strengthened review process. Supreme Court judges are still not authorised to invalidate Acts of Parliament.[205]

Although the Constitutional Reform Act of 2005 strengthened the separation of powers in the English legal system, certain peculiarities have been preserved such as the arrangement that the executive depends on a majority in the House of Commons. As long as this majority prevails, the executive can basically rely on parliamentary consent to its legislative programmes, which results in weak supervision of the executive through the legislative and a de facto executive supremacy through parliamentary supremacy.[206]

The introduction of the Constitutional Reform Act, however, had positive implications for the independence of the judiciary insofar as it transferred the authority to appoint judges from the Lord Chancellor to a newly created Judicial Appointments Commission, thereby reducing the role of the former in the selection process.[207] Section 3 of the Act then also explicitly provides for the guarantee of judicial independence.[208]

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202 Department of Constitutional Affairs, 'Constitutional Reform: A Supreme Court for the United Kingdom' (2003) 4.

203 Barnett, *Constitutional & Administrative Law* (n 175) 80.

204 Constitutional Reform Act 2005, ss 40 (1) and (5).

205 Barnett, *Constitutional & Administrative Law* (n 175) 80.

206 Leyland (n 166) 74 f.

207 Constitutional Reform Act 2005, Part 4 Judicial Appointments and Discipline.

208 Constitutional Reform Act 2005, s 3.

5. Conclusion

The constitutional principle of parliamentary sovereignty accounts for the salient formal features of the English model of the rule of law. Ultimately, Parliament enjoys the authority to enact laws contrary to the Human Rights Act of 1998 or (up to now) European Union law. To be sure, English courts strive to interpret and apply Acts of Parliament in a manner compatible with Convention and EU law as long as Parliament has not legislated in such a clear and unambiguous manner that incompatibility with Convention- or EU law is inevitable. The latter arrangement has been qualified as implementing the principle of legality insofar as Parliament may indeed derogate from European Union- or Convention law but it needs to do so in express language, for otherwise courts will give effect to the basic rights of individuals.[209] In essence, thus, it seems that the introduction of more meaningful standards of judicial review of public authority acts for their human rights compliance has tilted the English legal system towards a more substantive model of the rule of law. The exit of the United Kingdom from the European Union will, of course, affect this trend.

The constitutional principle of parliamentary supremacy also defines the English model of the separation of powers. Parliament is the foremost state organ in the English legal system, which does not allow for a separation of powers as pronounced as in the US, which establishes the three governmental branches as independent and equal powers.[210]

C. The Rule of Law in the United States

1. The Supreme Law of the Land

The normative underpinning of the US understanding of the rule of law is the liberal concept of individual liberty. The individuals constituting the American society have agreed to restrain their natural freedom through a government of laws in order to guarantee the maximum enjoyment of the liberties of all members of society.[211] The US Constitution is understood to embody this act of popular sovereignty and derives from this fact its supreme character as a limitation on all governmental action, an idea explicitly captured in art VI of

[209] UKHL, *Regina v Secretary of State for the Home Department ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 (Lord Hoffmann).

[210] Peerenboom, 'Competing Conceptions of Rule of Law in China' (n 149) 119 f.

[211] Brian Tamanaha, 'Rule of Law in the United States' in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S.* (Routledge 2004) 56.

the Constitution, which establishes the supremacy of the Constitution over all other laws.[212] It is this document which is the source and guardian of the US understanding of the rule of law, characterised by a robust system of checks and balances among the branches of the federal government and separation of powers between the federal and state governments as well as by a broad range of fundamental rights guarantees.[213] The US system of fundamental rights protection is based on basic rights which were already provided for in the original Constitution of 1787 (the prohibition of retroactive penal laws, the right to vote and the right to equal treatment of citizens of the different US states), the first ten Amendments forming the Bill of Rights, the Reconstruction Amendments adopted after the American Civil War and the guarantees developed by the US Supreme Court in interpreting the due process and equal protection clauses to restrain federal and state action.[214] In their origin, the basic rights guarantees of the US Constitution are owed to an urge of the states to contain the power of the federal government against their citizens. Over more than two centuries, however, the basic rights of the US Constitution were expanded and interpreted to also constrain the power of state and local authorities and constitute a crucial source of the still evolving US constitutional law.[215] Importantly, the expansive scope of fundamental rights protection in the US legal system is intimately connected with the power vested in the judicial branch of government and its evolution based on the interpretation of the US Constitution.[216]

2. Judicial Independence & Judicial Review

The judicial power of the United States is vested in the Supreme Court and in inferior federal courts as established by Congress.[217] The US Supreme Court is the highest appellate court of the country with regard to federal matters, enjoying original jurisdiction in only selected cases.[218] Supreme Court judges

[212] Gosalbo-Bono (n 71) 272. Art VI of the Constitution contains the 'supremacy clause'. It establishes that '[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding'.

[213] Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 301 f.

[214] Peter Hay, *The Law of the United States* (Routledge 2017) 30.

[215] Richard Fallon, *The Dynamic Constitution* (2nd edn, CUP 2013) 128 f.

[216] ibid 280.

[217] art III US Constitution.

[218] art III (2) US Constitution states that '[i]n all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall

are nominated and appointed by the President and US Presidents have traditionally appointed judges they expected to be faithful to their own political agenda regarding sensitive social issues such as abortion or affirmative action.[219] Bar the politics of the appointment procedure, however, the independence of the judiciary is solidly protected in the US Constitution.[220] A central reason behind the importance of the presidential right to appoint Supreme Court judges is not only their lifetime tenure but also the considerable powers of judicial review enjoyed by the highest court.

The authority of the Supreme Court to invalidate legislative or executive acts based on their unconstitutionality was not envisaged by the Constitution. The court itself established its right to judicial review in *Marbury v. Madison*. In this landmark decision, the court held the congressional Judiciary Act of 1789 to be unconstitutional to the extent that it conveyed on the Supreme Court original jurisdiction in a manner inconsistent with the text of the Constitution. The court held that if the Constitution was considered the paramount law of the country, acts of the legislature repugnant to this supreme law must be void and established that as a court charged with the function to determine what the law is, it was authorised to invalidate unconstitutional congressional statutes.[221]

3. Due Process & the Bill of Rights

In subsequent years, the court did not shy away from actively using its review powers and interfered extensively with congressional and state legislation based on its interpretation of the Constitution. A prominent avenue for the court to exercise constitutional review and to promote an important element of the rule of law, namely due process, were the due process clauses of the Fifth and Fourteenth Amendments of the Constitution.[222] Whereas the Fifth Amendment's due process clause restricts the exercise of federal governmental authority only, the Fourteenth Amendment's due process clause restrains state action. Both clauses have been interpreted by the Supreme Court to contain

have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make'.

219 art II (2) US Constitution. Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (2nd edn, Hart Publishing 2015) 129 f.

220 art III (2) US Constitution stipulates that '[t]he judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office'.

221 SCOTUS, *Marbury v Madison*, 5 U.S. 137 [1803].

222 Gosalbo-Bono (n 71) 273.

substantive as well as procedural guarantees and as avenues to extend the scope of individual rights protection that may be asserted against the federal and the state governments.[223]

Based on the Fourteenth Amendment's due process clause, most provisions of the Bill of Rights, which were originally directed at restricting the exercise of federal authority, were incorporated against the states to also guarantee these rights against acts of state and local governments.[224] In a similar move, the court declared the Fourteenth Amendment's equal protection clause to be applicable to the federal government through the Fifth Amendment's due process clause in order to ban racial discrimination by the federal government.[225] The Bill of Rights, the due process clauses of the Fifth and Fourteenth Amendments as well as the equal protection clause of the Fourteenth Amendment have served the US Supreme Court as a source to evolve fundamental rights guarantees and to 'discover' rights, which were not explicitly provided for in the Constitution. The court, thus, opposed racial segregation in education based on the equal protection clause, upheld the procedural rights of people held in custody, developed the right to publicly criticise government and public officials, invalidated a state statute prohibiting the use of contraceptives based on the unenumerated right to privacy, established the constitutional right to abortion and legalised same-sex sexual conduct and same-sex marriages.[226]

4. Separation of Powers

The rule of law principle of separation of powers is a salient feature of the US Constitution. In its first three Articles, the Constitution assigns the legislative power to Congress and establishes its scope, attributes the executive power to the President of the United States and vests the judicial power in the US

223 Fallon, *The Dynamic Constitution* (n 215) 111 ff; Akhil Amar, *America's Constitution: A Biography* (Random House 2005) 389.

224 Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press 1998) 163–180.

225 SCOTUS, *Bolling v Sharpe*, 347 U.S. 497 [1954]. Fallon, *The Dynamic Constitution* (n 215) 153.

226 SCOTUS, *Brown v Board of Education*, 347 U.S. 483 [1954]; SCOTUS, *Miranda v Arizona*, 384 U.S. 436 [1966]; SCOTUS, *New York Times v Sullivan*, 376 U.S. 254 [1964]; SCOTUS, *Griswold v Connecticut*, 381 U.S. 479 [1965]; SCOTUS, *Roe v Wade*, 410 U.S. 113 [1973]; SCOTUS, *Webster v Reproductive Health Service*, 492 U.S. 490 [1989]; SCOTUS, *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833 [1992]; SCOTUS, *Lawrence v Texas*, 539 U.S. 558 [2003]; SCOTUS; *Obergefell v Hodges*, 576 U.S. ____ [2015].

Supreme Court and in congressionally created inferior courts.[227] The concrete balance among the different branches of government, however, results not only from the Constitution but also from the case law of the US Supreme Court.

Whereas states may legislate on any subject as far as they respect the Constitution, Congress needs to base its regulatory activity on a constitutional authorisation in order to do so.[228] This constitutional arrangement caters not only to the separation of powers between federal, state and local governments but also between Congress and the President.[229]

In spite of the constitutional arrangement of a federal government of limited powers, Congress has considerably expanded the scope of its constitutionally designated powers over time. Article I (8) of the Constitution, which authorises Congress to regulate commerce among the states, has been employed by the legislative branch as a basis for regulatory activity with sometimes only tenuous connections between the subject of federal regulation and interstate commerce.[230] The extensive use of the commerce clause as a basis of congressional regulation might be seen as being in tension with the rule of law principle of legality to the extent that it is questionable whether the Constitution really provides for such far reaching congressional powers. Similar concerns may be raised with regard to Congress's 'Taxing and Spending Powers' which were broadly interpreted by the Supreme Court as to authorise congressional spending of funds as long as it promoted the general welfare or with regard to the broadly construed 'Necessary and Proper Clause', authorising Congress to enact all laws necessary to implement its enumerated powers.[231]

Regarding the separation of powers between Congress and the President, a landmark decision of the US Supreme Court is interpreted to establish a tripartite analysis in cases of conflict between the exercise of congressional and

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227 art I US Constitution establishes the legislative branch, art II the presidency and art III the judiciary.

228 Fallon, *The Dynamic Constitution* (n 215) 228.

229 Whereas art I (8) US Constitution contains a detailed catalogue of congressional authorities, the Tenth Amendment explicitly states that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people'. Art II of the Constitution outlines the scope of the presidential powers.

230 Robert Sedler, *Constitutional Law in the United States* (2nd ed, Wolters Kluwer 2014) 43 ff; Fallon, *The Dynamic Constitution* (n 215) 229.

231 Fallon, *The Dynamic Constitution* (n 215) 7, 244 f. Art I (8) cl 1 US Constitution establishes that 'Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States (. . .)'. Art I (8) cl 17 US Constitution holds that 'Congress shall have power (. . .) to make all laws which shall be necessary and proper for carrying into execution the foregoing powers'.

presidential powers.[232] Based on the 'Take Care Clause', the President is empowered to act in conformity with an express or implied authorisation by Congress. In the absence of a congressional grant or denial of authority, the President may only act based on his independent powers or – where he enjoys concurrent authority with Congress, eg in the field of war powers, – his authority may be implied from congressional inertia, indifference or quiescence.[233] The last scenario concerns presidential acts that are incompatible with the expressed or implied will of Congress and therefore unconstitutional to the extent that they cannot be attributed to the President's independent powers and are not beyond congressional control.[234]

Another field of contention regarding the separation of powers between Congress and the President have been the war powers.[235] Whereas Congress enjoys the right to declare war based on art I (8) of the Constitution, the President is the commander in chief of the federal army and navy and the militia of the states and may deploy the troops.[236] The compromise struck between the two branches of government is that the President will usually try to receive a certain kind of congressional approval before engaging the military in armed conflict, a compromise further entrenched with the enactment of the congressional War Powers Resolution of 1973.[237]

5. Conclusion

As can be drawn from the previous analysis, the US understanding of the rule of law rests on a more balanced distribution of powers among the different governmental branches than the English model. Congress enjoys only constitutionally enumerated powers but the Supreme Court has repeatedly accepted the broad congressional interpretation of its legislative authority. Nonetheless, the substantial powers of constitutional review of the US Supreme Court allow it to struck down congressional acts that are considered unconstitutional – an arrangement not foreseen in English law. As the US legal

232 SCOTUS, *Youngstown Sheet & Tube Co. v Sawyer* 343 U.S. 579 [1952]. This framework is based on Justice Robert Jackson's concurring opinion, which enjoys more authority in constitutional theory today than the majority opinion. Fallon, *The Dynamic Constitution* (n 215) 259.

233 The 'Take Care Clause' is found in art II (3) US Constitution which holds that the President '(…) shall take care that the laws be faithfully executed (…)', with laws meaning congressional laws.

234 See *Youngstown* (n 232) [635–638] (Justice Jackson Concurring Opinion).

235 Sedler (n 230) 268–275.

236 art II (2) US Constitution.

237 Tushnet (n 219) 113.

system provides for constitutional judicial review and features a broad catalogue of fundamental rights, the rule of law model it epitomises is of a substantive nature. Whereas Supreme Court judges are elected by the US President, their independence is firmly established, ia by their lifetime tenure. The system of checks and balances among the governmental branches as evidenced by the shared war powers of Congress and the US President further contributes to a refined institutional framework to prevent or address the arbitrary exercise of sovereign power.

D. The French État de Droit

Already the Declaration of the Rights of Man and of the Citizen of 1789 invoked two principles of the rule of law, stipulating that a constitution required that rights and freedoms be guaranteed and the separation of powers defined.[238] The specific concept of the 'état de droit' was introduced to France only at the beginning of the twentieth century by Raymond Carré de Malberg who had drawn his inspiration from the German concept of the 'Rechtsstaat'.[239] The French Constitution, however, nowhere explicitly invokes the 'état de droit'.[240] Nonetheless, the introduction of the concept to French constitutional law eventually led to a weakening of the omnipotent position of the French Parliament and a loosening of the profound reservations against the judiciary distinctive for the French legal system and institutionalised the idea that all state power needs to be confined by a supreme law, including the legislature.[241]

1. Parliamentary Sovereignty

Until the mid-20th century, the French legal system had not installed effective guarantees to ensure the supremacy of the constitution and the French Parliament enjoyed considerable institutional supremacy over the other branches of government.[242] The trust placed in parliament resulted from its

[238] art 16 Declaration of the Rights of Man of 1789 stipulates that '[a] society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.' ‹http://avalon.law.yale.edu/18th_century/rightsof.asp› accessed 14 July 2017.

[239] Laurent Pech, 'Rule of Law in France' in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S.* (Routledge 2004) 79, 80; Grote, 'The German Rechtsstaat in a Comparative Perspective' (n 176) 193.

[240] Olivier Jouanjan, 'Frankreich' in Armin von Bogdandy and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum*, vol I (CF Müller Verlag 2007) § 2, para 104.

[241] Gosalbo-Bono (n 71) 249.

[242] Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 281; Pech (n 239) 86.

perception as the body most accurately representing the popular will, which had historically been entrusted with the realisation of the individual rights as enshrined in the Declaration of the Rights of Man and of the Citizen of 1789.[243] The rule of law was, thus, for a long time identified with the rule of parliamentary law with the main yardstick for legitimacy of governmental action being the principle of legality.[244] The confidence in the governing expertise of the legislature went hand in hand with a profound distrust in the judiciary. Scepticism towards judges can be traced back to Montesquieu's writings, which explicitly envisaged the appropriate task of the judiciary in the mere application of laws made by the legislature.[245] The rejection of a strong judiciary dated back to a time when royal courts had thwarted progressive legislation of the royal administration before the French Revolution and resulted in the establishment of purely internal administrative review mechanisms and the creation of the Conseil d'État by Napoleon in 1799.[246]

2. Judicial Review

Over time, however, the French courts strengthened their role. The Conseil d'État, the supreme administrative body, was originally only entrusted with the review of administrative acts for their conformity with parliamentary laws. The development of general principles of law by the Conseil marked the beginning of a reorganisation of the French legal system towards the inclusion of more meaningful standards of review and a weakening of the principle of formal legality.[247] The general principles of law did not only serve the Conseil d'État to review executive acts for their procedural soundness but also contained substantive guarantees such as the principle of legal equality or the freedoms of thought, opinion and movement.[248] The Conseil d'État retrieved these principles from the Declaration of the Rights of Man and of the Citizen of 1789, the Preamble of the 1946 Constitution and from concepts such as justice and equity grounded in natural law.[249] The subsequent incremental strengthening of the standards of judicial review was a response to the extended law-making

243 Olivier Jouanjan, 'Verfassungsrechtsprechung in Frankreich' in Armin von Bogdandy and Peter Huber (eds), *Handbuch Ius Publicum Europaeum*, vol VI (CF Müller Verlag 2016) § 6, para 10.
244 Pech (n 239) 85 f.
245 Gosalbo-Bono (n 71) 246.
246 Boyron (n 135) 78.
247 Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 292.
248 ibid 293.
249 ibid 292.

powers of the executive, which had to be guarded in the interest of the principle of separation of powers.[250]

In 1958, the Conseil Constitutionnel was established to ensure respect for the boundary between the jurisdictions of parliament and the executive with the main focus lying on preventing the legislature from encroaching upon executive authority.[251] The review powers of the Conseil Constitutionnel were initially limited to the scrutiny of parliamentary acts for their formal and procedural constitutionality.[252] In an act of self-empowerment, however, the Conseil expanded its authority to also review parliamentary legislation for its compatibility with the fundamental rights guarantees contained in the Declaration of the Rights of Man and of the Citizen of 1789 and the preamble of the Constitution of 1946.[253] Whereas the right to apply for judicial review of parliamentary laws was initially reserved for the President of the Republic, the Prime Minister and the Presidents of the two houses of Parliament, it was incrementally expanded to include a group of at least sixty members of the National Assembly or sixty senators and extended again in 2008 to also encompass private individuals under restricted circumstances.[254] Today, the Conseil Constitutionnel systematically examines organic laws and regulations of the houses of Parliament for their compatibility with the Constitution before they enter into force.[255] In addition, the Conseil enjoys the authority to determine the constitutionality of international treaties and agreements before their ratification and since 2008 also of popular referendums.[256] While the Conseil was initially restricted to review the constitutionality of laws referred to him before they were promulgated by the President, the constitutional reform in 2008 granted claimants of a case that crucially depends on the interpretation of a legislative provision already in force, the right to have their case referred to the Conseil Constitutionnel by the Conseil d'État or the Cour de cassation to determine its compatibility with the fundamental rights and freedoms of the constitution.[257]

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250 Boyron (n 135) 37.

251 ibid 151. See arts 56–63 French Constitution of 1958.

252 Grote, 'The German Rechtsstaat in a Comparative Perspective' (n 176) 203.

253 Conseil Constitutionnel, Decision No 71–44 of 16 July 1971 ('Liberté d'association'). See, eg, Jouanjan, 'Frankreich' (n 240) § 2, para 40.

254 ibid § 2, para 40.

255 art 46 (5) French Constitution of 1958 (for a clarification of the concept of 'organic laws'); art 61 (1) French Constitution of 1958.

256 arts 11 (3) and 54 French Constitution of 1958.

257 art 61(2) French Constitution of 1958; art 61-1 French Constitution of 1958, implemented by the organic law of 9 December 2009. Grote, 'The German Rechtsstaat in a Comparative Perspective' (n 176) 203.

3. Restraint by the Bloc de Constitutionnalité

The substantive standards of constitutional review are found in various sources. The modern French Constitution consists of more than one document and is traditionally referred to as the 'bloc de constitutionnalité'. Besides the constitution of 4th October 1958, the Declaration of the Rights of Man and of the Citizen of 1789 and the Preamble of the 1946 Constitution were incorporated by the Conseil Constitutionnel into the 1958 Constitution based on their mention in its preamble.[258] Additionally, the general principles recognised in the laws of the Republic and the Charter for the Environment of 2004 enjoy constitutional status.[259] The 1789 Declaration, the 1946 Preamble and the general principles provide for a rich catalogue of fundamental rights guarantees ranging from political to social and economic rights, complemented since 2004 by environmental protections.[260]

4. Judicial Independence & Separation of Powers

The French Constitution provides explicitly only for the judicial independence of private law courts while omitting the reference to administrative courts altogether.[261] Article 64 (4) contains the principle of irremovability, while rules pertaining to the recruitment, education, accountability, appointment, career, promotion, duties and salaries of private law judges are regulated in organic laws as foreseen in art 64 (3).[262] The protection gap with regard to the independence of judges sitting in other judicial bodies than private law courts was closed by statutory law and the case law of the Conseil Constitutionnel.[263]

In contrast to the guarantee of judicial independence, the principle of separation of powers figured prominently already in art 16 of the Declaration of

258 'Liberté d'association' Decision (n 253).

259 Boyron (n 135) 38 f.

260 On the French environmental constitution, see David Marrani, *Dynamics in the French Constitution* (Routledge 2013) 37–55. On social rights in the French constitution, see, eg, Rainer Geesmann, *Soziale Grundrechte im deutschen und französischen Verfassungsrecht und in der Charta der Grundrechte der Europäischen Union* (Peter Lang 2004) 61-167.

261 arts 64–66 French Constitution of 1958. See, Boyron (n 135) 142 f.

262 Boyron (n 135) 143–145.

263 art L231-3 of the Code of Administrative Justice regulates the irremovability of judges of the first instance- and appeal administrative courts. Conseil Constitutionnel, Decision No 80-199 DC of 22 July 1980 established that the principle of judicial independence extends also to administrative courts. Remarkably though, the judicial independence of the Conseil d'État is not guaranteed either by positive or case law. While this raises concerns under art 6(1) ECHR, in practice the independence of the judges of the Conseil d'État has not been a problem. See, Boyron (n 135) 147–150.

the Rights of Man and of the Citizen of 1789 which stipulated that 'a society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all'.[264] This, of course, did not clarify how exactly the separation of powers should be ensured by the French legal system. The modern French Constitution, then, enumerates the parliamentary powers in arts 34 and 35, while reserving the remaining matters for the executive according to art 37. The French legal system of the Fifth Republic is characterised by a concentration of power in the executive, especially in the office of the President of the Republic, which can be traced back to the politics of self-empowerment of Charles de Gaulle that culminated in the introduction of presidential elections by direct universal suffrage in 1962.[265] The pivotal role of the President in the French legal system is evidenced, eg, by its authority to ensure due respect for the Constitution, the proper functioning of the public authorities and the continuity of the state and to guarantee national independence, territorial integrity and due respect for Treaties.[266] As a peculiarity with regard to the principle of separation of powers, the President of the Republic is further tasked in art 64 of the 1958 Constitution to guarantee the independence of the judiciary. The President also enjoys considerable powers over the other branches of government. The presidential right to appoint the Prime Minister according to art 8 of the Constitution has been converted into the practice of the President to choose his favourite candidate who during his term of office depends on the favour of the President more than being responsible to Parliament.[267] Additionally, the President promulgates primary as well as secondary legislation and may dissolve the National Assembly.[268] He furthermore enjoys extensive appointment rights pertaining to army and civil service positions.[269] Establishing the most extensive presidential authority, art 16 of the French Constitution entrusts the President with all constitutional powers in cases of national emergency.

5. Conclusion

Even though the French model of the rule of law was in its origins characterised by a strong focus on the principle of legality to guarantee and institutionalise the best possible representation of the popular will, the modern-day French legal system clearly features substantive rule of law elements. This, however, is

264 ‹http://avalon.law.yale.edu/18th_century/rightsof.asp› accessed 14 July 2017.
265 Jouanjan, 'Frankreich' (n 240) § 2, paras 30–32.
266 art 5 French Constitution of 1958.
267 Boyron (n 135) 71.
268 arts 12, 10 and 13 (1) French Constitution of 1958.
269 art 13 (1) French Constitution of 1958.

owed primarily to the self-empowerment of the Conseil d'État and the Conseil Constitutionnel. As a consequence, parliamentary acts nowadays need to withstand not only a review of their enactment in line with established procedures but are also subjected to substantive standards of review. A central substantive standard of review constitutes the French constitution, which contains broad political, social, economic and even environmental protections. Owed to the constitutional framework and acts of self-empowerment, the office of the President of the Fifth Republic has shifted the separation of powers with its originally strong focus on parliament to a concentration of power in the executive. This authority goes so far that the President even figures as the guarantor of the French Constitution.

E. The Rule of Law in Russia

The Russian Constitution refers to the rule of law in art 1 (1) and defines Russia as a 'democratic federated rule-of-law State with a republic form of government'.[270] The explicit mention of the rule of law in the Russian Constitution is a novelty of the post-Soviet Russian state. While the Soviet Union still existed, the rule of law was not practised and law was seen as subordinate to state power.[271] The implementation of this programmatic constitutional provision in modern Russia, however, lags behind the aspiration of the constitutional text.[272]

1. The Supreme Law of the Country & the Principle of Formal Legality

Following art 4 (2) of the Russian Constitution, the Constitution of the Russian Federation and federal laws are supreme throughout the entire Russian territory. Article 15 (1) further provides the Constitution with 'the highest legal force' and 'direct effect' and establishes that laws and other legal acts shall not contravene the Constitution.[273] Article 15 (2) complements the hierarchy of norms and

[270] See the English translation of the Constitution of the Russian Federation of 12 December 1993 in William Butler, *Russian Law and Legal Institutions* (Wildy, Simmonds & Hill Publishing 2014) 363–404. On the difficulties and ambiguities attached to the translation of the Russian phrase 'pravovoe gosudarstvo' into the concept of 'rule of law', see Jane Henderson, *The Constitution of the Russian Federation: A Contextual Analysis* (Hart Publishing 2011) 7 f.

[271] Irina Bogdanovskaia and Tatiana Vassilieva, *Constitutional Law in Russia* (Wolters Kluwer 2012) 32.

[272] Henderson (n 270) 85.

[273] art 15 (1) Russian Constitution of 1993. See also art 90 (3) Russian Constitution of 1993, which requires that edicts and regulations of the President of the Russian Federation shall not be contrary to the constitution and federal laws.

stipulates that agencies of state power and the local self-government, officials, citizens, and their associations are obliged to comply with the Constitution and federal laws. Article 15 (4) establishes the supremacy of generally recognised principles and norms of international law and of ratified international treaties over federal laws. This includes the European Convention on Human Rights and the decisions of the European Court of Human Rights. The Constitution further enshrines several important rule of law requirements with regard to the formal qualities of legal rules. Article 15 (3) requires that laws be officially published and that unpublished laws shall not be applied.[274] Article 54 (1) prohibits the retroactivity of laws 'establishing or aggravating responsibility' and paragraph 2 establishes that 'no one may bear responsibility for an act which at the moment of its commission was not deemed to be a violation of law'.

2. Presidential Supremacy & Separation of Powers

Whereas Soviet Russia was informed by the ideal of the unity of state power, the 1990 Declaration on State Sovereignty explicitly included the principle of the separation of powers.[275] The principle reappeared in art 3 of the 1978 Constitution and was later adopted by art 10 of the 1993 Constitution.[276] Article 10 of the 1993 Constitution stipulates that the state power in the Russian Federation 'shall be effectuated on the basis of separation into legislative, executive, and judicial' and maintains that the agencies of the three branches shall be autonomous. The term 'autonomous' is to be distinguished from the concept of 'independence' which was not intended by the constitutional text as the constitutional system of checks and balances does provide for mutual dependencies such as appointment rights into high office of one governmental branch by members of another.[277] Article 11 (1) explains in more detail that the state power shall be exercised by the President, the Federal Assembly (the Council of the Federation and the State Duma), the Government and the courts.

The state organ enjoying the foremost powers in the Russian Federation, however, is the President. Article 80 of the Constitution makes the President the head of state. He is the supreme commander-in-chief of the Russian armed forces, represents the federation in foreign relations, and enjoys emergency

274 art 15 (3) Russian Constitution of 1993.

275 Declaration on the State Sovereignty of the Russian Soviet Federative Socialist Republic of 12 June 1990.

276 Henderson (n 270) 88.

277 ibid 87.

powers and the authority to confer state awards and titles of honour and to grant citizenship, amnesties, pardons and political asylum.[278] Most importantly, the President is actively involved in the law-making process of the Russian Federation. He frequently introduces bills in the State Duma and has the right to veto laws of the Federal Assembly.[279] Additionally, art 90 of the Constitution authorises the President to issue edicts and regulations that are binding throughout the entire Russian territory, a power criticised of having been subjected to repeated presidential overuse, as exemplified by Yeltsin's extensive economic regulation.[280] Additionally, the President may dissolve the State Duma under specific circumstances.[281]

With regard to the government, the President enjoys near absolute control. He appoints the Chairmen of the Government, ie the Prime Minister, and the deputy chairmen and federal ministers following the request of the Prime Minister. He may dismiss the Government and has the right to preside over sessions of the Government, which he frequently does.[282]

The President further enjoys the peculiar authority to repeal decrees and regulations of the central government in cases of their alleged incompatibility with the Constitution, federal laws or presidential edicts.[283] He may further suspend executive acts of subjects of the Russian Federation if they contravene the Constitution, federal laws, international obligations or the rights and freedoms of the man and citizen until a court has decided upon the alleged violation.[284] In spite of these far reaching presidential powers, which define large parts of the Russian legal order, the Constitutional Court has developed a doctrine of implied presidential powers which may comprise everything that is compatible with the overall spirit of his constitutional prerogative.[285] These constitutional arrangements do not only concede the President broad powers over the Russian Constitution but also over the other governmental branches, resulting in an accumulation of power in the office of the President.

278 arts 86, 87 (1), 88, 89 (a) (b) and (c) Russian Constitution of 1993.

279 arts 84 (d) and 107 (3) Russian Constitution of 1993. The presidential veto may then again be overridden by a two-thirds vote in both chambers. See, Butler (n 270) 300.

280 Henderson (n 270) 123.

281 arts 84 (b) and 109 Russian Constitution of 1993.

282 arts 83 (a) (b) (e) and 117 (2) Russian Constitution of 1993.

283 art 115 (3) Russian Constitution of 1993.

284 art 85 (2) Russian Constitution of 1993.

285 Henderson (n 270) 129 f.

3. Human Rights Protection

The Russian Constitution contains an extensive catalogue of fundamental rights and freedoms which includes civil and political liberties such as freedom of thought, speech or assembly as well as economic and social rights, eg, the right to land in private ownership, labour rights, the guarantee of social security for age, illness, disability, unemployment, nurturing children and health protection and medical assistance.[286] Article 19 (1) of the Constitution provides for the rule of law principle of legal equality and requires that 'all shall be equal before law and court'. In addition, the Constitution contains a rich catalogue of procedural rights. Article 45 of the Constitution stipulates that the 'state defence of the rights and freedoms of man and citizen shall be guaranteed in the Russian Federation' and that every rightholder may use all legal means to defend his rights and freedoms. The article introduces the chapter of the rights catalogue devoted to procedural guarantees. This catalogue aspires to grant the right to a remedy, the right of access to a court established by law, the right to qualified (free) legal assistance and a defence counsel, the presumption of innocence, the prohibition of double jeopardy, the right to appeal a conviction, the right against self-incrimination, victim access to justice and state compensation.[287] The enforcement of these rights, then, is mainly entrusted to the Russian courts, which in practice, however, enjoy only limited authority in the Russian political reality.

Article 2 of the Constitution establishes the binding nature of these rights and holds that 'man, his rights and freedoms are the highest value' and that 'recognition of, compliance with, and defence of the rights and freedoms of man and citizen shall be the duty of the State'. The guarantee implies that the state shall recognise and establish fundamental rights in the form of positive legislation, refrain from unwarranted interference, enforce rights by means of positive action and ensure their realisation among private actors.[288] The fundamental rights catalogue binds the legislature in that legislation abolishing or diminishing the rights and freedoms must not be issued in the Russian Federation.[289] Limitations on these rights are only justified to the extent that they are necessary to defend the foundations of the constitutional system, morality, health, rights and legal interests of other persons or to ensure the

[286] arts 29 (1), 31, 36 (1), 37, 39 (1) and 41 (1) Russian Constitution of 1993. The entire rights-catalogue ranges from art 17 to art 64 of the Constitution.

[287] arts 47, 48, 49, 50 (1) (3), 51, 52, 53 Russian Constitution of 1993.

[288] Rainer Arnold and Helena Sieben, 'Art. 2' in Bernd Wieser (ed), *Handbuch der Russischen Verfassung* (Verlag Österreich 2014) paras 10–14.

[289] art 55 (2) Russian Constitution of 1993.

defence of the country and security of the state.[290] The requirement of necessity introduces the principle of proportionality to the justification of rights curtailments.[291] The Constitutional Court also applies the principle of proportionality as a balancing standard in cases of collision between fundamental rights positions of different rightholders.[292] Additionally, rights curtailments are admissible under restricted circumstances in extraordinary situations with the exemption of a selected catalogue of rights, which are considered non-derogable even during a state of emergency such as the right to life or the dignity of the person.[293]

4. Judicial Review

Chapter 7 of the Russian Constitution contains the provisions on the judiciary. Article 125 of the Constitution creates the Constitutional Court of the Russian Federation and furnishes it with the right of constitutional review of the federal laws and normative acts of the President, the Council of the Federation, the State Duma and the Government of the Russian Federation. The court may further review the constitutions, charters, laws and other normative acts of the federal subjects for their constitutionality, as well as treaties concluded between the federal government and the governments of the federal subjects, treaties concluded between the governments of the federal subjects and international treaties and agreements of the Russian Federation which have not yet entered into force.[294] Additionally, the court is supposed to interpret the Constitution and to review the constitutionality of laws being applied or subject to application in a specific case in the procedure established by a federal law with regard to appeals against a violation of constitutional rights and freedoms of citizens.[295] If the court determines the unconstitutionality of an act or provision, they should cease to have legal effect.[296] On the books, thus, the Russian legal system knows a robust system of constitutional review.

Additionally, the Procuracy, a distinct Russian supervisory body originally entrusted to supervise the legality of the acts of parliamentary and governmental agencies of the subjects of the Russian Federation, enjoys the authority to monitor the compliance of state organs and commercial as well as non-commercial organisations with the Constitution as well as with laws of

290 art 55 (3) Russian Constitution of 1993.
291 Arnold and Sieben (n 288) paras 27–32.
292 ibid paras 18.
293 art 56 Russian Constitution of 1993.
294 art 125 (b) (c) and (d) Russian Constitution of 1993.
295 art 125 (4) and (5) Russian Constitution of 1993.
296 art 125 (6) Russian Constitution of 1993.

superior state authorities.[297] The procurator, however, has no authority to review the acts of the President, the Government or the Federal Assembly of the Russian Federation.[298] The review of their acts falls within the jurisdiction of the Constitutional Court.[299] In cases of an alleged contravention of a legal act or omission with a superior law, a procurator may file a protest with the responsible state authority, which has to be addressed by the respective organ.[300] Regarding conflicts of laws of the Federal Assembly with the Constitution, the Procurator General may refer such alleged violations to the President.[301]

If citizens approach the Procuracy regarding alleged violations of their constitutional rights and freedoms, it may advise them and take steps to address such violations by appealing to courts for the invalidation of the concerned act, preventative or compensating measures or the initiation of civil, administrative and criminal proceedings.[302]

Another avenue for citizens to enforce their constitutionally guaranteed rights is foreseen in art 58 (2) of the Russian Constitution which grants citizens a right to appeal in cases of rights infringements by state officials. The 1993 'Law of the Russian Federation on appealing to a court actions and decisions violating the rights and freedoms of citizens' introduces appeals by citizens, non-citizens and legal entities against concrete acts and decisions and their legal basis.[303] Crucially, art 46 (3) of the Constitution contains the right of everyone in accordance with international treaties of the Russian Federation to apply to inter-state agencies for the defence of the rights and freedoms of man if domestic remedies have been exhausted. Since the entry into force of the European Convention on Human Rights and Fundamental Freedoms in Russia in 1998, individuals can appeal to the European Court of Human Rights in cases of an alleged infringement of a Convention right.[304] This also implies that Russian courts have to apply Convention rights and follow the jurisprudence of the Strasbourg court.[305] In practice, however, judges seldom apply international norms and standards or international and regional case law.[306]

297 Henderson (n 270) 240; Butler (n 270) 245.
298 Butler (n 270) 245.
299 Henderson (n 270) 240.
300 Butler (n 270) 246.
301 ibid 247.
302 ibid.
303 Henderson (n 270) 241 f.
304 ibid 247.
305 ibid 251.
306 UNHRC, Report of the Special Rapporteur on the Independence of Judges and Lawyers (30 April 2014) UN Doc A/HRC/26/32/Add.1 [27f].

In theory, the Russian legal system appears to have a robust system of judicial review in place, catering to the rule of law. In practice, however, the independence and impartiality of Russian judges is only insufficiently guaranteed and judicial decisions are often not implemented with detrimental consequences for the effectiveness of the courts' review powers.

5. Judicial Independence

The Russian Constitution provides for judicial independence in that it establishes the irremovability, inviolability and immunity of judges, the publicness of court cases and the funding of the courts.[307] The guarantee of judicial independence was further substantiated in the Federal Act No. 3132-1 'On the Status of Judges' of 26 June 1992.[308] Yet, several factors impede the effective implementation of the Constitution and its extensive fundamental rights catalogue. A concerning constitutional arrangement with regard to the principle of separation of powers and the independence of the judiciary is the right of the President to present to the Council of the Federation candidates for appointment as judges of the Constitutional Court, the Supreme Court, the Higher Court of Arbitration, the Procurator-General and other federal courts.[309] He also appoints the procurators of the subjects of the Russian Federation upon recommendation of the Procurator General.[310] Additionally, the President appoints the presidents and deputy presidents of all courts of general jurisdiction and recommends the Chairperson of the Constitutional Court and the Chief Justices of the Supreme Court and the Supreme Arbitration Court who are claimed to enjoy disproportionate influence over their colleague judges and to entertain close relations with the executive.[311] According to the UN Special Rapporteur on the Independence of Judges and Lawyers, the current appointment mechanisms exert undue political influence upon judges and affect their impartiality towards members of the executive. Accordingly, he recommended the creation of qualification collegia that are independent from both the executive and the legislative.[312]

Another serious concern for the enjoyment of rights and the effective implementation of the Russian laws are the tremendous deficiencies in the Russian legal system regarding the implementation of judicial decisions, which

307 arts 120–124 Russian Constitution of 1993.
308 Report Special Rapporteur A/HRC/26/32/Add.1 (n 306) [7].
309 arts 128 (1) (2) and 129 (2) Russian Constitution of 1993.
310 art 129 (3) Russian Constitution of 1993.
311 Report Special Rapporteur A/HRC/26/32/Add.1 (n 306) [24f].
312 ibid [17f].

are reported to amount to 50 to 60 per cent of all court rulings.[313] A considerable amount of cases reaching the European Court of Human Rights are then also concerned with the failure to implement domestic court decisions.[314]

6. Conclusion

The Russian political reality is characterised by the practice of rule by law and an instrumental understanding of the law rather than by the principle of the rule of law.[315] The law can rule in areas such as commercial, private or criminal law but only to the extent that no interests of the ruling political class are affected.[316]

The Constitutional Court of the Russian Federation and many Russian legal theorists promote a substantive rather than formal understanding of the rule of law, which binds all state organs to the basic rights and freedoms enshrined in the Constitution as well as to the principle of democracy.[317] The Constitutional Court has established a list of guarantees and elements that are associated with its understanding of the rule of law under the Russian Constitution: The supremacy of the constitution and its binding force for all state organs, the duty of the state to guarantee human dignity and the fundamental rights and freedoms provided for in the Constitution, the principle of separation of powers, the prohibition of arbitrariness, the principles of justice and proportionality, the right to protection against violations through private individuals by police, courts and criminal legislation, procedural guarantees, including the rights to a remedy and fair trial as well as the criteria of determinacy, clarity and consistency as qualities of state laws.[318] Russian commentators, however, admit that the implementation and full realisation of these rule of law elements remain a challenging aspiration in light of present-day Russian politics and that the process of creating a rule of law-abiding Russian state must still be considered to be in its infancy.[319]

313 ibid [52].

314 Henderson (n 270) 250.

315 Jeffrey Kahn, 'The Law Is a Causeway: Metaphor and the Rule of Law in Russia' in James Silkenat, James Hickey and Peter Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer 2014) 229, 231, 235 f.

316 ibid 235, 237.

317 Otto Luchterhandt, 'Art. 1' in Bernd Wieser (ed), *Handbuch der Russischen Verfassung* (Verlag Österreich 2014) para 21.

318 ibid para 22.

319 Bogdanovskaia and Vassilieva (n 271) 32.

F. The Rule of Law in China

The Amendment to the Constitution of the People's Republic of China of March 1999 added the first paragraph to art 5 of the Constitution which reads that 'the People's Republic of China governs the country according to law and makes it a socialist country under rule of law'.[320] Invoking this formal recognition of the principle of the rule of law in the Chinese constitution, the Chinese government observed at the occasion of the 56th session of the Human Rights Commission that 'Chinese society was in a phase of transition between two systems; supremacy of power was about to give way to supremacy of law'.[321] The import of the said constitutional provision for the governance of the Chinese legal system, however, has been claimed to be of only modest reach as the reference to the rule of law has not been interpreted and implemented to effectively restrain the powers of the administrative state.[322]

1. Supremacy of the Constitution

According to the constitutional text, the Chinese Constitution is the supreme law of the land. Several constitutional provisions attest to this.[323] Article 5 of the Chinese Constitution of 1982 prominently stipulates that no laws, administrative or local regulations may contravene the Constitution and that all state organs, the armed forces, all political parties, public organisations, enterprises and institutions must abide by the Constitution and other laws. It

320 English translation provided for on website of The National People's Congress of the People's Republic of China ‹http://www.npc.gov.cn/englishnpc/Constitution/node_2824.htm› accessed 14 July 2017.

321 Fifty-sixth Session of the Commission on Human Rights – Summary Record of the 31st Meeting (25 October 2000) UN Doc E/CN. 4/2000/SR.31 [14].

322 Qianfan Zhang, *The Constitution of China: A Contextual Analysis* (Hart Publishing 2012) 149.

323 According to art 67 (7) (8) Chinese Constitution of 1982, the Standing Committee of the National People's Congress shall annul those administrative regulations, decisions and orders of the State Council that contravene the Constitution or other laws as well as those local regulations and decisions of the organs of state power of provinces, autonomous regions, and municipalities directly under the Central Government that contravene the Constitution, other laws or administrative regulations. Art 89 (1) of the Constitution commits the State Council to the Constitution and other laws when adopting administrative measures and regulations and issuing decisions and orders. Art 99 requires local people's congresses at various levels to ensure the observance and implementation of the Constitution and other laws and the administrative regulations in their respective administrative areas. Art 100 binds the people's congresses of provinces, and municipalities and their standing committees to the Constitution, other laws and administrative regulations when adopting local regulations.

further establishes that no organisation or individual shall be privileged to be beyond the Constitution or other laws. In practice, however, the Constitution is claimed to suffer from the absence of effective implementing mechanisms and is superseded by so called non-positive rules authored and enforced by the Chinese Communist Party (CCP).[324] A case in point of how far Chinese politics deviate from the constitutional text is the reversal of the democratic structure in the Chinese legal system. The constitutionally established state structure that is supposed to derive its legitimacy from the people and shall be organised bottom-up, works just the other way around, with superior congresses and governments appointing and supervising governing bodies on subordinate federal levels.[325] The top-down control by the central government is opposed to the constitutional design. Additionally, the sweeping powers of the National People's Congress (NPC) over the Constitution strongly compromise the supremacy of the document.[326]

2. The Principle of Legality

Such as the supremacy of the Constitution, the principle of legality is deeply entrenched in the constitutional text. Article 2 of the Constitution, which entrusts the people with the exercise of state power, stipulates that the administration of state affairs and the management of economic, cultural and social affairs must be in accordance with the law. Many other constitutional provisions attest to a hierarchy of norms and to the principle that all state action shall abide by the law as established.[327] Several constitutional provisions also reflect that the law is the source and limitation of the authority of state organs such as the local people's congresses, the people's congresses of nationality townships, the standing committee of a local people's congress, the local people's governments or the organs of self-government of autonomous regions, autonomous prefectures and autonomous counties.[328] Article 40 of the Constitution which guarantees the freedom and privacy of correspondence stipulates that censorship of correspondence needs to be in accordance with procedures prescribed by law.

In practice, however, the principle of legality suffers from the same constraints as the Constitution, namely that 'governments at all levels will follow "latent rules", which bear no resemblance to the laws in the books, and

[324] Zhang, *The Constitution of China* (n 322) 97–99.
[325] ibid 97.
[326] See further down in this document, 55.
[327] arts 41, 67 (7) (8), 89 (1), 99, 100 Chinese Constitution of 1982
[328] arts 99, 104, 107, 115 Chinese Constitution of 1982.

the people will be institutionally incapable of making any use of the latter for protecting themselves'.[329] With an eye to the realisation of social justice, however, Chinese scholarship has suggested that given the 'all-encompassing omnipotence in Chinese behaviours' of informal rules and networks, they may 'serve disciplinary and co-ordinating functions that supplant the transparency, accountability and predictability the rule of law is presumed to provide'.[330]

3. Separation of Powers

A crucial feature of the Chinese legal system is the principle of parliamentary supremacy. As a consequence, its institutional design does not have much in common with a separation of powers model as known in US constitutional law.[331] The entire Chinese legal system is dominated by the NPC.[332]

The National and Local People's Congresses enjoy supreme authority in the Chinese legal system to ensure – in theory – the people's rule over the republic.[333] Article 2 of the Constitution bears witness of this arrangement in that it entrusts all power in the People's Republic of China to the people and prescribes that the NPC and the Local People's Congresses are the organs through which the people exercise state power. Article 57 of the Constitution, then, establishes the NPC as the highest organ of state power. Its permanent body, the Standing Committee (SCNPC), exercises its functions and powers and enjoys supreme authority over the Constitution as it has the power to interpret and amend it, annul acts and laws in contravention to it and supervise its enforcement.[334] The notion of parliamentary supremacy in the contemporary Chinese constitution does, thus, even involve the far reaching authority to determine the meaning of the constitution.[335]

Article 76 of the Constitution seems to provide one of the few limitations to this institutional supremacy in that it requires all NPC deputies to play an exemplary role in abiding by the Constitution and other laws. This appeal, however, appears to be rather toothless with the NPC's extensive constitutional

329 Zhang, *The Constitution of China* (n 322) 106.

330 Phil Chan, *China, State Sovereignty and International Legal Order* (Brill Nijhoff 2015) 150.

331 Randall Peerenboom, 'Judicial Independence in China: Common Myths and Unfounded Assumptions' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUP 2010) 69, 81.

332 Peerenboom, 'Competing Conceptions of Rule of Law in China' (n 149) 116.

333 Zhang, *The Constitution of China* (n 322) 121.

334 arts 62 (1) (2), 64, 66 and 67 (1) (7) (8) Chinese Constitution of 1982.

335 Rainer Grote, 'The People's Republic of China: Introductory Note' (OUP 2005) Oxford Constitutional Law Online.

authority in mind. The only institutional control seems to be envisaged by art 77, which stipulates that the NPC's deputies are subject to supervision by the units, which elected them and further have the power to recall them through procedures prescribed by law.

The supremacy of the NPC is further reflected in the institutional design of the Chinese legal order. The Congress is superior to the State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuratorate and other important state organs and may not be restricted by them.[336] It elects the President and the Vice-President of the People's Republic of China, the Chairman of the Central Military Commission, the President of the Supreme People's Court and the Procurator-General of the Supreme People's Procuratorate.[337] In addition, it decides on the choice of the Premier of the State Council and the Vice-Premiers, State Councillors, Ministers in charge of ministries or commissions, the Auditor-General, the Secretary-General of the State Council and the members of the Central Military Commission.[338] Furthermore, the Chinese state organs are not only established by the NPC but also required to implement its laws and resolutions.[339] This constitutional arrangement illustrates the omnipresence of centralism as an organising principle of the Chinese legal system as opposed to the principle of separation of powers.[340]

The principle of centralism operates to the benefit of the political power of the Chinese Communist Party. The special historic role of the CCP for the Chinese republic is reflected in the preamble of the 1982 Constitution. It testifies to the historic role of the CCP in 'China's New-Democratic Revolution' and requires the Chinese people 'under the leadership of the Communist Party of China' to 'adhere to the people's democratic dictatorship and the socialist road' and 'the system of the multi-party cooperation and political consultation led by the Communist Party of China' to 'exist and develop for a long time to come'. The party's rule over state affairs in China, however, is neither reflected in the main text of the Constitution, nor in any other laws or statutes of the land.[341] The main reason for the CCP's supreme position is the party's majority in the NPC. Article 57 of the Constitution creates the NPC's permanent body, the Standing Committee of the National People's Congress. Since the CCP makes up the majority of the members of the

336 Xu Chongde and Niu Wenzhan, *Constitutional Law in China* (Wolters Kluwer 2013) 56.
337 art 62 (4) (6)-(8) Chinese Constitution of 1982.
338 art 62 (5) (6) Chinese Constitution of 1982.
339 Chongde and Wenzhan (n 336) 56.
340 ibid 15.
341 Zhang, *The Constitution of China* (n 322) 99.

NPC, it dominates the Standing Committee and consequently the activities of the NPC. The domination of the NPC by the CCP also flows from the authority of the Presidium which conducts the yearly plenary session of the NPC and nominates candidates for Chairman, Vice-Chairmen, Secretary-General and other members of the SCNPC, the President and Vice-President of the People's Republic of China, the Chairman of the Central Military Commission, the President of the Supreme People's Court and the Procurator-General of the Supreme People's Procuratorate.[342] Since a majority of the members of the Presidium belong to the CCP, the party exerts great control over the NPC.[343]

4. Judicial Independence

Article 126 of the 1982 Constitution stipulates that 'the people's courts exercise judicial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organization or individual'. In political reality, however, the Chinese legal system is often blamed for an absence of judicial independence due to the firm grip of the CCP on all state organs.[344] Whereas such allegations cannot be denied, the concrete assessment of the severity of the curtailment may vary. Peerenboom, proceeding from the fact that China is a single-party, socialist state, maintains that the party influences ideology, policy and personal matters of the courts but that it does not determine all cases decided by them – a very modest standard admittedly.[345] Arrangements commonly perceived as incompatible with judicial independence such as the diversion of particular socioeconomic conflicts from the courts to alternative resolution mechanisms (e.g. administrative reconsideration, mediation or arbitration) for capacity reasons may also be qualified as conducive to the preservation of the courts' authority if their handling of such cases risks undermining public respect for the courts.[346] Generally, however, interferences of the party with judicial decisions take place often, usually at the hands of the Political-legal Committee, the party committee,

[342] art 13 Organic Law of the National People's Congress of the People's Republic of China ‹http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384019.htm› accessed 14 July 2017.

[343] Zhang, *The Constitution of China* (n 322) 126.

[344] Qianfan Zhang, 'Judicial Reform in China: An Overview' in John Garrick and Yan Chang Bennett (eds), *China's Socialist Rule of Law Reforms under Xi Jinping* (2016) 17, 18.

[345] Peerenboom, 'Judicial Independence in China' (n 331) 79.

[346] Randall Peerenboom, 'Judicial Independence in China: Common Myths and Unfounded Assumptions' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUP 2010) 69, 79.

individual CCP members, the adjudicative committee or court presidents.[347] The entire constitutional design is tilted towards the institutional control of the courts by the NPC. Not only does the NPC elect important court officials, the SCNPC also supervises the work of the Supreme People's Court and the Supreme People's Procuratorate and appoints or removes the Vice-Presidents and Judges of the Supreme People's Court, members of its Judicial Committee and the President of the Military Court.[348] Also on the local level, courts depend on local governments regarding appointments of judges and financial support.[349]

The NPC also controls the Supreme People's Court of China. The court is the highest judicial organ of the Republic. It is supposed to supervise the administration of justice by the people's courts at various local levels and by the special people's courts.[350] The arrangement that the Supreme Court is responsible to the NPC and its SCNPC, however, seriously compromises the independence of its judicial personnel, keeping in mind to what extent the CCP rules the NPC. Its authority is further undermined by the fact that it is not authorised to interpret the constitution – a right reserved for the SCNPC – but may only propose bills to the NPC or the SCNPC.[351]

At least for reputational purposes, however, the Chinese government appears to be committed to the strengthening of the independence of the judiciary. In its last national report under the UN universal periodic review process, China pledged that the judicial and procuratorial organs should exercise their powers independently in accordance with the law.[352] The CCP Central Committee Decision concerning Some Major Questions in Comprehensively Promoting Governing the Country According to Law of 23 October 2014, which intends to accelerate the construction of a socialist rule of law country and to rule the country according to the law, also refers to the aspiration to strengthen the independence of the courts.[353]

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347 Peerenboom, 'Judicial Independence in China' (n 331) 80.

348 arts 128, 67 (6) (11) Chinese Constitution of 1982.

349 Zhang, 'Judicial Reform in China' (n 344) 19.

350 art 127 Chinese Constitution of 1982.

351 Grote, 'The People's Republic of China' (n 335).

352 UNHRC, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 (5 August 2013) UN Doc A/HRC/WG.6/17/CHN/1 [98].

353 For an English translation, see ‹https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/› accessed 14 July 2017. Para IV. (1) of the Decision holds that '[p]erfect systems to ensure judicial authority and procuratorial authority are exercised fairly and independently, according to the law. All levels' Party and government bodies and leading cadres must support the courts and procuratorates in exercising their functions and authorities independently and

5. Judicial Review & Human Rights Protection

As regards the authority of Chinese courts of judicial review, the supervision of the Constitution is not entrusted to a supreme constitutional court but to the SCNPC.[354] This arrangement is typical of communist states where the legislature is viewed as the prime guarantor of the people's will and welfare.[355] Chinese courts are not authorised to invalidate generally applicable laws and regulations or to review legislation for its conformity with higher laws, including the Constitution.[356] The only area where some kind of judicial review exists is administrative law. Here, courts may review concrete administrative acts.[357] The absence of a robust arrangement for judicial review in the Chinese legal systems has serious implications for the effective protection of the fundamental rights of the Chinese citizens.

As a central provision for socialist constitutions, art 33 guarantees equality before the law. China was the first Asian country to explicitly adopt the principle of legal equality in its 1923 Constitution, albeit limited its application to citizens.[358] Today, art 33 of the Constitution is understood to contain a substantive understanding of equality and complemented by several other equality guarantees.[359] In practice, however, especially peasants suffer from discrimination in many spheres of life such as access to justice, labour or education and freedom of movement.[360] Another area of discrimination of the

fairly according to the law'. For an analysis of the Decision, see Randall Peerenboom, 'Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What Does the 4th Plenum Decision Mean for Legal Reforms in China?' (2015) 7 *HJRL* 49–74.

354 According to art 67 (7) (8) Chinese Constitution of 1982, the Standing Committee of the National People's Congress exercises the power to annul those administrative regulations, decisions or orders of the State Council that contravene the Constitution or other laws as well as those local regulations or decisions of the organs of state power of provinces, autonomous regions, and municipalities directly under the Central Government that contravene the Constitution, other laws or administrative regulations.

355 Wen-Chen Chang and others, *Constitutionalism in Asia: Cases and Materials* (Hart Publishing 2014) 309.

356 Peerenboom, 'Competing Conceptions of Rule of Law in China' (n 149) 117.

357 ibid; Zhang, *The Constitution of China* (n 322) 95.

358 Chang (n 355) 551.

359 See, eg, art 4 (equality of nationalities), art 34 (political equality), art 48 (equality of women and men).

360 For a depiction of the Household Registration System which requires inhabitants of urban or rural areas to receive a permit from the People's Security Bureau when leaving their abode as registered in the household registration system for the other (rural/urban) part of the country, de facto resulting in the discrimination of the rural population, see Zhang, *The Constitution of China* (n 322) 199–202. On the discrimination of rural non-residents

rural population pertains to land-takings by the government.[361] Whereas just compensation for land-takings is still in its infancy, peasants are particularly affected by the practice of local governments to increase their revenues by means of property takings with state compensations below market value.[362] Chinese political reality also lags behind the constitutional aspiration with regard to the guarantee of gender equality, the discrimination of women in areas such as employment still being a pervasive phenomenon in the Chinese society.[363]

Another issue of concern regarding the protection of human rights pertains to procedural legal guarantees in China. Despite improvements in the enforcement of procedural rights, guarantees such as the presumption of innocence or the prohibition of prolonged detention and extorted confessions are still violated by the Chinese police and prosecuting authorities or non-existent such as the right to habeas corpus.[364] A particularly troublesome aspect has been the violation of procedural rights in connection with the infliction of death penalties.[365]

Since the beginning of the 21st century, the consciousness of civil society – and seemingly the government – for human rights issues has been on the rise, finding its expression in the positions of Chinese academia as well as in the activities of human rights lawyers and NGOs.[366] As UN reports witness, however, these initiatives suffer considerable setbacks with human rights defenders in China being intimidated, illegally detained, physically abused, abducted or denied fair trial rights and medical treatment in detention.[367] The prominent placement of the fundamental rights catalogue in the second chapter of the Constitution does thus not reflect the reality that many of the guarantees are not realised in the lives of the Chinese people. In line with this rather low standard of national fundamental rights protection, China has made no secret of its scepticism towards the imposition of international human rights standards

by cities and wealthy provinces regarding access to compulsory and higher education, see ibid 202–204.

361 ibid 220.

362 ibid 218–220.

363 Chan (n 330) 140.

364 Zhang, *The Constitution of China* (n 322) 208–210.

365 ibid 211 f.

366 Yu Xingzhong, 'Western Constitutional Ideas and Constitutional Discourse in China, 1978–2005' in Stéphanie Balme and Michael Dowdle (eds), *Building Constitutionalism in China* (Palgrave Macmillan 2009) 111, 113 f.

367 UNHRC, Report of the Special Rapporteur on the Situation of Human Rights Defenders (4 March 2015) UN Doc A/HRC/28/63/Add.1 [136–239].

and review mechanisms that are allegedly insensitive to national political, economic and socio-cultural realities.[368]

6. Conclusion

On the books, the Chinese legal system seems to satisfy a wide array of central rule of law elements. The principle of separation of powers is explicitly guaranteed in the Constitution, as is a broad catalogue of fundamental rights. The principle of legality is deeply entrenched in the constitutional text and the supremacy of the Constitution guaranteed. The political reality of the Chinese legal system, however, is characterised by the organising principle of centralism, which results in a concentration of power in the National People's Congress and through it in the Chinese Communist Party, which essentially rules the country. Many arrangements foreseen in the Constitution such as that the state should derive its legitimacy and authority from local governing bodies and be ruled bottom-up or that the people's courts should exercise their judicial power independently, are not at all reflected in practice and many fundamental rights provisions of the Constitution realised in an only discriminatory fashion. The most fundamental commitment of modern China to the rule of law must probably be seen in its on-going efforts to fight corruption among state officials. The concrete implementation of anti-corruption campaigns by the Chinese Communist Party, however, does itself often disregard the due process rights of those suspected and, thus, the rule of law.[369]

G. Concluding Observations

As can be inferred from the preceding comparative analysis, the rule of law figures prominently as a constitutional principle in the legal systems of the P5. Most constitutions even explicitly refer to the rule of law in their text. Rule of law guarantees such as the independence of the judiciary, the principles of legality and separation of powers, due process guarantees, fundamental rights protection or the institution of judicial review more or less define the organisational structure of the discussed legal systems – at least on the books. This, theoretically, provides a sufficient common basis for the P5 to discuss and agree on the use of certain terms or references to particular principles and

368 Chan (n 330) 129 (referring to China's official reaction to the UNHRC universal periodic review mechanism).

369 Chongyi Feng, 'China's Socialist Rule of Law: A Critical Appraisal of the Relationship between the Communist Party and Comprehensive Law Reform' in John Garrick and Yan Chang Bennett (eds), *China's Socialist Rule of Law Reforms under Xi Jinping* (Routledge 2016) 45, 50.

guarantees associated with the rule of law in Security Council documents. Evidently, the national implementation of rule of law guarantees such as the separation of powers or judicial review vary drastically in the legal systems of the P5 as exemplified, eg, by a comparison of the principle of parliamentary sovereignty and its implications for the separation of powers and judicial review in the United Kingdom with the nuanced system of checks and balances and the far reaching rights of judicial review of the Supreme Court in the United States.

In practice, several rule of law principles are also only guaranteed in theory or largely replaced by informal practices, examples being the extensive appointment rights of the Russian President of members of the judiciary and their implications for judicial impartiality and independence in the Russian legal system. In China, eg, the prevalence of non-positive rules superseding the Chinese Constitution curtails the principles of formal legality and constitutional supremacy, while the arrangement that the SCNPC supervises the Constitution rather than a judicial body undermines the institution of judicial review.

The differing conceptualisation and realisation of rule of law principles in the legal systems of the P5 or their sometimes even absent implementation or circumvention, however, does not necessarily bar them from agreeing on a vocabulary intimately related to the rule of law or achieving a general consensus as to the meaning of particular rule of law guarantees. The language in Security Council resolutions usually does not go into too much detail. As a rule, the language used by the Council will be sufficiently abstract to leave room for different understandings of the invoked concepts and terms. The concretisation of the meaning of Council resolutions then usually happens on a level of implementation. What a Council reference to the guarantee of the independence of the judiciary implies concretely, is, thus, usually decided by implementing actors such as, eg, UNDPKO, UNDPA or OHCHR. This concretisation through implementation, however, has to be sanctioned by Council members at least by acquiescence.

Another reason why Council members may find sufficient common ground to develop a consensual rule of law vocabulary of course also pertains to the fact that the P5 decide against which states the Council issues resolutions containing rule of law language. This allows them a controlled diffusion of rule of law measures which is quite obviously not inhibited by the fact that some members of the P5 themselves do not satisfactorily implement several rule of law guarantees.

IV. A Core Definition of the Rule of Law

Despite the controversies on what the rule of law implies in detail, it is claimed that it is possible to identify its core meaning with which most theories and political models correspond.[370] To agree with this claim means to reject the idea that the rule of law is an *essentially* contested concept and to suggest that it may be contested but not in its very essence. A core definition of the rule of law focuses on the question of what must be qualified as being at the heart of the principle devoid of which one could no longer speak of its existence. It thus presupposes that any rule of law concept worthy of the name must at least embody these elements.

Common to all rule of law concepts is the aspiration to restrain the exercise of public authority in a manner that forecloses arbitrary rule.[371] What is necessary – at a minimum – in order to achieve this goal by means of law, shall be qualified as the core of the rule of law.

In order to reduce the risk of arbitrary rule, the rule of law requires that law and legal institutions are the sole legitimate tools by which public authority is exercised and that they serve as limitations on the exercise of such authority.[372] For law to be capable of performing this function, it needs to conform to a certain set of core requirements. As such core requirements count the predictability, the supremacy of the law and the equality before the law. This account, as 'thin' as it may seem at first sight, does imply a number of sub-criteria. In order for law to satisfy the requirement of predictability, it needs to be clear, stable, certain, consistent, intelligible, accessible, prospective and not require the impossible.[373] The supremacy of the law requires that no one be above the law, that it applies not only to citizens but also to the sovereign itself. It precludes the 'rule of man' as well as the 'rule by law'. Equality before the law, then, requires that the law be of general application and treat all of its subjects equally without unwarranted discrimination.

Chesterman frames the core definition of the rule of law in a slightly different way but principally in line with the elements just proposed. According to Chesterman, the core definition of the rule of law entails that power is not exercised arbitrarily, which precludes the rule of man and requires laws to be prospective, accessible and clear.[374] For Chesterman, thus, what has been

370 Tamanaha, 'The History and Elements of the Rule of Law' (n 73) 232.

371 Chesterman 'An International Rule of Law?' (n 18) 342.

372 Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 270 f.

373 These sub-elements correspond more or less with the 'laundry lists' of Raz and Fuller. See part 1 ch II A. pp 18–20.

374 Chesterman 'An International Rule of Law?' (n 18) 342.

defined as the goal of the rule of law above, counts as one of its key components. He then, however, relates it to similar sub-elements as discussed under the heading of predictability just above. In addition, Chesterman's core definition requires that the law applies to the sovereign and its instruments and that it treats all persons equally, thus establishing the exact same elements as proposed above.[375]

All of these elements contribute to the eradication of arbitrariness by hands of those in charge of ruling, thereby advancing the core idea of the rule of law. They do not, however, tell us anything about the process in which the law is created or by whom and what substantive standards it is supposed to satisfy.[376] This factor is the very reason why most rule of law concepts will correspond with each other regarding this core meaning. Tamanaha emphatically excludes distinct concepts such as democracy or human rights from his core definition since including them would amount to reserving the achievement of the rule of law for liberal democracies.[377] Such a concept, it is claimed, cannot represent the core of the rule of law.[378]

Is the rule of law, reduced to its core, indeed capable of achieving its principal goal, ie the eradication of arbitrary rule? One notices the remarkable resemblance of the core definition with formal conceptions of the rule of law. As Raz prudently pointed out, the rule of law formally understood does not eradicate all possible manifestations of arbitrary rule.[379] Even if the law satisfies all of the aforementioned criteria, sovereign power may still be exercised arbitrarily. It may be arbitrary if it pursues the mere self-interest of the rulers or if it is indifferent as to whether it will achieve the purposes it is allowed to pursue or if it is employed in the knowledge that it will not achieve its purported purposes.[380] Substantive standards might assist in filling the gaps giving room for arbitrary rule by this core understanding of the rule of law. The requirements that the exercise of authority needs to be in the public interest or that it shall not violate human rights might mitigate the risk that authority is exercised in the mere self-interest of the rulers. Such an understanding of the rule of law, however, would no longer count as representing the ideal's core meaning nor would it clearly avert the risk of arbitrary rule insofar as the

375 ibid 342.

376 Tamanaha, 'The History and Elements of the Rule of Law' (n 73) 234.

377 ibid 234. See also Peerenboom, 'Competing Conceptions of Rule of Law in China' (n 149) 135.

378 Chesterman 'An International Rule of Law?' (n 18) 342 (to whom the core definition of the rule of law must be necessarily a formal one); Tamanaha, 'The History and Elements of the Rule of Law' (n 73) 234.

379 Raz (n 61) 219.

380 ibid 219 f.

selection and application of substantive standards involves a risk of arbitrariness of its own.[381] To conclude, one probably must accept that the rule of law – whatever concept one decides to follow – can only assist in approaching a state of non-arbitrary rule rather than fully guarantee it.

V. The International Rule of Law

In recent years, the rule of law discourse has transcended the national realm and also focused on the question what the rule of law implies if applied to the international society. The historical breeding ground of the rule of law is the national legal system.[382] Descending from this national constitutional principle, the rule of law has been 'upheaved' to an international standard referred to as the international rule of law.[383] Concepts of an international rule of law have to reflect this circumstance and deviate from national conceptions insofar as the context of their application differs.[384] While the national rule of law is meant to restrain and legitimise centralised authority exercised by national governments and to protect the freedom of individuals from the arbitrary use of state power, the international rule of law works analogously only to a certain extent. One of the most pivotal structural differences is the absence of a central authority governing international legal subjects comparable to a national government.[385] In the domestic realm, the rule of law is aligned in the vertical direction, shaping the relationship between a sovereign and individuals. On the international plane, by contrast, the rule of law is mainly aligned in the horizontal direction and primarily applies to relationships between 'equal' subjects such as states or international organisations.[386] An inapt

381 Raz (n 61) 211; Dworkin, *A Matter of Principle* (n 110) 13.

382 Barber (n 159) 452.

383 ibid; Anne Peters and Ulrich Preuss, 'International Relations and International Law' in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 33.

384 Ian Brownlie, *The Rule of Law in International Affairs* (Martinus Nijhoff Publishers 1998) 212f; Chesterman 'An International Rule of Law?' (n 18) 358; Hisashi Owada, 'The Rule of Law in a Globalizing World – An Asian Perspective' (2009) 8 *Wash. U. Global Stud. L. Rev.* 187, 192f; Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (n 88) 317; Hurd, 'The International Rule of Law' (n 18) 40.

385 Stéphane Beaulac, 'The Rule of Law in International Law Today' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 197, 204; Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (n 88) 317; Machiko Kanetake, 'The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions' (2012) 9 *Int'l Org. L. Rev.* 267, 272; Hurd, 'The International Rule of Law' (n 18) 40,

386 Chesterman 'An International Rule of Law?' (n 18) 333.

analogy between the implications of the rule of law for the individual on the national level and the implications of the rule of law for sovereign states on the international level may suggest that – as the rule of law is meant to guarantee the freedom of the individual in the national legal system – it is similarly supposed to guarantee the freedom of states on the international plane. However, as Waldron notes, if one changes from the national to the international level, the central goal of the rule of law and its relationship to sovereign states does not change fundamentally.[387] Accordingly, Ian Hurd rightly observes:

> The international rule of law is premised on the opposite concern. In a system of atomistic, decentralized authority units such as sovereign states, the 'individuals' have more legal autonomy than the common good can tolerate. The excess autonomy of the units must be limited in order to preserve international society itself.[388]

The perspective of the international rule of law can thus not be that states need to be protected by law from the exercise of arbitrary power by a superior international sovereign as compared to individuals subject to a national sovereign. Like in the national realm, states themselves are the primary addressees (as opposed to beneficiaries) of the international rule of law also on the international level.[389] As the national rule of law, the goal and purpose of the international rule of law is to ensure the 'well-being, liberty, and dignity of individuals'.[390] Consequently, also on the international level the rule of law

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387 Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (n 88) 341.

388 Hurd, 'The International Rule of Law' (n 18) 41.

389 Compare, eg, Nollkaemper who holds that '[t]hough the practical and institutional manifestations of the rule of law may take different shapes and forms at different level of government, we should not demand less at the international level than we do at the domestic level'. See, André Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 3. See also, Stephan Schill, 'The Rule of Law and the Division of Labour Between National and International Law: The Case of International Energy Relations' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016) 409, 441 (who, invoking Nollkaemper's position in *National Courts and the International Rule of Law*, stipulates that '[i]nstead of understanding the rule of law as a concept that exists independently at the national and the international level, depending on whether the exercise of domestic or international public authority is at stake, one should adopt an integrated perspective on the concept of the rule of law that is applied by and binds both national and international actors').

390 Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (n 88) 341 ('Ultimately the reasons for continuing to insist that ROL requirements apply to the nation-state are the same as they always are. Those requirements apply to the state for the sake of the well-being, liberty, and dignity of individuals. Those values are as much at

requires states to be law-abiding. Understood this way, the international rule of law may, however, also be considered to guarantee a particular notion of freedom for the subjects of international law to the extent that it aims at inhibiting the abuse and violation of or noncompliance with international law by other subjects of international law.

But what exactly does the international rule of law refer to and require? In its most literal understanding, the international rule of law may be conceptualised as the rule of international law. This can mean very different things. It may refer to an international legal regime that directly regulates the normative situation of individuals without national institutions figuring as intermediaries, a prominent example being the administration of territories by international organisations.[391] It could relate to a structural aspect and concern the supremacy of international over national law, which today applies to peremptory norms of international law or certain human rights treaties.[392] Usually, however, the meaning of the international rule of law is construed with reference to the rule of law in the national context, bearing in mind the differences between a national and the international legal order.[393] The rule of international law understood this way is concerned with the application of rule of law principles to the relationship between states, international organisations and other subjects of international law.[394] Along these lines, the UN General Assembly has held that the 'rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law (. . .) should guide all of their activities and accord predictability and legitimacy to their actions'.[395]

stake when the state acts externally as they are when it acts internally: the main difference is that many more individuals may be affected by the state's external action than by its internal action.').

391 Chesterman 'An International Rule of Law?' (n 18) 355 f.

392 ibid 355.

393 James Crawford, 'International Law and the Rule of Law' (2003) 24 *Adel. L. Rev.* 3, 10, 12 (being aware of the differences between the national and international legal sphere but also noting the relativity of this distinction); Tamanaha, *On the Rule of Law: History, Politics, Theory* (n 80) 129 (cautioning against simple analogies between the international and national rule of law); Chesterman 'An International Rule of Law?' (n 18) 358 (criticising a nonreflective application of national legal principles to the international sphere); Beaulac (n 385) 204.

394 Chesterman 'An International Rule of Law?' (n 18) 355. See also William Bishop, 'The International Rule of Law' (1961) 59 *Mich.L. Rev.* 553 or Crawford (n 393) 10.

395 UNGA, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UNGA Res 67/1 (30 November 2012) UN Doc A/RES/67/1 [2]. With regard to the application of the rule of law to the United Nations and its organs, see also UNGA Report of the Secretary-General, 'Strengthening

Several authors have examined the conformity of the international legal order with different rule of law principles. For these endeavours, the national rule of law provides the backbone of analysis.[396] Some share the view that it is thin or formal rule of law theories that are most suitably applied to the international legal order rather than substantive concepts as it is already challenging to satisfy the requirement of 'formal legality' on the international plane, let alone elements such as participation rights in decision-making.[397] This position, however, ignores the wide array of human rights- and humanitarian law treaties that enjoy almost universal membership, the institutional arrangements supposed to monitor and ensure state compliance with such instruments and the circumstance that certain human rights and principles of international humanitarian law today enjoy the status of customary- or even peremptory international law.[398]

Elements of a so-called 'thin' rule of law conception are, eg, the principles of formal legality, legal certainty, legal supremacy or legal equality.

When applying the principle of formal legality to the international legal order, the results are mixed.[399] Indeed, many global interests have been legalised and institutionalised, particularly in fields such as international human rights-, humanitarian-, criminal-, trade- or security law.[400] The requirement of

and Coordinating United Nations Rule of Law Activities' (2014) UN Doc A/68/213/Add.1 [89] ('As other institutions at the international level must be accessible and accountable, it is important to ensure the same of the United Nations itself. Representative and responsive governance at the international level, based on the rule of law, makes for a more credible, influential and effective organization and thus strengthens its work in the areas of peace and security and sustainable and inclusive development.')

396 Kanetake (n 385) 276.

397 Mattias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 *Va. J. Int'l L.* 19, 22; Chesterman 'An International Rule of Law?' (n 18) 342; Beaulac (n 385) 201f (who considers already the application of the principle of legality to the international level as a challenging task); Kanetake (n 385) 277 (albeit focusing on the international rule of law as applied to the 'peace and security arm' of the UN).

398 Owada (n 384) 195-97; Robert McCorquodale, 'The Rule of Law Internationally' in Clemens Feinäugle (ed), *The Rule of Law and its Application to the United Nations* (Nomos 2016) 51, 66 f.

399 Nollkaemper, *National Courts and the International Rule of Law* (n 389) 3f (Nollkaemper's proposal for a rule of law concept applicable to the international level builds upon the parallels between the rule of law applied to the national and international level. He thus, ia, requires that 'the exercise of public powers should be based upon authority conferred by law and must be controlled by law' and 'that public powers cannot set or change law at will. They have to act within the powes conferred by law'). See also Tamanaha, *On the Rule of Law: History, Politics, Theory* (n 80) 131.

400 Chesterman 'An International Rule of Law?' (n 18) 359; Beaulac (n 385) 206.

clarity of international legal rules, however, varies drastically between different regulative regimes. Whereas human rights treaties often contain relatively open-ended concepts that require interpretation, more technical fields of regulation may display a high degree of specificity and clarity such as, eg, in the field of the international law of the sea.[401] On the international plane, however, a lack of clarity of rules should not be interpreted to free states from their general obligation to comply with them.[402] With regard to the promulgation of international legal rules, one may refer to the Vienna Convention and its detailed regulation of the creation and entry into force of international treaties.[403] Also, legal documents issued by UN organs are adopted according to rules contained in the UN Charter and the codes of procedure of the respective bodies.[404] One may further point to art 102 of the UN Charter which requires the publication of treaties and international agreements entered into by UN members.[405] Of course, none of this applies to rules of customary or peremptory international law. It pertains primarily to international treaty law, certain soft law instruments (such as, eg, General Assembly resolutions) or Security Council resolutions. On the other hand, non-transparent procedures, the omitted publication of decisions of international judicial bodies and the often incalculable reception process of international law by national law and vice versa are qualified as undermining the guarantee of formal legality.[406]

Another formal requirement of the rule of law is the principle of legal certainty. It is catered to, eg, by the general principle of law *pacta sunt servanda* or the increasing codification of international law.[407] In July 2015, more than 560 multilateral treaties had been concluded under the auspices of the United Nations and the Secretary-General processed over 900 treaty actions

401 See, eg, the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2011) 2167 UNTS 3.

402 Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (n 88) 326.

403 Beaulac (n 385) 208 f.

404 For the General Assembly, see ch IV UN Charter and Rules of Procedure of the General Assembly, UN Doc A/520/Rev.18. For the Security Council, see ch V UN Charter and Provisional Rules of Procedure of the Security Council, UN Doc S/96/Rev.7.

405 Beaulac (n 385) 209.

406 Tamanaha, *On the Rule of Law: History, Politics, Theory* (n 80) 132 (Tamanaha refers to the closed hearings of the WTO dispute settlement body, to the unpublished arbitration decisions of the International Court of Arbitration and the restricted publication of the decisions of the International Centre for Settlement of Investment Disputes.).

407 Chesterman 'An International Rule of Law?' (n 18) 359 (who, however, discusses the *pacta sunt servanda* rule under the heading of 'government of laws').

per year.[408] States' ultimate authority over the implementation and effectiveness of international legal rules, however, seriously hampers the notion of legal certainty in the international legal sphere, as does the fragmentation of the international legal order.[409]

The rule of law principle of the supremacy of the law is fulfilled only partially in the international legal order. If it is understood as the compliance of international legal subjects with international law, the absence of an international body authorised to enforce international law in cases of its breach, has detrimental effects. To this can be added the lacking compulsory jurisdiction of the ICJ and other international judicial bodies and the ultimate authority of states to decide whether to accept the jurisdiction of international tribunals or to implement their decisions.[410] Additionally, the ICJ has no right to judicial review over decisions and acts of other UN organs or to interpret the UN Charter authoritatively.[411] Consequently, international human rights guarantees such as due process rights cannot be enforced against international organisations as could be seen in the case of targeted sanctions issued by the UN Security Council.[412] UN or EU administrations in post-conflict situations exercising state-like functions without the ensuing accountability for their actions are just another example.[413]

With regard to the rule of law element of legal equality, one may invoke the principle of the sovereign equality of states as provided for by art 2 (1) UN Charter and the General Assembly *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in*

408 UNGA Report of the Secretary-General, 'Strengthening and Coordinating United Nations Rule of Law Activities' (2015) UN Doc A/70/206 [5].

409 See, eg, Tamanaha, *On the Rule of Law: History, Politics, Theory* (n 80) 132; Hurd, 'The International Rule of Law' (n 18) 41; Ekaterina Yahyaoui Krivenko, 'Revisiting the Reservations Dialogue: Negotiating Diversity while Preserving Universality Through Human Rights Law' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016) 289, 295.

410 Crawford (n 393) 11f; Tamanaha, *On the Rule of Law: History, Politics, Theory* (n 80) 129f; Chesterman 'An International Rule of Law?' (n 18) 359; Beaulac (n 385) 213f; Holger Hestermeyer, 'A Rights-based Approach to the Rule of Law in International Law' in Clemens Feinäugle (ed), *The Rule of Law and its Application to the United Nations* (Nomos 2016) 131, 140.

411 Beaulac (n 385) 215 f.

412 Chesterman, "I'll Take Manhattan" (n 16) 70 f.

413 Simon Chesterman, 'UNaccountable? The United Nations, Emergency Powers, and the Rule of Law' (2009) 42 *Vand. J. Transnat'l L.* 1509, 1529. See also Tilmann Altwicker and Nuscha Wieczorek, 'Bridging the Security Gap through EU Rule of Law Missions? Rule of Law Administration by EULEX' (2016) 21 *J. Conflict & Sec. L.* 115–133.

Accordance with the Charter of the United Nations.[414] The universality of international law, including that the international community has essentially attained global membership, thereby achieving the application of international law to almost all states, may also be considered as contributing to the principle of legal equality.[415] Of course, not all international law applies equally to all states but its application depends on their particular situation and the degree to which they have committed themselves to treaty rules or rules of customary international law. Accordingly, '[o]ne cannot assess the legality of an international act without knowing the identity of the actor'.[416] But to the extent that states are in comparable situations, international law is supposed to apply to them even-handedly.[417] It is also for this reason that the principle of legal equality does not apply directly to the legal treatment of international legal subjects (states, international organisations, multinational corporations, non-governmental organisations or individuals) to the extent that they fulfil very different functions in the international legal order and accordingly bear different rights and have different obligations.[418] Legal arrangements such as the veto power of the P5 in the UN Security Council may be considered incompatible with a notion of legal equality as well as the lack of the predictable and general application of international law to all of its subjects.[419]

The scrutiny of the international legal system for its compatibility with rule of law elements developed for the national realm reveals salient deviations from the rule of law or must focus on selected aspects of the international legal order to arrive at more satisfying results. The rule of law element seemingly best satisfied on the international plane is the 'rule by law' to the extent that the UN Charter, international treaties and customary law largely govern international relations.[420]

414 UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625. For a critique of attempts to compare the principle of sovereign equality of states with the national rule of law principle of legal equality, see Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (n 88) 334 f.

415 Beaulac (n 385) 210.

416 Hurd, 'The International Rule of Law' (n 18) 42.

417 Arthur Watts, 'The International Rule of Law' (1993) 36 *German Y.B. Int'l L.* 15, 31.

418 Beaulac (n 385) 209.

419 Chesterman 'An International Rule of Law?' (n 18) 360; Krygier, 'The Security Council and the Rule of Law' (n 18) 23.

420 See, eg, Beaulac (n 385) 207f; Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (n 88) 319 (on doubts regarding customary international law as a body of binding law following an understanding compatible with the rule of law); Machiko Kanetake and André Nollkaemper, 'The International Rule of Law in the Cycle of Contestations and Deference' in Machiko Kanetake and André Nollkaemper (eds), *The*

The fulfilment of the international rule of law, thus, depends on the decision of international legal actors to abide by existent international legal rules.[421] It is in this context that statements by the UN Security Council with regard to its 'commitment to ensure that all UN efforts to restore peace and security themselves respect and promote the rule of law' merit attention.[422] The Council may be said to have subjected its actions – to a certain degree – to a self-imposed notion of the rule of law in the context of targeted sanctions.[423] In response to considerable political and legal opposition to the due process deficits of the Council's sanctions regime, UN organs initiated a process to address these concerns.[424] In the World Summit Outcome of 2005, the General Assembly called upon the Security Council to ensure 'that *fair* and *clear* procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exceptions'.[425] The

Rule of Law at the National and International Levels: Contestations and Deference (Hart Publishing 2016) 445.

421 Louis Henkin, *How Nations Behave* (Pall Mall Press 1968) 42 (who famously observed that '[i]t is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time').

422 UNSC Presidential Statement 11 (2010) UN Doc S/PRST/2010/11.

423 See, eg, Bernd Martenczuk, *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrats* (Duncker & Humblot 1996) 274f (who inquires whether the Council should exercise self-constraint with regard to the question against whom it issues enforcement measures in cases of an international conflict).

424 For reactions from European Union courts, see EGC, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Case T-315/01 [2005] ECR II-3649 (21 September 2005); CJEU, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P [2008] ECR I-6351 (3 September 2008); EGC, *Yassin Abdullah Kadi v European Commission*, Case T-85/09 [2010] ECR II-0000 (30 September 2010); CJEU, *European Commission and the Council of the European Union v. Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P [2013] ECR not yet reported (18 July 2013). For reactions from the European Court of Human Rights, see ECtHR, *Al-Jedda v United Kingdom* (App No 27021/08) 7 July 2011; ECtHR, *Nada v Switzerland* (App No 10593/08) 12 September 2012. For national case law see, eg, UKSC, *HM Treasury v Mohammed Jabar Ahmed and others, HM Treasury v Mohammed al-Ghabra, R (Hari El Sayed Sabaei Youssef) v HM Treasury* [2010] UKSC 2 (Judgment of 27 January 2010); CFC, *Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada*, 2009 FC 580 (Judgment of 4 June 2009). For an illustration of the UN response, see Kanetake (n 385) 267–338. See also Bardo Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-Up Action by the United Nations' (20 March 2006) ‹http://www.un.org/law/counsel/Fassbender_study.pdf› accessed 14 July 2017.

425 UNGA, 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 [109] (emphasis added).

Security Council subsequently adopted this wording in its own resolutions on targeted sanctions and expressed its commitment to the rule of law principles of fairness and clarity regarding the listing procedure.[426] As a first implementing measure of the 'fair and clear procedures' requirement, Council resolution 1730 (2006) created the 'focal point' to receive de-listing requests by individuals, groups, undertakings or entities on the sanction's committees' lists.[427] The 'focal point' was subsequently authorised to receive exemption requests for travel bans and asset freezes and communications from individuals who had been removed from the Al-Qaida sanctions list or who claimed they had mistakenly been subjected to the sanctions.[428] Additionally, the Office of the Ombudsperson was established in 2006 to review delisting requests of individuals and entities, which had been listed on the Al-Qaida sanctions list and to issue delisting recommendations.[429] The Ombudsperson process was further refined by the requirement that the Ombudsperson meets personally with a petitioner, an overall acceleration of the delisting procedure and the enhanced transparency of the entire process.[430] This process – as unsatisfying

426 UNSC Res 1730 (19 December 2006) UN Doc S/RES/1730 [preamble, indent 5]; UNSC Res 1822 (30 June 2008) UN Doc S/RES/1822 [28]; UNSC Res 1844 (20 November 2008) UN Doc S/RES/1844 [22]; UNSC Res 1857 (22 December 2008) UN Doc S/RES/1857 [25]; UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904 [34]; UNSC Res 1988 (17 June 2011) UN Doc S/RES/1988 [26; 30(g)]; UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989 [42]; UNSC Res 2082 (17 December 2012) UN Doc S/RES/2082 [30]; UNSC Res 2083 (17 December 2012) UN Doc S/RES/2083 [45]; UNSC Res 2129 (17 December 2013) UN Doc S/RES/2129 [preamble, indent 15]; UNSC Res 2161 (17 June 2014) UN Doc S/RES/2161 [24].

427 UNSC Res 1730 (19 December 2006) UN Doc S/RES/1730 [1].

428 UNSC Res 2083 (17 December 2012) UN Doc S/RES/2083 [37]; UNSC Res 2161 (17 June 2014) UN Doc S/RES/2161 [63].

429 UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904 [20; 21]; UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989 [21; 23; Annex II, para 12].

430 See UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989 [6(c); Annex II, paras 5, 8, 13, 16(a)] (introducing the right of the Ombudsperson to shorten the time of engagement and report drafting, shortening the time period for placing a delisting request on the Committee's agenda from 30 to 15 days and calling upon the Committee to set out its reasons for rejecting a delisting request and to abandon the request requirement for the distribution of publicly releasable information about Committee procedures by the Ombudsperson); UNSC Res 2083 (17 December 2012) UN Doc S/RES/2083 [14; 17; 29; 36] (strongly urging member states to provide reasons for submitting delisting requests while in the previous resolution only encouraging them to do so, allowing the Ombudsperson to notify the petitioner, and states relevant to the case which are not members of the Committee, of the stage which the process has reached, requiring the Committee to provide reasons for its decision to accept a delisting request, allowing for the transmission of the updated narrative summary of reasons for listing to the petitioner, where appropriate and requiring that the Ombudsperson meets personally

as its results may still be from a rule of law perspective – must be qualified as an act of self-restraint by the Security Council catering to the international rule of law.[431]

The above illustrations suggest that the international rule of law does not yet achieve its desired goal of effectively restraining the exercise of public authority at the international level. For the success of the rule of law on the international plane, the exercise of so-called self-restraint by international legal subject is thus a crucial determinant in the meantime. This applies to states as well as to international organisations and their organs such as the UN Security Council.[432]

VI. Conclusion

As illustrated in the present chapter, a core content of the rule of law may be identified but it also leaves ample room for so-called rich or thin concretisations of the principle's content based on such a core. The rule of law models enshrined in the constitutional law of the P5 further demonstrate that the understanding, commitment to and implementation of concrete rule of law guarantees varies drastically in different states. It does not seem far-fetched, thus, to characterise the rule of law as a contested concept even if it may not be contested with regard to its very essence. Against this background, the fact that an international organ such as the UN Security Council makes active use of a concept that can be conceptualised so differently seems of utmost interest. The question that arises immediately is, whether the organ's engagement with the rule of law indicates an already existing consensus among Council members or even the wider UN membership about its content or whether it only indicates an agreement within the Council about the function or instrumental value of the rule of law. If the Council's engagement with the rule of law cannot be qualified as evidencing an already existing or emerging consensus on the rule of law in the international society, the follow-up question must be, whether

with a petitioner); UNSC Res 2161 (17 June 2014) UN Doc S/RES/2161 [44; 50; Annex II, paras 1(e), 3] (authorising the Committee to shorten the 60-days period after which states shall terminate sanctions measures in case of a delisting recommendation by the Ombudsperson or delisting request by a designating state; requiring an appropriate explanation by the Ombudsperson to the petitioner in case of a return of a repeated request and authorising the Ombudsperson to shorten the information gathering period of four months under certain circumstances).

431 cf Nico Krisch, 'Article 41' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary on the UN Charter*, vol II (3rd edn, OUP 2012) 23f (speaking of the formulation of rights standards in Council practice); Happold (n 16) 96.

432 Chesterman, ''I'll Take Manhattan'' (n 16) 70f; Hurd, 'The International Rule of Law' (n 18) 41.

Council resolutions invoking the rule of law may affect the emergence of a global understanding of the principle's content. To address these questions, the subsequent chapters will portray the Council's function and powers as they determine the legal and political implications of its rule of law language. To determine whether this language may even indicate an already existing or emerging consensus on the rule of law, the organ's composition and working methods will further be discussed to determine the body's representativeness of the wider UN membership. Subsequently, the chapter scrutinises the preconditions of a Council impact on the evolution of a global understanding of the rule of law from a social-constructivist perspective.

Part 2 – The Role of the Security Council as an International Actor Contributing to the Emergence of a Global Concept of the Rule of Law

I. Introduction

In the 1990s, Western governments and private donors started to employ the rule of law with a view to stabilising or reforming the legal systems of war-torn, developing and post-communist countries in order to make them amenable to the introduction of a market economy model.[433] The basic idea behind such endeavours can be traced back to liberal thinkers such as Adam Smith who considered the rule of law as an essential prerequisite for a functioning free market and was often informed by strategic economic and political interests of powerful states and organisations to yield their influence abroad.[434] Many international and regional organisations, their organs or advisory bodies have since adopted this functional rationale and closely connected the rule of law to the fulfilment of their diverse interests or mandates.[435] From this, however, it

[433] Thomas Carothers, 'The Rule of Law Revival' (1998) 77 *Foreign Aff.* 95-106; Paris, *At War's End* (n 6) 19; Monika Heupel, 'Rule of Law Promotion through International Organizations and NGOs' in Michael Zürn, André Nollkaemper and Randy Peerenboom (eds), *Rule of Law Dynamics in an Era of International and Transnational Governance* (CUP 2012) 133.

[434] Paris, *At War's End* (n 6) 48; Outi Korhonen, 'The "State-building Enterprise": Legal Doctrine, Progress Narratives and Managerial Governance' in Brett Bowden, Hilary Charlesworth and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (CUP 2009) 15 f.

[435] See, eg, UNGA, United Nations Millennium Declaration, UNGA Res 55/2 (8 September 2000) UN Doc A/RES/55/2 and the annual resolutions of the UNGA on the agenda item "the rule of law at the national and international levels", starting in 2006 with UNGA, The Rule of Law at the National and International Levels, UNGA Res 61/39 (11 September 2006) UN Doc A/61/39, with the most recent resolution on the agenda item being UNGA, The Rule of Law at the National and International Levels, UNGA Res 71/148 (20 December 2016) UN Doc A/RES/71/148 and the Declaration of the High-level Meeting A/RES/67/1 (n 395). See also, eg, EU Commission Communication, A new Framework to Strengthen the Rule of Law (COM (2014)158) (11 March 2014); ODIHR of the OSCE, *ODIHR and the Rule of Law* (2013); Venice Commission, Report on the Rule of Law, No 512/2009 (4 April 2011) CDL-AD(2011)003rev.; OAS, Declaration of San Salvador on Citizen Security in the Americas (7 June 2011) OAS Doc AG/DEC.66 (XLI-O/11); AU, Constitutive Act of the African Union (11 June 2000).

neither follows that there exists a regionally or globally universal consensus on how to define the rule of law nor that these actors have developed a coherent approach to how they refer to or implement the rule of law.[436] In fact, international and regional organisations largely avoid providing a definition of the rule of law, presumably to leave ample room for diverging understandings of the principle's concrete meaning and related policy measures.[437] This may also explain Nollkaemper's observation that, 'apart from human rights law, the general concern of the international community with the significance of the domestic rule of law, for instance as a means to make failed states more effective, has only to a very limited extent been made part of positive international law'.[438]

Within the UN, the Secretary-General issued the only official definition of the rule of law. According to his seminal report on the rule of law and transitional justice in conflict- and post-conflict societies, the rule of law is:

> [A] principle of governance, in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[439]

This definition, however, was neither officially endorsed by the Security Council nor the General Assembly and is still a subject of controversy among member states in the General Assembly's Sixth Committee.[440] It can, thus, not be qualified as the UN's official definition of the rule of law and the Secretary-General has made it clear that it does not apply outside the Secretariat.[441]

References to the rule of law in official documents of an international organ such as the Security Council – enjoying a pivotal function in the international

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436 Per Bergling, Erik Wennerström and Richard Sannerholm, 'Rule of Law and Security Sector Reform: Casual Assumptions, Unintended Risks and the Need for Norms' (2012) 4 *HJRL* 98, 103.

437 Michael Trebilcock and Ronald Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar 2008) 12 f.

438 Nollkaemper, 'Process of Legalisation' (n 5) 99.

439 UNSC Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004) UN Doc S/2004/616 [6].

440 UNDPKO, Handbook for Judicial Affairs Officers in United Nations Peacekeeping Operations (2013) [16]. See also Sannerholm (n 3) 53 (who remarks that it is unclear what legal implications the definition might have).

441 Thomas Fitschen, 'Inventing the Rule of Law for the United Nations' (2008) 12 *Max Planck Y.B. U.N. L.* 347, 355.

society and being equipped with unique and considerable powers to fulfil it – may, however, trigger or influence the evolution of a converging understanding of the rule of law among actors addressed by its resolutions and those interacting with the Council.[442]

The Council's 'norm-creating function' seems established with regard to its activities that regulate the normative situation of its addressees.[443] If the Council, thus, imposes binding rule of law measures on states, its decisions may affect their rule of law understanding by way of re-building or amending their state strutures based on such an understanding. Apart from issuing binding rule of law measures that may – more or less coercively – shape states' understanding of the rule of law, the Council may further affect the emergence of an international understanding of the rule of law by means of participating in an international legal discourse with regard to its meaning.[444] In this discourse, the Council is a crucial actor in determining the meaning of the Charter articles relevant for the maintenance of international peace and security.[445] In interpreting these articles, the Council may present the rule of law as a prerequisite for the maintenance of international peace and security and identify how it should be conceptualised in order to fulfil this task.[446] The Council's more common promotion of the *role* of law to settle or prevent disputes may thus be considered to have expanded to also include the promotion of the *rule* of law as a means of conflict management.[447] Owing to the Council's pivotal role in international society, its contribution to an

442 Steven Ratner, 'The Security Council and International Law' in David Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner 2004) 591, 602 (observing that '[t]o those mapping the legal landscape and gauging how expectations of states change over time, the resolutions and practice of the Council are critical evidence. But they can also be more: by virtue of the power behind the Council's resolutions – or at least the potential power behind them – they stand a greater chance of influencing state decisionmaking than do many other pronouncements of international law').

443 Rüdiger Wolfrum, 'Sources of International Law' (MPEPIL 2011) para 42.

444 Ingo Venzke, *How Interpretation Makes International Law – On Semantic Change and Normative Twists* (OUP 2012) 69 ('it may often be more plausible and illuminating to look at international actors not as agents under the tutelage of their creators but as independent participants in legal discourse').

445 Johnstone, 'Security Council Deliberations' (n 24) 452.

446 ibid (on how the interpretation of existing norm texts by international organisations frequently does 'more than contributing to changes in meaning' but also 'create new reference points for legal discourse'). See also, True-Frost (n 20) 121 (arguing 'that even where the resolutions have not had material effects, they have undeniably provided a discursive framework for the development and implementation of the relevant norms').

447 Ratner (n 442) 600 (who in 2004 still observed that '[t]his sort of promotion of the role – as opposed to the rule – of law in settling disputes is common' when discussing the Council's function to promote the deployment of international law).

international legal discourse on the function and content of the rule of law may thus create an international standard and exert considerable influence on the legal and political views and reasoning of other international actors and states.[448]

Instead of affecting the emergence of a global understanding of the rule of law, references to the rule of law in Council resolutions may also reflect an already existing or emerging international consensus among states with regard to its function and content.[449] In order to assess whether the Security Council may contribute to the emergence of a global concept of the rule of law and whether its recommendations and decisions may be reflective of an already existing or emerging international consensus, a closer look at its function and powers, its composition, working methods and general representativeness of the wider UN membership is required.

II. Function and Powers of the Security Council and their Political and Legal Implications for its Rule of Law Language

In order to assess whether the UN Security Council is able to contribute to the evolution of a global concept of the rule of law, one needs to have a look at the function and powers of the UN organ. It is namely the body's function and powers, which, ia, determine the extent to which it may act as a standard-setting authority on a global concept of the rule of law – both politically and legally.

A. Council Function and Powers

1. The Legal Basis of the Council's Function and Powers

The Security Council of the United Nations is one of the organisation's principal organs.[450] Article 24 (1) UN Charter stipulates that the United Nations members confer on the Council the primary responsibility for the maintenance of

[448] For a related observation, see ibid 593 (holding that '[a]s for the products of those deliberations, when a body as politically significant as the Security Council – one in which the most (or most of the most) powerful states must agree in order for it to decide a matter – addresses, even indirectly, the legal issues underlying many international disputes, it cannot but influence how states regard the contours of the relevant norms').

[449] McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (n 140) 286. See also, Månsson (n 11) 91 (who suggests that Council resolutions may reflect a 'general political consenus at the international level as to the current status of international human rights law').

[450] art 7 (1) UN Charter.

international peace and security and that in carrying out these duties, the Council acts on their behalf. In order to discharge the related duties, the Council is vested with specific powers laid down in chapters VI, VII, VIII and XII of the UN Charter. The said Charter chapters regulate the pacific settlement of disputes, action with respect to threats to the peace, breaches of the peace and acts of aggression, regional arrangements and the international trusteeship system, which is no longer of practical relevance.[451] Further powers of the Council are found scattered over the Charter, including arts 4 and 6 of chapter II, art 12 (1) in chapter IV, art 26 in chapter V or art 94 (2) in chapter XIV.[452]

The question of whether the specific powers listed in art 24 (2) UN Charter should be understood as an exhaustive enumeration of competences or whether the explicit mention of specific powers *e contrario* suggests the existence of general powers, seems more or less settled nowadays in the latter sense.[453] Whereas the ICJ has clearly expressed its position that art 24 (2) does not preclude the existence of general Council powers, the ICTY adopted a restrictive reading of the Charter, limiting the Council to the list of specific powers.[454] To reconcile the positions of the two courts one may have reference to the ICJ's case law on the principle of implied powers and argue 'that the Council must possess further unspecified powers to take various kinds of measures to the extent that these are essential to discharging its responsibility to maintain international peace and security'.[455] Article 24 (1) of the UN Charter would then not serve as a legal basis for general Council powers but

451 Dietrich Rauschning, 'Article 75' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol II (3rd edn, OUP 2012) para 2.

452 Anne Peters, 'Article 24' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012) para 58.

453 Thomas Giegerich, 'Article 36' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012) para 13.

454 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion of 21 June 1971) [1971] ICJ Rep 16 [110] ('The reference in paragraph 2 of this Article to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1'); ICTY, *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of the Appeals Chamber of 2 October 1995; Case No IT-94-1-AR72) [28] ('The Charter thus speaks the language of specific powers, not of absolute fiat.').

455 Peters, 'Article 24' (n 452) para 60 (citing ICJ, *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion of 11 April 1949) [1949] ICJ Rep 174, 182 and ICJ, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion of 13 July 1954) [1954] ICJ Rep 47, 56).

rather any Charter provision pertinent to the fulfilment of the Council's responsibility to maintain international peace and security.[456]

2. Triggers of Council Action

Besides the legal basis in the UN Charter, the Council itself determines the concrete scope of its powers by interpreting its mandate.[457] In this regard, art 39 UN Charter, the gateway for Council enforcement measures, requires particular attention. Based on the said provision, the Council determines the existence of a threat to or breach of the peace, or an act of aggression and consequently decides whether it is authorised to act or not under chapter VII.[458] The Council has used its wide discretionary powers under art 39 to creatively interpret its mandate and adapt it to changing realities, needs and perceptions within international society.[459]

Reflecting the incremental expansion of its understanding of the concept of a threat to international peace and security, the Council in 1992 recognised that 'non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security'.[460] In determining what constitutes a threat to international peace and security, the Council had started from a traditional notion of threats flowing from interstate conflicts to later include threats resulting from internal armed conflicts and to eventually even encompass threats of an abstract nature such as the proliferation of weapons of mass destruction or terrorism. In addition, the Council had linked HIV/Aids, drug trafficking, climate change, food insecurity, the illegal exploitation of natural resources as well as wildlife- poaching and trafficking to the notion of a threat to international peace and security.[461] The Council also

456 Peters, 'Article 24' (n 452) para 61.

457 The ICJ held that every UN organ is the ultimate arbiter of its own jurisdiction in light of the fact that 'proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted'. See, ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion of 20 July 1962) [1962] ICJ Rep 151, 168.

458 *Prosecutor v Tadic* (n 454) [28] ('It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article.').

459 Bardo Fassbender, 'Quis judicabit? The Security Council, Its Powers and Its Legal Control' (2000) 11 *EJIL* 219, 224.

460 UNSC Note by the President 23500 (1992) UN Doc S/23500.

461 Nico Krisch, 'Article 39' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol II (3rd edn, OUP 2012) para 32f; Anne Peters, 'Novel Practice of the Security Council: Wildlife Poaching and Trafficking as a Threat to the Peace', EJIL: Talk! (12 February 2014) ‹http://www.ejiltalk.org/novel-practice-of-the-security-council-wildlife-poaching-and-trafficking-as-a-threat-to-the-peace/› accessed 14 July 2017 (discussing UNSC resolutions 2134 on the Central African Republic and

initiated a 'humanisation' of the concept when qualifying widespread and systematic breaches of international human rights- and humanitarian law as threats to international peace and security.[462] In most of these cases, however, factors such as cross-border refugee flows, arms trade or violence on a massive scale had additionally qualified the respective situations, making it impossible to conclude that violations of human rights- or international humanitarian law alone – regardless of their transborder effects – had led the Council to determine a threat to international peace and security.[463]

Of particular interest for the present thesis, several Council resolutions issued during the past six years may also be read to indicate that the Council started to consider rule of law deficiencies as contributing to insecurity and instability and, thus, relatable to the notion of a threat to international peace and security. In the Democratic Republic of the Congo, the Council characterised, ia, the limited progress in building professional and accountable rule of law institutions as a significant security challenge.[464] In the Central African Republic, the Council expressed its deep concern at the security situation characterised by a total breakdown in law and order *and* the absence of the rule of law.[465] It must be noted, however, that in both situations rule of law deficiencies were accompanied by a volatile security situation with transborder effects, thus not allowing for the conclusion that the Council would consider the collapse of rule of law structures in a single country without transborder repercussions as a valid stand-alone basis for its action.[466]

Other resolutions have also linked rule of law deficits to security threats. The causality they imply, however, seems to be that sources of instability and insecurity exacerbate efforts to establish or guarantee the rule of law rather than vice versa. This has been the case in Guinea-Bissau, where the Council

2136 on the Democratic Republic of Congo); Chesterman, Johnstone and Malone (n 7) 127.

462 See, eg, Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17 *EJIL* 881, 889f; George Andreopoulos, 'The Challenges and Perils of Normative Overstretch' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 103, 110 ff; Vera Gowland-Debbas, 'The Security Council as Enforcer of Human Rights' in Bardo Fassbender (ed), *Securing Human Rights*? (OUP 2011) 36, 42–46.

463 Ratner (n 442) 598; Krisch, 'Article 39' (n 461) para 26 f.

464 UNSC Res 1991 (28 June 2011) UN Doc S/RES/1991 [preamble, indent 5].

465 UNSC Res 2121 (10 October 2013) UN Doc S/RES/2121 [preamble, indent 3]; UNSC Res 2127 (5 December 2013) UN Doc S/RES/2127 [preamble, indent 3]; UNSC Res 2134 (28 January 2014) UN Doc S/RES/2134 [preamble, indent 3].

466 Peters, 'Novel Practice of the Security Council: Wildlife Poaching and Trafficking as a Threat to the Peace' (n 461).

observed that a resurgence of political violence, a lack of civilian oversight and control of the armed forces and continued detentions without due process of law jeopardised efforts to consolidate peace and stability, as well as the rule of law.[467] With regard to the situation in Sudan and South Sudan, the Council expressed its concern at the rule of law vacuum in the Abyei Area, which it linked to delays in the establishment of the Abyei Area Administration, Council and Police, which were essential to maintain law and order and prevent intercommunal conflict in Abyei.[468]

3. Council Measures to Fulfil its Mandate

It is not only in the determination of the existence of a threat to the peace, breach of the peace or act of aggression that the Council enjoys considerable discretion but also with regard to the selection of measures to respond to a threat.[469] Article 39 UN Charter holds that after the Council has determined the existence of a threat to the peace, breach of the peace or act of aggression, it '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'.

Based on a traditional understanding of its mandate and particularly with an eye to chapter VII measures, the Council was long considered to mainly

467 UNSC Res 1876 (26 June 2009) UN Doc S/RES/1876 [preamble, indents 2 & 3]; UNSC Res 1949 (23 November 2010) UN Doc S/RES/1949 [preamble, indents 2 & 3].

468 UNSC Res 2126 (25 November 2013) UN Doc S/RES/2126 [preamble, indent 18]; UNSC Res 2156 (29 May 2014) UN Doc S/RES/2156 [preamble, indent 17]; UNSC Res 2179 (14 October 2014) UN Doc S/RES/2179 [preamble, indent 17]; UNSC Res 2205 (26 February 2015) UN Doc S/RES/2205 [preamble, indent 15]; UNSC Res 2230 (14 July 2015) UN Doc S/RES/2230 [preamble, indent 16]; UNSC Res 2251 (15 December 2015) UN Doc S/RES/2251 [preamble, indent 16]; UNSC Res 2287 (12 May 2016) UN Doc S/RES/2287 [preamble, indent 18]; UNSC Res 2318 (15 November 2016) UN Doc S/RES/2318 [preamble, indent 18]; UNSC Res 2352 (15 May 2017) UN Doc S/RES/2352 [preamble, indent 19].

469 Vera Gowland-Debbas, 'The Functions of the United Nations Security Council in the International Legal System' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 277, 287 (holding that the 'Council was deliberately given wide discretionary powers in (…) its choice of responses following a determination under Article 39'); Eric Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?' (2004-5) 28 *Fordham Int'l L.J.* 542, 555 (holding that '[t]his broadening of the Council's view of what constitutes a "threat to international peace and security" has resulted in a corresponding broadening of the types of measures it has chosen to impose on States in an attempt to address the threat'); Luis Miguel Hinojosa Martinez, 'The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits' (2008) 57 *Int'l & Comp. L.Q.* 333, 334f (with regard to art 41 UN Charter measures).

exercise executive-like functions, ie as being in charge of ensuring international order by issuing decisions with preventive or repressive effects in response to concrete threats to or breaches of international peace and security.[470] Its task was primarily related to the enforcement of international peace and not to the enforcement of international law, even though these endeavours often coincided.[471]

Over the years and particularly after the end of the Cold War, however, the Council extensively interpreted the notion of 'measures to maintain or restore international peace and security' and thus expanded its powers, particularly when interpreting art 41 UN Charter. Accordingly, it established UN peace missions and territorial administrations, set up international courts and tribunals, created sanctions regimes targeting non-state actors and issued legislative resolutions. The creativity of the Council in developing measures to maintain or restore international peace and security has resulted in an expanded perception of how it may fulfil its responsibility, encompassing dispute settlement, adjudication, legislation and administration beyond its traditional police function.[472] As a related evolution, the traditional perception of the Council as an enforcer of the peace slowly changed and it was also considered as enforcing international law by identifying breaches of international law and their authors as well as issuing measures against individuals or states in order to rectify such violations.[473]

Council resolutions that contain legal determinations of situations or acts are discussed in legal scholarship under the headings of 'declarative' Council action, quasi-adjudication or (binding) dispute settlement.[474] Examples include

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470 Martti Koskenniemi, 'The Police in the Temple. Order Justice and the UN: A Dialectical View' (1995) 6 *EJIL* 325, 338f; Peters, 'Article 24' (n 452) para 65.

471 Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens & Sons Limited 1950) 294. See also, Krisch, 'Article 39' (n 461) para 10. Orakhelashvili, however, maintains that coercive measures are only *legitimately* imposed based on art 39 UN Charter in response to a violation of international law. See, Alexander Orakhelashvili, 'The Power of the UN Security Council to Determine the Existence of a "Threat to the Peace"' (2006) 1 *Irish Y.B. Int'l L.* 61, 75.

472 Krisch, 'The General Framework' (n 10) para 25.

473 Ratner (n 442) 601; Bruce Cronin, 'International Consensus and the Changing Legal Authority of the UN Security Council' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 57, 49; Vera Gowland-Debbas, 'Security Council Change: The Pressure of Emerging International Public Policy' (2009-10) 65 *Int'l J.* 119, 122.

474 Dispute settlement has been a traditional function of the Council under ch VI UN Charter based on which, however, the Council is not authorised to issue binding decisions. Dispute settlement in this context refers to Council action based on ch VII of the UN Charter. See, eg, Ratner (n 442) 593f; Ian Johnstone, 'Legislation and Adjudication in

the Council's determination that Rhodesia's new government was an 'illegal racist minority regime', that Namibia's occupation by South Africa was 'illegal', that the use of chemical weapons in the war between Iran and Iraq was a 'violation of international humanitarian law and other laws of armed conflict', that Iraq 'was liable under international law for any direct loss, damage or (…) injury' resulting from its unlawful invasion of Kuwait, that those violating international humanitarian law in the internal conflict in Somalia would be held 'individually responsible' or its endorsement of the SRSG's declaration that Cambodia's elections had been 'free and fair'.[475] Similarly, with regard to the situations in Somalia and the Democratic Republic of the Congo, the Council was considered to have indirectly established responsibility for human rights violations in the conflict.[476] The creation of court-like sanctions committees aimed at preventing non-state actors from engaging in terrorist activities by imposing penalties such as asset freezes and travel bans, have also been attributed to the Council's (quasi-) judicial function.[477] The Council's own awareness of the potential legal consequences of its legal determinations is sometimes clearly evidenced such as, eg, in several of its thematic resolutions in which the Council explicitly stressed that it did not 'seek to make any legal determination as to whether situations which will be referred in the Secretary-General's report are or are not armed conflicts within the context of the Geneva Conventions and the Additional Protocols thereto' and that it did not intend to 'prejudge the legal status of the non-State parties involved in these situations'.[478]

the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 *AJIL* 275, 294; Krisch, 'Article 41' (n 431) para 30; Chesterman, Johnstone and Malone (n 7) 138 f.

475 These examples are taken from Ratner (n 442) 593 f. See also the discussion in Alvarez (n 7) 190 and Marc Perrin de Brichambaut, 'The Role of the United Nations Security Council in the International Legal System' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 269, 272 f.

476 Månsson (n 11) 87, 92 f.

477 Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 352-57; Johnstone, 'Legislation and Adjudication in the UN Security Council' (n 474) 294-99; John Beuren, *Das Al Qaida-Sanktionenregime als Ausübung supranationaler Kompetenzen durch den Sicherheitsrat* (Duncker & Humblot 2016) 231. For a critical review of the legality of the Council's quasi-judicial action in this context, see Hans Köchler, *The Security Council as Administrator of Justice? Reflections on the Antagonistic Relationship between Power and Law* (International Progress Organization 2011) 59–67.

478 UNSC Res 1539 (22 April 2004) UN Doc S/RES/1539 [preamble, indent 9]. For the same formulation see further UNSC Res 1612 (26 July 2005) UN Doc S/RES/1612 [preamble, indent 8]; UNSC Res 1882 (4 August 2009) UN Doc S/RES/1882 [preamble, indent 11]; UNSC Res 1888 (30 September 2009) UN Doc S/RES/1888 [preamble, indent 17]; UNSC Res 1960 (16 December 2010) UN Doc S/RES/1960 [preamble, indent 17];

As Council legislation were qualified resolutions establishing obligations for all UN member states in response to abstract threats, usually with long-term effects.[479] For long, legal scholarship had qualified this form of Council action as not within the confines of its function and powers.[480] The most prominent legislative resolutions are resolution 1373 (2001) on measures to counter the financing of terrorism and resolution 1540 (2004) on the proliferation of weapons of mass destruction to non-state actors. Most recently, the Council issued resolution 2178 (2014) on foreign terrorist fighters.[481] By means of these resolutions, the Council obliged all UN member states to undertake a certain range of measures against terrorist financing, the proliferation of weapons of mass destruction and the support to and travel of terrorist fighters in order to counter terrorism as an abstract threat to international peace and security.[482]

UNSC Res 1998 (12 July 2011) UN Doc S/RES/1998 [preamble, indent 10]; UNSC Res 2068 (19 September 2012) UN Doc S/RES/2068 [preamble, indent 3]; UNSC Res 2106 (24 June 2013) UN Doc S/RES/2106 [preamble, indent 13]; UNSC Res 2225 (18 June 2015) UN Doc S/RES/2225 [preamble, indent 11]. See also, eg, UNSC Res 1817 (11 June 2008) UN Doc S/RES/1817 [5] ('Calls upon States that have not done so to consider ratifying or acceding to, and State parties to implement fully the multilateral treaties whose aim is to fight against the illicit trafficking of narcotic drugs, notably the United Nations Single Convention on Narcotic Drugs, 1961, as amended by the Protocol of 25 March 1972 and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, underlines the importance for all States parties to these treaties to implement them fully, and stresses that nothing in this resolution will impose on State parties new obligations with regard to these treaties.').

479 Axel Marschik, 'Legislative Powers of the Security Council' in Ronald Macdonald and Douglas Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Nijhoff 2005) 457, 461; Chesterman, Johnstone and Malone (n 7) 145. For a recent monograph on the legality, legitimacy and legal consequences of Council legislation, see Theresia Kloke, *Der Sicherheitsrat der Vereinten Nationen als Weltgesetzgeber – eine kritische Betrachtung aus völkerrechtlicher Sicht* (Cuncker & Humblot 2016).

480 See, eg, Michael Wood, 'The Interpretation of Security Council Resolutions' (1998) *Max Planck Y.B. U.N. L.* 73, 78 (who held that the Council 'does not lay down new rules of general application'); Georg Nolte, 'The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 315, 322.

481 For a comment on this resolution, see Anne Peters, 'Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person – Parts I & II' EJIL: Talk! (20 & 21 November 2014) ‹https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/› and ‹https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-ii/› accessed 14 July 2017.

482 Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *AJIL* 175, 176 (describing international legislation as characterised by 'the general and abstract

Other resolutions that were discussed in the context of Council law-making are resolutions 1422 (2002) and 1487 (2003) on the exemption of peacekeepers dispatched by non-member states of the Rome Statute from the jurisdiction of the ICC and resolutions 827 (1993) and 955 (1994) on the establishment of the ICTY and the ICTR to the extent that the court statutes annexed to the said resolutions contained criminal provisions of a general-abstract nature.[483]

The notion of so-called Council territorial administration is used with reference to the situations in Kosovo and Timor-Leste, where the Council installed UN territorial administrations with executive functions that replaced the respective state administrations in their entirety, including law enforcement, legislation and adjudication.[484]

A related field of Council action and the centre of interest of the present thesis, are its observations, recommendations or decisions aimed at re-establishing or strengthening national rule of law institutions and structures and thus its efforts to propose or implement changes to the 'internal governance structures of states'.[485] Predominantly in the context of conflict prevention, conflict management and peacebuilding, the Council applied rule of law measures to tackle state instability and inter- or intrastate conflicts.[486] Based on chapter VII mandates of UN multidimensional peacekeeping or peacebuilding missions but often also consent-based, the Council has interfered with the internal affairs of states by means of establishing rule of law institutions and

character of the obligations imposed. These may well be triggered by a particular situation, conflict, or event, but they are not restricted to it. Rather, the obligations are phrased in neutral language, apply to an indefinite number of cases, and are not usually limited in time'); Bianchi (n 462) 890 ('the peculiarity lies, rather, in the fact that the threat in question is neither situation-specific nor time-limited. International terrorism remains fairly indeterminate, given the controversy surrounding its definition or, at least, the scope of application of current definitions, particularly at times of armed conflict'); Chesterman, Johnstone and Malone (n 7) 288–292.

483 Wood, 'The Interpretation of Security Council Resolutions' (n 480) 78. For the position that the Council did not 'legislate' when establishing the international criminal tribunals for the former Yugoslavia and Rwanda but only established courts with jurisdiction over already existing rules of international criminal law, see Alexander Orakhelashvili, *Collective Security* (OUP 2011) 42. The creation of international courts and tribunals has also been qualified as an act of 'promotion of international law'. See, Ratner (n 442) 599.

484 See UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244 (establishing the UN Interim Administration Mission in Kosovo, UNMIK); UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272 (establishing the UN Transitional Administration in East Timor, UNTAET).

485 Krisch, 'The General Framework' (n 10) para 36 f.

486 See part 3 ch II C. 2. Farrall, 'Rule of Accountability or Rule of Law?' (n 19) 391 f.

procedures.[487] Another field in which the Council invoked the need to strengthen or establish the rule of law is the prevention and fight of crime committed in the context of armed conflict or with transborder effects.[488] The Council's rule of law engagement in UN member states is an act of Charter interpretation. It may be an evolution of the Council's understanding of non-military enforcement measures according to art 41 UN Charter or of its dispute settlement apparatus based on chapter VI or – as was indicated above – be based on its implied powers in order to fulfil its primary responsibility of maintaining international peace and security.[489]

As illustrated in the present chapter, the scope of the Council's powers was considerably expanded, particularly after the end of the Cold War. To the extent that UN member states accept the Council's expansive interpretation of its mandate, however, it must be considered legitimate and legal as it may be qualified as 'subsequent practice' relevant for the interpretation of the Charter in accordance with art 31 (3) (b) VCLT.[490]

B. The Council's Power to Recommend and Decide

To fulfil its main responsibility of maintaining international peace and security, the Council may issue recommendations whose observance shall be considered by their addressees with good faith or binding decisions, which they must implement.[491]

487 Johnstone, 'Security Council Deliberations' (n 24) 459 f.

488 See part 3 ch II C. 3.

489 Oscar Schachter, 'Metaphors and Realism in International Law' (2002) 96 *ASIL Proceedings* 268, 269; Johnstone, 'Security Council Deliberations' (n 24) 452 (claiming that 'every operational decision it [the Council] makes is an implicit interpretation of the Charter and other relevant law'). See also René Provost, 'Interpretation in International Law as Transcultural Project' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 290, 301.

490 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

491 Tono Eitel, 'The UN Security Council and its Future Contribution in the Field of International Law' (2000) 4 *Max Planck Y.B. U.N. L.* 53, 60; Jochen Frowein, 'Implementation of Security Council Resolutions Taken under Chapter VII in Germany' in Vera Gowland-Debbas (ed), *United Nations Sanctions and International Law* (Kluwer 2001) 253, 263; Security Council Report, 'Security Council Action under Chapter VII: Myths and Realities' (23 June 2008) 12.

1. Binding Council Decisions

Article 25 of the UN Charter provides the Charter basis for the binding legal effect of Council resolutions for UN member states. Article 25 holds that member states agree to accept and carry out the decisions of the Council. The provision is complemented in chapter VII on enforcement measures by art 48 (1) of the Charter which stipulates that 'the action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine' and by art 49 which holds that Members 'shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council'. The member states' duty to give effect to the Council's binding decisions is further solidified by art 103 of the Charter which establishes that the members' obligations under the Charter precede their obligations under any other international agreement in cases of conflict between the obligations. The text of the provision speaks generally of Charter obligations, not of obligations flowing from Council decisions. Since the Council's authority and the bindingness of its decisions flow from the Charter, obligations resulting from Council decisions are considered obligations under the UN Charter and accordingly covered by the precedence rule.[492] Whereas the wording of art 103 may be read to establish the prevailing effect of Charter obligations only with respect to obligations established by international treaties, it has also been suggested that the rule extends to obligations of conflicting customary law.[493] It is established, however, that the provision does not give precedence to Council decisions over *ius cogens* rules.[494] Furthermore, the legitimate application of the prevailing clause depends on the Council's compliance with the Charter which may be understood to include the human rights compatibility of Council decisions in accordance with arts 25 and 1 (3) UN Charter.[495]

The requirements for the bindingness of Council decisions have been a matter of debate among UN member states with certain states proposing that only measures based on chapter VII should be binding and others holding that

[492] ICJ, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Request for the Indication of Provisional Measures)* (Order of 14 April 1992) [1992] ICJ Rep 3 [39].

[493] Anne Peters, 'Article 25' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012) para 209f (holding that it 'seems not yet settled whether Council decisions also prevail over pre-existing contrary customary obligations of members').

[494] Alexander Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 *Max Planck Y.B. U.N. L.* 143, 150 f.

[495] ibid 149; Peters, 'Article 25' (n 493) para 205.

the Council could enact binding decisions based on other Charter chapters too.[496] In its 1971 Namibia opinion, the ICJ held that it was not only under chapter VII that the Council could enact binding measures. Since arts 48 and 49 of the Charter already provided for the binding legal effect of enforcement measures under chapter VII, so the court reasoned, art 25 would be devoid of independent meaning if it did not imply that the Council could also issue binding decisions outside of chapter VII.[497] The court supported this position by highlighting that art 25 applied to 'the decisions of the Security Council' that are not confined from the outset to chapter VII and that the provision was included in the part of the Charter generally delineating the functions and powers of the Council.[498] According to the court, the binding character of a Council resolution or its provisions must be determined in the concrete case with consideration to the 'terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution'.[499] This implies that binding measures could also be based on chapter VI on peaceful dispute settlement.[500] Consequently, resolutions can also contain binding provisions in the absence of a reference to chapter VII, eg when following up on preceding resolutions that were clearly of a mandatory character or when speaking explicitly of 'obligations'.[501] A reference to chapter VII to issue binding provisions should not be considered necessary to establish a binding legal effect if following the ICJ's Namibia opinion that the Council enjoys general binding powers based on articles 24 and 25 and thus does not need to base its decisions on chapter VII in order to issue mandatory measures.

The fact that resolutions are never binding in their entirety but often contain decisions as well as recommendations, further exacerbates the identification of binding provisions.[502] Council resolutions do not necessarily contain binding

496 Loraine Sievers and Sam Daws, *The Procedure of the UN Security Council* (4th edn, OUP 2014) 384; Security Council Action under Chapter VII: Myths and Realities (n 491) 5.

497 *Legal Consequences* (n 454) [113].

498 ibid.

499 *Legal Consequences* (n 454) [114].

500 Peters, 'Article 25' (n 493) paras 11–14 (it is particularly art 34 (2) UN Charter, which authorises the Security Council to investigate disputes or situations that may lead to international frictions or give rise to a dispute which is considered to be the basis of binding measures in order to enable the Council to effectively exercise its function). See also Security Council Action under Chapter VII: Myths and Realities (n 491) 6.

501 Security Council Action under Chapter VII: Myths and Realities (n 491) 8 (referencing to UNSC Res 783 (1992) on Cambodia); Sievers and Daws (n 496) 388.

502 Marko Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 *EJIL* 879, 880; Munir Akram and Syed Haider Shah, 'The Legislative Powers of the United Nations Security Council' in

provisions. Usually only some provisions of Council resolutions are binding and their identification may require recourse to the criteria developed by the ICJ. Even with the ICJ's criteria in mind, however, it might not always be simple to identify binding provisions. Council discussions – which might assist in determining the Council's intention – are usually neither public nor recorded and not all terms used by the Council in its resolutions have an unequivocal meaning.

In the sparse literature dealing expressly with the language used by the Council in order to invoke mandatory or recommendatory measures, different assessments exist regarding the common legal consequences of terms used by the Council. Whereas some authors regard terms such as 'requests' or 'demands' as 'fairly definite', others qualify them as 'more equivocal'.[503] The legal implications of the operative word 'requests' are relatively unambiguous for some authors, while creating 'some uncertainty as to whether a binding decision has been intended' for others.[504] The same uncertainties apply to the term 'urges', which by some authors is clearly identified as introducing non-binding provisions, while others consider the term to have an equivocal meaning.[505] Phrases such as 'calls upon' are viewed as possibly indicating binding as well as non-binding measures.[506] The most uncontroversial terms seem to be 'decides' and 'recommends' as direct correlates to the terms 'decision' and 'recommendation'.[507]

Ronald Macdonald and Douglas Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Nijhoff 2005) 431, 437.

503 See Sievers and Daws (n 496) 382 (for the first assessment) and Krisch, 'The General Framework' (n 10) para 56 (for the latter view).

504 See Sievers and Daws (n 496) 382 (for the former position) and Orakhelashvili, *Collective Security* (n 483) 38 (for the latter point).

505 Clearly against potential bindingness: Security Council Action under Chapter VII: Myths and Realities (n 491) 4 (where it is observed that 'clearly, the term "urges" cannot be interpreted as imposing a mandatory obligation'). See also Paul Szasz, 'The Security Council Starts Legislating' (2002) 96 *AJIL* 901, 902. For a more cautious position, see Krisch, 'The General Framework' (n 10) para 56 and Sievers and Daws (n 496) 382.

506 Security Council Action under Chapter VII: Myths and Realities (n 491) 9; Orakhelashvili, *Collective Security* (n 483) 37; Sievers and Daws (n 496) 382.

507 Krisch, 'The General Framework' (n 10) para 56; Daniel Joyner, *Iran's Nuclear Program and International Law* (OUP 2016) 196. See, however, Security Council Action under Chapter VII: Myths and Realities (n 491) 6, 9 (holding that 'the Council has tended to use the word "decides" in a broad sense, especially when establishing operations with no reference to Chapter VII' but later remarking that 'it can be clearly established that by using "urges" and "invites," as opposed to "decides," the paragraph is intended to be exhortatory and not binding').

Remaining uncertainties regarding the bindingness of particular provisions may be clarified with recourse to the ICJ's Namibia opinion and in analogous application of the interpretation rules of the VCLT, reverting to the text of the resolution, the context and drafting history of its creation as well as to its object and purpose. As becomes evident in direct comparison, the interpretation criteria of the VCLT do not differ strongly from those invoked by the ICJ.

It cannot be ruled out, however, that different actors will interpret resolutions differently which is the unfortunate result of the Council's lacking authorship over the implementation of its decisions and recommendations for which it mostly relies on the Secretariat or UN member states.[508] In response to diverging interpretations regarding the bindingness of its resolutions or provisions thereof, the Council has tended to make its intentions clear, often expressly citing chapter VII, art 39 of the Charter or determining the existence of a threat to or breach of the peace or an act of aggression in order to imply the mandatory character of particular provisions.[509]

The legal effects of binding Council decisions can be manifold. The Council may reinforce, implement or amend international law with regard to a particular situation.[510] As a consequence of its newly asserted function to issue legislative resolutions, it may also supervene, adapt, or enforce international law by rules of general-abstract application and thus change international treaty law and – according to some authors – customary international law.[511] Due to its

[508] Jared Schott, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency' (2008) 6 *Nw. U. J. Int'l Hum. Rts*. 24, 66 f. In the most deciding cases, diverging interpretations of Council resolutions may not only pertain to their bindingness but extend to whether they include an authorisation to use force or not and can result in the unilateral use of force with reference to Council resolutions as happened with resolutions 678 and 688, which were invoked by the allied forces, including the United States, the United Kingdom and France, when moving their armed forces into Iraq in order to allegedly force Iraqi compliance with the said resolutions. For a discussion of the lawfulness of these interventions see Frowein, 'Unilateral Interpretation of Security Council Resolutions' (n 22) 97. For a discussion of the legality of the military NATO-intervention in Kosovo, which was not authorised by the Security Council, see, eg, Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *EJIL* 1-22 and Antoni Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *EJIL* 23–30.

[509] Security Council Action under Chapter VII: Myths and Realities (n 491) 1; Sievers and Daws (n 496) 387, 391.

[510] Kelsen (n 471) 295 ('The decision enforced by the Security Council may create new law for the concrete case'); Wood, 'The Interpretation of Security Council Resolutions' (n 480) 78; Wheatley (n 23) 534.

[511] See, eg, Szasz (n 505) 902; Akram and Shah (n 502) 437; Michael Wood, 'The UN Security Council and International Law' (Hersch Lauterpacht Memorial Lectures 2006;

composition, voting procedure, mandate and unique powers, the legal effects of Council decisions have been compared to those of the ICJ, whereas their impact on the evolution of international law is sometimes ranked even higher.[512]

2. Council Recommendations

Council recommendations are non-binding as opposed to Council decisions.[513] They may, however, have a normative effect akin to that of binding decisions.[514] This may be the case when the Council issues recommendations in a tense context where the non-compliance of the addressees might result in a deterioration of the security situation and prompt the Council to transform previous recommendations into decisions.[515] The propensity of a situation to result in a threat to the peace if the addressed actors do not follow the

First Lecture: 'The Legal Framework of the Security Council') 19 para 55; Ian Johnstone, 'The Security Council as Legislature' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 80, 81f; Stefan Talmon, 'Security Council Treaty Action' (2009) 62 *RHDI* 65, 89; Jan Wouters and Jed Odermatt, 'Quis custodiet consilium securitatis? Reflections on the Law-making Powers of the Security Council' in Vesselin Popovski and Trudy Fraser (eds), *The Security Council as Global Legislator* (Routledge 2014) 71, 75. For a sceptical analysis as to whether the prevailing effect of art 103 UN Charter can be read to also apply to international customary law, see Rain Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 *Int'l & Comp. L.Q.* 583–612.

512 Eitel (n 491) 61; Ratner (n 442) 595.

513 On the discussions at the San Francisco Conference about the Council's decision-making- and recommendatory powers, see Jost Delbrück, 'Article 25' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary*, vol I (C.H. Beck 2002) para 3.

514 Security Council Action under Chapter VII: Myths and Realities (n 491) 12 (holding that 'the mere fact that the Security Council, the body conferred with primary responsibility for international peace and security, has pronounced itself on an issue may give rise to the obligation to duly consider Council messages in good faith' and refererring to Judge Lauterpacht's position regarding legal effects of General Assembly resolutions proposing that '[a] resolution recommending (…) a specific course of action creates some legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation (…) The state in consideration, while not bound to accept the recommendation, is bound to give it due consideration in good faith'. While this position relates to recommendations of the General Assembly, the thought should be even more valid with regard to recommendations of the Council, taking into account its function and powers.) See also Giegerich, 'Article 36' (n 453) para 72 (who holds that Council recommendations 'are not legally irrelevant; they may not simply be disregarded by member States. They do have some legal effects beyond their political "compliance pull": member States to whom such recommendations are addressed are, by virtue of their membership status and their ensuing duty to cooperate, at a minimum legally obliged to consider them in good faith, although not to comply with them.').

515 Peters, 'Article 25' (n 493) para 10.

exhortatory provisions of a Council resolution may thus be one factor in the identification of recommendations of a higher normative relevance.[516] A pertinent example are recommendations based on arts 36 and 37 UN Charter which presuppose a dispute the continuance of which is likely to endanger the maintenance of international peace and security according to art 33 (1) of the Charter.[517]

Another factor that could affect the normative relevance of Council recommendations might be the precision of their wording, assuming that the clearer and more specifically the Council expresses its position on a course of action conducive to ameliorating a conflict, addressing a situation or settling a dispute, the more likely states are going to act on it and the more likely the Council might follow-up with enforcement action (if non-compliance contributes to a threat to the peace).[518] At times, the Council may also deliberately blur the line between decisions and recommendations to create the impression of bindingness even for non-binding provisions.[519]

From a social-constructivist perspective that is interested in the ideation that Council resolutions may initiate and stimulate among states addressed by such acts or other actors involved with the Council's rule of law agenda, the legal effects of Council pronouncements on the rule of law do not matter much. Also

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516 Kelsen (n 471) 293 ('But, as pointed out, decisions of the Security Council which, in accordance with the Charter, are not binding upon the Members, such as a mere recommendation, may nevertheless assume a binding character if the Security Council, under Article 39, considers non-compliance with its decision as a threat to the peace and takes enforcement action against the recalcitrant Member.').

517 Giegerich, 'Article 36' (n 453) para 77; ibid, 'Article 37' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012) para 48.

518 cf Nigel White and Matthew Saul, 'Legal Means of Dispute Settlement in the Field of Collective Security: The Quasi-Judicial Powers of the Security Council' in Duncan French, Matthew Saul and Nigel White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart Publishing 2010) 191, 211 (holding that 'on occasions, the Council's recommendations for settlement based on a combination of Article 24 and Chapter VI, are more comprehensive and detailed so that they suggest a more intense and concerted effort by the Council to achieve a settlement than on other occasions'). For the claim that clear and specific norms have a higher potential of influence see, eg, Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *IO* 46, 56 ('The determinacy of a rule directly affects its legitimacy because it increases the rule's transparency and thus its capacity to pull members of the international community toward voluntary compliance'). See also ibid, *Fairness in International Law and Institutions* (Clarendon Press Oxford 1995) 31 (postulating that 'indeterminate normative standards make it harder to know what conformity is expected, which in turn makes it easier to justify noncompliance').

519 Akram and Shah (n 502) 437.

recommendations or provisions of an even lesser normative quality may endorse a particular understanding of the rule of law and thus contribute to the construction of a collective understanding in international society of the principle's content and function.

C. Legal Limits to the Council's Powers

As has been illustrated above, the Council enjoys a broad mandate, the scope of which it has expanded by means of Charter interpretation particularly during the past three decades. Its powers, however, are nonetheless bound by legal limitations that flow – at the very least – from the instrument that created it, ie the UN Charter.[520] These limitations are, ia, the United Nations' jurisdiction, the particular function and powers delegated to the Council and the Charter-inscribed division of power among the UN organs.[521]

To the present day, legal scholarship has not come to an agreement as to the sources and scope of legal limitations to Council action. Most uncontroversial nowadays is the view that *ius cogens* binds the Council in all its activities.[522] This position is more or less established in literature as well as in the jurisprudence of regional and national courts.[523] Widely shared agreement

[520] ICJ, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion of 28 May 1948) ICJ Rep 57 [64] ('The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.'). See also *Prosecutor v Tadic* (n 454) [28] ('The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus (unbound by law).').

[521] *Certain Expenses* (n 457) [168]. See also Talmon, 'The Security Council as World Legislature' (n 482) 182; Martinez (n 469) 345; Beuren (n 477) 178.

[522] For a recent study on the concept of *ius cogens*, see, Robert Kolb, *Peremptory International Law – Jus Cogens* (Hart Publishing 2015).

[523] See, eg, Terry Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter' (1995) 26 *NYIL* 33, 79; Karl Doehring, 'Unlawful Resolutions of the Security Council and their Legal Consequences' (1997) 1 *Max Planck Y.B. U.N. L.* 91, 99; Michael Fraas, *Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof* (Peter Lang 1998) 84; Nigel White, 'To Review or Not to Review? The Lockerbie Cases Before the World Court' (1999) 12 *LJIL* 401, 419; Nils Meyer-Ohlendorf, *Gerichtliche Kontrolle des*

seems to prevail also with regard to procedural limitations to Council acts that relate to the Charter-based rules on the adoption of its resolutions as well as to the limitation of its function and powers by the confines of its mandate and with regard to the purposes and principles of the United Nations as referred to in art 24 (2) UN Charter.

1. The Purposes and Principles of the United Nations as Limits

Article 24 (2) UN Charter requires the Council to 'act in accordance with the Purposes and Principles of the United Nations' when discharging the duties flowing from its primary responsibility for the maintenance of international peace and security. These purposes and principles – contained in chapter I of the Charter – suggest that different legal limits apply to Council enforcement action under chapter VII as compared to its dispute settlement activities under chapter VI. Article 1 (1) of the Charter can be read to restrict the requirement of the conformity with 'the principles of justice and international law' to Council actions under chapter VI, while excluding its activities under chapter VII from this legal restraint. Article 2 (7) UN Charter further exempts enforcement measures under chapter VII from the domestic jurisdiction clause. From this it can be inferred that non-coercive Council action needs to be in line with general international law, while it remains open which legal limits apply to chapter VII enforcement measures.

A restrictive reading of the Charter considers only the purposes and principles of the United Nations to restrain the Council's enforcement action

Sicherheitsrates der Vereinten Nationen durch den Internationalen Gerichtshof (Verlag für Wissenschaft und Forschung 2000) 144-46; de Wet, *The Chapter VII Powers of the United Nations Security Council* (n 477) 187–191 (for references to other authors sharing this view, see 187, n 40); Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review' (n 494) 177; Antonios Tzanakopoulos, *Disobeying the Security Council: Contermeasures against Wrongful Sanctions* (OUP 2011) 71. For a differentiated view, however, see Fassbender, 'Quis judicabit?' (n 459) 227 (who maintains that *ius cogens* norms cannot be set against the Charter as peremptory rules of international law 'rest on the foundation of the Charter and could not be imagined without it'). Similarly, Martenczuk (n 423) 273 f. For case law see, eg, ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Order of 13 September 1993) [1993] ICJ Rep 325 (Separate Opinion Judge Lauterpacht) [440, para 100]; ICTY, *Prosecutor v Tadic* (Appeals Chamber Judgment of 15 July 1999; Case No IT-94-1-A) [296]; EGC, *Yassin Abdullah Kadi* (n 424) paras 226–230 and EGC, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Case T-306/01 [2005] ECR II-3533 (21 September 2005) [281]; Swiss Federal Court, Youssef Nada (14 November 2007) BGE 133 II 450 [7.3].

based on art 24 (2) UN Charter.[524] These limits, however, were characterised as too vague and abstract as to meaningfully restrain the Council in the exercise of its powers.[525] Restrictive positions with regard to legal limits of Council action are usually motivated by the rationale that the Council's powers to maintain international peace and security should not be unduly restrained by considerations of law with the risk of rendering the organ ineffective.[526]

2. The Charter as a Limit

Other authors hold the view that the entire UN Charter binds the Council based on the argument that an international organisation and its organs are bound by the legal rules of its constituent instrument as long as that instrument does not authorise its organs to disregard them or based on a constitutionalist approach to the question whether Council acts need to conform with rules of the founding instrument.[527] The position that the Charter binds the Council also entails that it may interpret but not amend it.[528] Further, articles 2 (5) and 25 UN Charter, which require UN member states to give the United Nations every assistance and to carry out the decisions of the Security Council 'in accordance with the present Charter', can be interpreted in a manner supportive of this position.[529]

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524 *Certain Expenses* (n 457) [168]. See also, Kelsen (n 471) 294f; Meyer-Ohlendorf (n 523) 138, 146f; Thomas Giegerich, '"A Fork in the Road" – Constitutional Challenges, Chances and *Lacunae* of UN Reform' (2005) 48 *German Y.B. Int'l L.* 29, 60 f.

525 Koskenniemi (n 470) 327; Wolfgang Weiß, 'Security Council Powers and the Exigencies of Justice after War' (2008) 12 *Max Planck Y.B. U.N. L.* 45, 79; Maurizio Arcari, 'Limits to Security Council Powers under the UN Charter and Issues of Charter Interpretation' (2012) XXXII *Polish Y.B. Int'l L.* 239, 243; Chesterman, Johnstone and Malone (n 7) 129.

526 Gabriel Oosthuizen, 'Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law' (1999) 12 *LJIL* 521, 553; August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *AJIL* 851, 855; Ratner (n 442) 592.

527 See, eg, Derek Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 *EJIL* 89, 95; Martenczuk (n 423) 163; Stein (n 16) 33; Fassbender, 'Quis judicabit?' (n 459) 227; Manusama (n 16) 18–31; Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review' (n 494) 175–190; Talmon, 'Security Council Treaty Action' (n 511) 68; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff 2009) 118 (who, however, considers the Charter as 'the supporting frame of all international law existing today and, at the same time, the highest layer in a hierarchy of norms of international law' and the concomitant position that the Council is bound *only* by Charter law); Krisch, 'The General Framework' (n 10) para 41; Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations* (5th edn, Brill Nijhoff 2016) 460 f.

528 Peters, 'Article 25' (n 493) para 135 f.

529 With regard to the ambiguity of the text of art 25 UN Charter, see Peters, 'Article 25' (n 493) paras 56–60.

3. General International Law as a Limit

Most convincing – particularly, but not only from a normative perspective – is the view that the Council is required to respect the UN Charter *and* general international law in all its actions regardless of the legal basis in the Charter.[530] This position is of particular relevance with regard to the question whether international human rights- and humanitarian law binds the Council. Doctrinally, the position can be based on the principle of speciality, which implies that an international organisation only enjoys those powers conferred on it by its founders.[531] The principle of *nemo plus iuris transferre potest quam ipse habet* further implies that the founders – here, UN member states – could not transfer on the Council powers or rights which they themselves did not have: the right to disregard general international law.[532] An additional doctrinal explanation why this position is plausible is the argument that international organisations as international legal persons should be considered bound by general international law.[533] Legal standards applicable to the Council, if it is

[530] The notion of 'general international law' is meant to refer to international customary law and general principles of law. Notably, Peters, 'Article 25' (n 493) paras 87f, 101, 149. See also Barbara Lorinser, *Bindende Resolutionen des Sicherheitsrates* (Nomos 1996) 53; Heike Gadin, *Der Schutz der grundlegenden Menschenrechte durch militärische Maßnahmen des Sicherheitsrates – das Ende staatlicher Souveränität*? (Duncker & Humblot 1996) 48; Jochen Herbst, *Rechtskontrolle des UN-Sicherheitsrates* (Peter Lang 1997) 372–378; Fraas (n 523) 82–84, 246; White and Saul (n 518) 195f; Gowland-Debbas, 'The Security Council as Enforcer of Human Rights' (n 462) 39; Beuren (n 477) 176–231. See also, UNCESCR, General Comment No 8: Article 14: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights (12 December 1997) UN Doc E/C.12/1997/8 [1; 7f].

[531] ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion of 8 July 1996) [1996] ICJ Rep 66 [25] ('The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.').

[532] arts 40–41 DARIO and Commentary, in particular on art 41: Report of the International Law Commission: Fifty-ninth Session (7 May-5 June and 9 July-10 August 2007), UN Doc A/62/10 (2007) [218-20, paras 2–7]. See also Reinisch (n 526) 858; Beuren (n 477) 225.

[533] See Reinisch (n 526) 858 and Peters, 'Article 25' (n 493) para 104. Both refer to ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion of 20 December 1980) [1980] ICJ Rep 73 [37] ('International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties) and to Justice Fitzmaurice's dissenting opinion concluding that '[e]ven when acting under Chapter VII of the Charter

accepted that it needs to respect general international law, are, eg, the general principles of law of proportionality, good faith and abuse of rights.[534] This position, then, also implies that the Council is legally restrained in its actions by human rights- and humanitarian law, which enjoys the status of customary or peremptory international law.[535]

A Charter-based obligation of the Council to respect human rights- and humanitarian law may be based on articles 1 (3) and 55 (c). Both articles, however, only require the United Nations to promote and encourage respect for human rights and fundamental freedoms but do not require it – and its organs – to respect human rights. A historical reading might suggest that the Charter drafters did not intend to tolerate human rights violations by the United Nations but rather did not anticipate that the organisation could engage in such conduct.[536] The Council's obligation to respect human rights law could also be based on a combined reading of art 1 (3) and the principle of good faith in art 2 (2) of the Charter.[537] With regard to the source of the Council's human rights obligations, it must respect at least those human rights, which have acquired the status of customary international law and certainly those that are rules of *ius cogens*.[538]

Crucial policy considerations why the Council should be bound by international human rights- and humanitarian law relate to the argument that the Council may only credibly promote respect for human rights and fundamental freedoms as required by arts 1 (3) and 55 (c) UN Charter if it itself

itself, the Security Council has no more power to abrogate or alter territorial rights, (…) This is a principle of international law that is as well established as any there can be, — and the Security Council is as much subject to it (for the United Nations is itself subject of international law) as any of its individual member States are (…)' (*Legal Consequences* (n 454) [1135]).

534 Gowlland-Debbas, 'The Functions of the United Nations Security Council in the International Legal System' (n 469) 306; Manusama (n 16) 26.

535 Peters, 'Article 25' (n 493) para 120. For Erika de Wet, art 1 (3) UN Charter requires the Council to respect all 'human rights instruments developed under the auspices of the organisation', including the International Covenants, regardless of the fact that the Council is not a party to the respective treaties, based on the explanation that these human rights 'represent an elaboration upon the Charter's original vision of human rights found in Article 1(3) and Articles 55 and 56'. See, de Wet, *The Chapter VII Powers of the United Nations Security Council* (n 477) 199.

536 Reinisch (n 526) 857; Bardo Fassbender, *Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to ensure Fair and Clear Procedures are made available to Individuals and Entities targeted with Sanctions under Chapter VII of the UN-Charter* (Study commissioned by the United Nations, Office of Legal Affairs, 20 March 2006) 16 f.

537 de Wet, *The Chapter VII Powers of the United Nations Security Council* (n 477) 199.

538 White and Saul (n 518) 195 f.

leads by example.[539] A further argument relates to the attempt to prevent protection gaps if UN organs assume tasks and functions traditionally fulfilled by states which are bound by general international law.[540] Further, it seems desirable from a constitutionalist perspective to consider the Council bound by general international law with a particular emphasis on international human rights- and humanitarian law if one takes into account the growing realm of tasks undertaken by the Council based on an extensive interpretation of its mandate which have far reaching consequences for individual rights such as targeted sanctions or territorial administration. Along these lines, a mediated position suggests that the Council should be free to disregard general international law when exercising its traditional police function and responding to concrete situations with short-term measures based on chapter VII but requires the Council to respect the principles of justice and international law when engaging in activities that were traditionally not perceived as part of its mandate such as legislation, territorial administration, quasi-adjudication or dispute settlement – even if they were based on chapter VII.[541]

The Council's own practice may be understood to support the position that it is bound to respect international human rights- and humanitarian law considering that it has increasingly reacted in response to large-scale violations of international human- and humanitarian law and enforced human rights- and humanitarian law standards in various of its resolutions.[542] This practice – being directed at state compliance – of course does not conclusively suggest that the Council considers itself bound by this corpus of law but it may reflect a Council commitment to these legal standards which – if consistent – would also require itself to respect international human rights- and humanitarian law.

As has been demonstrated, several doctrinal arguments can be advanced as a basis for the position that the Council is bound to respect general international law and international human rights- and humanitarian law in particular. If the Council does not comply with these legal limitations, however, there are no legal

539 Peters, 'Article 25' (n 493) para 114. Similarly, Vera Gowlland-Debbas, 'The Security Council and Issues of Responsibility under International Law' (Strengthening the Rule of Law through the United Nations Security Council Workshop Paper Series No 2.2 (2011)) 15. See also, Fraas (n 523) 83; de Wet, *The Chapter VII Powers of the United Nations Security Council* (n 477) 199 f.

540 Peters, 'Article 25' (n 493) paras 114, 130.

541 See, Krisch, 'The General Framework' (n 10) paras 42, 58. See also Martinez (n 469) 346 (with regard to Council legislation); Beuren (n 477) 225.

542 Gowlland-Debbas, 'The Security Council as Enforcer of Human Rights' (n 462) 36–73.

mechanisms in place which may force the Council to do so.[543] In lieu of an international body which can hold the Council accountable for acts in contravention to such laws, Council decisions and recommendations should at least be interpreted and implemented based on the assumption that it intended to respect general international law (with an emphasis on international human rights- and humanitarian law) unless it has explicitly expressed its opposite intention.[544]

D. Conclusion

The UN Security Council was endowed by UN member states with the responsibility to maintain international peace and security and thus with the task to guarantee a public interest of the international society of the highest order. This is, ia, reflected in the UN's primary purpose as inscribed in art 1 (1) UN Charter. If the Council, thus, develops standards with regard to the national rule of law in order to realise this pivotal goal, they must be considered of a high normative and political relevance for the effective and peaceful functioning of the international society. The Council's authority to enforce such standards by means of legally binding decisions provides the UN organ with a powerful tool to implement its notion of the rule of law in UN member- and third states. Further, non-binding references to the rule of law in Council recommendations or mere observations attesting to the value attributed to the concept by the Council or illustrating how it is best achieved or implemented, may also initiate or stimulate an ideation among the addressees of Council resolutions and other international agents interacting with the Council. The fact that the Council enjoys wide discretionary powers in deciding when and how to intervene has further resulted in an expanded impact sphere of the UN organ – a circumstance also underpinned by a lack of external mechanisms to enforce legal limitations against it. As a consequence of its particular function, the

543 Anne Peters, 'The Constitutionalisation of International Organisations' in Walker Neil, Shaw Jo and Tierney Stephen (eds), *Europe's Constitutional Mosaic* (Hart Publishing 2011) 253, 268; Giegerich, 'Article 36' (n 453) para 14.

544 *Al-Jedda* (n 424) para 102 ('Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.'). See also Tzanakopoulos, *Disobeying the Security Council* (n 523) 73–75.

powers conferred to it and the manner in which the Council exercises them, rule of law standards disseminated among UN member- and third states by way of Council documents, thus, have the potential to affect the evolution of a global understanding of the rule of law. Whether references to rule of law standards in Council documents may even be considered as evidencing an already existing or emerging global rule of law understanding depends, ia, on the Council's composition, the inclusiveness and transparency of its working methods and its general representativeness of the wider UN membership.

III. Composition and Working Methods of the Security Council and their Implications for its Representativeness

References to the rule of law in Council documents, whether binding or not, may reflect the UN body's understanding of the concept and reveal how it considers it best satisfied, achieved or implemented. To the extent that Council members must be considered delegates of all UN member states, the question also arises whether Council documents may even be considered pieces of evidence of an already existing or emerging consensus among UN member states with regard to the function and content of the rule of law. Such an assumption, however, presupposes that Council documents also reflect the political and legal positions of other UN member states rather than only those of states sitting on the Council (at least to a certain extent). Whether this is the case depends, ia, on the extent to which the body's composition and working methods make it representative of the wider UN membership.

A. Composition

1. Permanent Members

The Council is the most exclusive UN organ. It is composed of only fifteen of 193 United Nations member states.[545] A central motive behind the Council's exclusive institutional design was to create a body that allowed for 'prompt and effective action by the United Nations' in the maintenance of international peace and security.[546] In response to the ineffectiveness of the League of Nations, the aspiration was to create an 'effective centre of international power' capable of governing the task of collective security.[547]

[545] art 23 (1) UN Charter.

[546] Rudolf Geiger, 'Article 23' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012) para 1.

[547] Koskenniemi (n 470) 338.

Its exclusivity is further reinforced by the fact that art 23 (1) of the UN Charter permanently reserves five Council seats for the three victorious powers of World War II – the United States, the Russian Federation and the United Kingdom – as well as for China and France.[548] Additionally, the five permanent Council members (P5) are provided with a right to veto in all non-procedural matters by art 27 (3) of the UN Charter. Additional Charter arrangements, such as the mandatory ratification of any Charter amendment by the P5 or their special representation rights in the Military Staff Committee, further perpetuate their dominant position in relation to the wider UN membership.[549] These arrangements seem to stand in stark contrast to the principle of sovereign equality of states as enshrined in art 2 (1) of the UN Charter. According to a contractual reading, however, the privileges conveyed to the five permanent members could be considered compatible with art 2 (1) UN Charter to the extent that they are backed by the member states' sovereign decision to limit their rights in form of the special Council seating and voting arrangements as foreseen in the Charter.[550] A constitutionalist reading of the Charter also allows to consider the permanent seats and the veto right as a qualification of the principle of sovereign equality with the aim of reaching the Charter goal of guaranteeing international peace and security and based on the view that the special rights of the P5 correlate with their special obligations.[551] The great powers were, thus, entrusted with special rights as a result of their heightened responsibility in the maintenance of international peace and security and in order to ensure their commitment to guaranteeing collective security.[552] Regardless of this attributed heightened responsibility of the P5, however, they are often perceived as acting in their national interest only rather than on behalf of a notion of collective security and the Council's legitimacy and authority have been questioned based on the fact that its composition no longer reflects 'modern power realities'.[553]

548 Geiger (n 546) para 8.

549 arts 47 (2), 108 and 109 UN Charter.

550 Bardo Fassbender, 'Article 2(1)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012) para 63.

551 Fassbender, *The United Nations Charter as the Constitution of the International Community* (n 527) 146 f.

552 Kishore Mahbubani, 'The Permanent and Elected Council Members' in David Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner 2004) 253, 255; Fassbender, 'Article 2(1)' (n 550) para 64.

553 Mahbubani (n 552) 262f; Ratner (n 442) 603; Giegerich, '"A Fork in the Road" – Constitutional Challenges, Chances and *Lacunae* of UN Reform' (n 524) 34.

2. Non-permanent Members

The ten non-permanent Council seats, five of which are assigned by General Assembly election each year for a term of two years, are theoretically open for appointment to every member of the organisation.[554] To enhance the body's representativeness, the ten non-permanent seats cannot be occupied for two subsequent terms by the same state and are distributed in a manner catering to the principle of 'equitable geographical distribution' which grants five seats to African and Asian states, one to Eastern Europe, two to Latin America and the Caribbean and two to Western European and other states.[555] De facto, however, many UN member states have never been selected to sit on the Council and have only slim chances of ever being elected due to the political character of the selection process and the considerable size of the overall UN membership.[556]Additionally, insufficient financial or diplomatic capabilities or involvement in an issue on the Council's agenda render a substantial number of UN member states unlikely candidates for office.[557] Those that have been elected, however, contribute to the expertise of the Council due to diverse factors such as their role in UN peace operations or conflicts on the Council's agenda, their size, geographical position or membership status in relevant organisations.[558] In this way non-permanent Council members enhance the body's representativeness to the extent that different political perspectives and know-how affect the Council's deliberations and decisions. The circumstance that the Council has tended to ensure the unanimous adoption of its resolutions in recent years has also increased the impact of the elected ten.[559]

It is further the fact that non-permanent members are elected by the whole UN membership which contributes to the Council's (albeit limited)

554 art 23 (1) & (2) UN Charter; Rules of Procedure General Assembly (n 404) r 142.

555 art 23 (1) UN Charter; UNGA, Questions of Equitable Representation on the Security Council and the Economic and Social Council, UNGA Res 1991 A (XVIII) (17 December 1963) UN Doc A/RES/1991 (XVIII) [3]. Of the five seats designated for African and Asian states, three were assigned to African states and two to Asian states. See, Sievers and Daws (n 496) 127.

556 According to art 18 (2) UN Charter and Rules of Procedure General Assembly (n 404) r 83, candidates need the support of a two-thirds majority in the General Assembly in order to be elected for a non-permanent seat in the Council. For a description of the election process, see Security Council Report, 'Security Council Elections 2016' (3 June 2016). For an illustration of the highly politicised nature of the election campaign, see David Malone, 'Eyes on the Prize: The Quest for Nonpermanent Seats on the UN Security Council' (2000) 6 *Global Governance* 3-23.

557 Sievers and Daws (n 496) 141.

558 ibid 128.

559 Hulton (n 164) 237f; Matthias Wolfram, *Entscheidungsprozesse im Sicherheitsrat der Vereinten Nationen* (Nomos 2011) 159.

representativeness.[560] Criticism has been levelled repeatedly, however, at the P5's alleged domination of the Council's decision-making process, which curtails the impact of elected Council members.[561] Consequently, the Council's membership has been subjected to manifold reform proposals in order to address issues such as an ever-increasing UN membership or imbalances in geographical representation.[562] None of them have been successful to the present day, however.

3. The Council Presidency

The Security Council's presidency counts as one of the more egalitarian and representative features of the UN organ due to its rotation mechanism and decision-making mode. The Council members have explicitly acknowledged the crucial role of the presidency in facilitating communication and exchange of information within the Council in order to counterbalance the privileged position of some of its members.[563] Each calendar month, the Council presidency rotates to another Council member, providing all states with an opportunity to preside over the body.[564] Importantly, presidential statements are not statements of the president but of the Security Council as an organ of the United Nations.[565]

As can be derived from the above-said, the Council is a highly exclusive and political body. The seating privileges of the P5 and the politicised nature of the elections to non-permanent Council seats restrain its potential to represent the wider UN membership by way of its changing composition. Nonetheless, Council member states must be considered as 'delegates of *all other* UN members, and as *trustees* of the international community'.[566] The question then of course arises whether these deficits in representation are somehow addressed by the Council's working methods.

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560 Sabine Hassler, *Reforming the UN Security Council Membership* (Routledge 2013) 52 referring to Johnstone, 'Security Council Deliberations' (n 24) 461.

561 Mahbubani (n 552) 256.

562 For a comprehensive analysis of the various reform proposals regarding Council membership, see Hassler (n 560). See also Dimitris Bourantonis, *The History and Politics of UN Security Council Reform* (Routledge 2005).

563 UNSC Note by the President 565 (2014) Un Doc S/2014/565.

564 Rules of Procedure Security Council (n 404) r 18.

565 ibid r 19.

566 Anne Peters, 'The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and its Members' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest* (OUP 2011) 297, 314.

B. Working Methods

1. Council Instruments

a. Resolutions

The repertoire of instruments available to the Council in order to act ranges from resolutions over presidential statements, letters and notes of the president to statements to the press. All of these documents are agreements reached among the fifteen (or nine at the minimum) member states of the Council on a particular issue based on different voting requirements and can contain decisions of the Council with the exception of statements to the press by the Council president.[567] Even though in theory each of these documents could have the same political and legal relevance, it has been the practice of the Council to revert to the format of resolutions when intending to issue binding decisions or attributing sufficient political weight to an agenda item.[568] Resolutions are the Council's preferred instrument to act.[569] They can be issued by nine affirmative votes as long as none of the P5 casts a veto.[570] In spite of this fact, the Charter does nowhere expressly use the term 'resolution'.[571]

The legal nature of resolutions is of a *sui generis* character. Traditionally, the Security Council has been issuing documents that relate to individual situations or disputes that are directed at few, specified addressees with the aim of maintaining international peace and security. This traditional perception of its task is reflected in the idea that the Council primarily exercises police functions.[572] Due to the organ's composition and decision-making procedures, its acts are neither judgments of a judicial body nor international treaties.[573]

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567 Repertoire of the Practice of the Security Council, 18th Supplement, Part II, 2012-13 ‹http://www.un.org/en/sc/repertoire/2012-2013/Part%20II/2012-2013_Part%20II.pdf #page=58› accessed 14 July 2017. See also Sievers and Daws (n 496) 374 (holding that the 'Security Council can adopt a decision in any format it deems appropriate. (. . .) In agreeing a decision, the action of the Security Council may be seen as comprising two parts: the first part is achieved when the Council reaches agreement on the substance of the decision; the second part if "publishing" a decision in a particular format'. On the nature of Statements to the Press by the President see, Andreas Zimmermann, 'Article 27' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012) para 74.

568 Sievers and Daws (n 496) 376–378, 402.

569 Michael Wood, 'Security Council' (MPEPIL 2007) para 13; Sievers and Daws (n 496) 374.

570 art 27 (3) UN Charter.

571 Sievers and Daws (n 496) 374.

572 Peters, 'Article 24' (n 452) para 63.

573 See, ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, (Advisory Opinion of 22 July 2010) [2010] ICJ

Their legal nature cannot be clearly determined but only approached by way of analogy and as Orakhelashvili observed, Council resolutions 'arguably combine in themselves the elements of an agreement between states and the elements of "statutory" or regulatory administrative acts'.[574] Although exhibiting certain features of international treaties, they differ from them insofar as a resolution must be considered to represent the collective will of the Council as a body rather than the interests of a multitude of states and with regard to the circumstance that resolutions often bind states that have not been involved in their issuance.[575]

The UN Charter, however, does not exclude the possibility that the Council issues documents that resemble legislative acts or judgments.[576] A major practical limitation to the Council's actions, however, relates to the necessity to preserve the perception among UN member states that its activities are legitimate in order to ensure its continued effectiveness. As mentioned before, the Council, eg, issued resolutions of a legislative character albeit only on rare occasions due to the questionable legitimacy attached to rules of general

Rep 2010 [442, para 94] (where the ICJ held in the context of interpreting the content of Council resolutions that '[w]hile the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also requires that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (. . .), irrespective of whether they played any part in their formulation'. See also, Orakhelashvili, *Collective Security* (n 483) 32 (who also acknowledges differences between Security Council resolutions and international treaties, albeit notes that 'decisions of the Council are not formally designated as treaties, but are still agreements on which the states concerned can place reliance' and that 'their binding force does not differ from that of treaties').

574 Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review' (n 494) 160.

575 Christian Henderson and Noam Lubell, 'The Contemporary Legal Nature of UN Security Council Ceasefire Resolutions' (2013) 26 *LJIL* 369, 372f, n 23.

576 *Prosecutor v Tadic* (n 454) [35] ('It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force." It is a negative definition.'). See also Talmon, 'The Security Council as World Legislature' (n 482) 181f (with regard to legislative resolutions of the Council and their compatibility with the wording of art 41 UN Charter in principle); Johnstone, 'Legislation and Adjudication in the UN Security Council' (n 474) 275; Peters, 'Article 24' (n 452) para 70.

application imposed on sovereign states by an insufficiently representative organ.[577]

b. Documents issued by the Council President

Most of the documents issued by the Council president are of a consensual nature and represent the position of the Council as a UN body.[578] This holds true for statements, letters and notes as the president issues these documents in representation of the Security Council 'in its capacity as an organ of the United Nations'.[579] Statements to the press, by contrast, only represent the view of the members of the Security Council and are not decisions of the Council in the meaning of art 27 UN Charter.[580] As the Council has developed a penchant for achieving unanimity when adopting resolutions, however, this feature may no longer be as decisive a criterion of differentiation between resolutions and Council documents that require consensus.[581]

Whereas presidential statements were predominantly issued on behalf of the Council as a whole since 1948, the Council clarified the attribution of presidential statements to the Council as an organ in 1996 in reaction to a letter of the Argentinian representative in the Council.[582] As such, they customarily represent the view agreed upon by all Council members and are considered as statements made on behalf of the Council as an organ of the United Nations.[583] In contrast to Council resolutions, presidential statements are as a general rule legally non-binding and of recommendatory character only.[584] Their consensual character, however, may vest presidential statements with political clout not to be underestimated.[585] They may also be a valuable source of information when trying to determine the Council's intention regarding a particular issue on its

577 See part 2 ch II A. 3. p 82 f.

578 Sievers and Daws (n 496) 397 f.

579 Rules of Procedure Security Council (n 404) r 19. Sievers and Daws (n 496) 379.

580 Stefan Talmon, 'The Statements by the President of the Security Council' (2003) 2 *Chinese J. Int'l L.* 419, 448; Zimmermann (n 567) para 74.

581 Hulton (n 164) 237 f.

582 Until 1995, the majority of presidential statements was issued on behalf of the Council but practice also involved statements only made on behalf of Council members. Sievers and Daws (n 496) 398.

583 See, Rules of Procedure Security Council (n 404) r 19. Talmon, 'The Statements by the President of the Security Council' (n 580) 419f; Zimmermann (n 567) para 73.

584 This is not to imply that all resolutions are legally binding. They can also be of a solely declaratory or recommendatory nature. Equally, it is not precluded that the Council considers certain provisions of a presidential statement as binding. See, Talmon, 'The Statements by the President of the Security Council' (n 580) 452f and Sievers and Daws (n 496) 381.

585 ibid 458.

agenda or when analysing the political dynamics of the body's decision-making process. This is mainly due to the fact that presidential statements may serve as vehicles of compromise in cases where Council members are unable to agree on a common position or when reacting to new situations on which the members have not yet come to a conclusion regarding the most appropriate course of action.[586] Additionally, they can assist in interpreting the content of Council resolutions and sometimes even serve to implement the latter.[587]

2. Agenda Setting & Drafting of Council Resolutions

All members of the Security Council can propose a new subject matter to be put on the Council's agenda for discussion and the issuance of a potential decision.[588] Occasionally, also the Council president or non-member states – when invited for participation according to arts 31 and 32 UN Charter and rules 37 and 38 of the Council's Provisional Rules of Procedure – have introduced proposals. Generally, however, non-Council members are only rarely involved in the drafting process of resolutions.[589] Every now and then, the Secretary-General or members of the Secretariat have introduced draft resolutions or parts of them.[590] As so-called 'penholders', Council members then draft a proposal and 'initiate and chair the informal drafting process' of Security Council documents.[591] Historically, penholding would alternate among different Council members and individual Council members would not own particular items on the Council's agenda.[592] With the increase of agenda items after the end of the Cold War, the Council started to draft resolutions with 'groups of friends of states' that had a particular interest in a specific agenda item. These groups of friends could involve permanent, non-permanent and even non-members of the Council.[593] By 2010, however, the Council's unwritten practice changed and resolution drafting became dominated by the P3 (USA, UK & France). Only after the P3 had agreed on a text, would they then negotiate it

586 Sievers and Daws (n 496) 402.
587 Talmon, 'The Statements by the President of the Security Council' (n 580) 455.
588 Johnstone, 'Security Council Deliberations' (n 24) 461.
589 Talmon, 'The Security Council as World Legislature' (n 482) 186.
590 Sievers and Daws (n 496) 394.
591 UNSC Note by the President 268 (2014) Un Doc S/2014/268.
592 Update website of Sievers and Daws (n 496) ch 5, s 6, 'Conduct of Meetings and Participation – Motions, Proposals, and Suggestions' ‹http://www.scprocedure.org/#!chapter-5-section-6b/c9dv› accessed 14 July 2017; Security Council Report, 'Penholders and Chairs' (posted 2 February 2017) ‹http://www.securitycouncilreport.org/un-security-council-working-methods/pen-holders-and-chairs.php› accessed 14 July 2017.
593 Penholders and Chairs (n 592).

with Russia and China before circulating it among elected Council members.[594] This has resulted in a predominance of the permanent Council – and particular its Western – members in the drafting process to the detriment of its inclusivity.[595] The dominance of the permanent Council members in the drafting of resolutions has then also been subject of complaints by elected or non-Council members.[596]

Once Council resolutions have been drafted, they are usually sponsored by states, attesting to their commitment or interest in the particular matter at issue. Commonly, there is more than just one sponsoring state, which may even include non-member states.

Overall, the P5 exert great influence on whether, in what form and with what content the Council becomes active. It is not only brute facts such as the veto power or permanent membership that cater to a dominance of the P5 in the drafting process but also soft factors such as the Council's main working language. The simple fact that the Council primarily works in English benefits English-speaking Council members and in particular the two permanent members USA and UK.[597]Access to a larger pool of experts and a profound institutional memory only add to the advantages of permanent Council members.[598]

There are of course factors counteracting these power imbalances. The P5 or P3 are by far not in sync regarding all issues on the Council's agenda and deliberate efforts to increase the role of non-permanent Council members as penholders of agenda items have been made in recent years.[599] The Council

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[594] Wolfram (n 559) 156; Security Council Report, 'Security Council Working Methods: A Tale of Two Councils' (25 March 2014) 12; update website Sievers and Daws (n 592).

[595] For an overview of 'penholder-ship' in the Council in 2017, see: Security Council Report, '2017 Chairs of Subsidiary Bodies and Penholders' ‹http://www.securitycouncilreport.org/un-security-council-working-methods/atf/cf/%7B65BFCF9B-6D27–4E9C-8CD3-CF6E4FF96FF9%7D/Penholders%20and%20Subsidiary%20Body%20Chairs.pdf› accessed 14 July 2017. Of 39 situation-specific or thematic matters, the US heads or is involved with the drafting of resolutions on 16 matters, the UK with 10, France with six and Russia with four. Notably, China does not lead the drafting of any resolution nor is it part of any Group of Friends involved in a drafting process. Non-permanent Council members head or are involved with the drafting of resolutions on 11 matters on the Council's agenda.

[596] 6870th Council Meeting on the Implementation of the Note by the President of the Security Council (S/2010/507), UN Doc S/PV.6870 (26 November 2012) [17].

[597] Eitel (n 491) 57; Wolfram (n 559) 155; Sievers and Daws (n 496) 98 f.

[598] UNSC, Annex to the Letter dated 27 April 2015 from the Permanent Representative of Finland to the United Nations addressed to the President of the Security Council (27 April 2015) UN Doc S/2015/292 [19].

[599] Michael Wood, 'Security Council Working Methods and Procedure: Recent Developments' (1996) 45 *Int'l & Comp. L.Q.* 150, 153; Sievers and Daws (n 496) 128.

itself has issued several documents aimed at correcting the power imbalance among its members with regard to the working process.[600] In a 2010 note by the president, the Council reaffirmed that all its members 'should be allowed to participate fully in the preparation of, inter alia, the resolutions, presidential statements and press statements of the Council' and that the drafting of all Council documents should be carried out in a manner that allows adequate participation of all Council members.[601] With reference to this note, the members of the Council later affirmed their commitment to an increased diversity regarding Council members acting as penholders.[602] They also required that states chairing the drafting process ensure timely consultations with all Council members in order to give them a say in the drafting process – a requirement probably primarily addressed at regular penholders.[603] The Council members have thus acknowledged the importance of an improved intra-Council dialogue and more inclusive working mechanisms for the efficient and transparent functioning of the Council.[604] Whether and how these recommendations will be implemented in practice is difficult to assess at this time as Council members are still in the process of discussing how to implement them and the issue of penholders was considered as not yet 'entirely ripe'.[605] So far, only few agenda items have been spearheaded by non-permanent Council members, such as, eg, the situations in Afghanistan, Guinea-Bissau and Timor-Leste or the International Criminal Tribunals for the former Yugoslavia and Rwanda and their residual mechanisms or Council working methods.[606]

On the different views of the P5 regarding the notion of collective security, see Frederking (n 7) 31–40.

600 See, eg, UNSC Note by the President 165 (1999) UN Doc S/1999/165 (on the importance of allowing all Council members to participate fully in the preparation of resolutions or presidential statements).

601 UNSC Note by the President 507 (2010) UN Doc S/2010/507 [42].

602 UNSC Note by the President 268 (2014) UN Doc S/2014/268.

603 ibid.

604 UNSC Note by the President 565 (2014) UN Doc S/2014/565.

605 Annex Letter Permanent Representative of Finland S/2015/292 (n 598) [19]. This circumstance seemed not to have changed drastically one year later: See, UNSC, Annex to the Letter dated 26 May 2016 from the Permanent Representative of Finland to the United Nations addressed to the President of the Security Council (2 June 2016) UN Doc S/2016/506 [24f].

606 Sievers and Daws (n 496) 128 f.

3. Meeting Formats

When convening, the Council can choose from a range of meeting formats to discuss a matter under its consideration.[607] Public meetings include 'open debates', 'debates', 'briefings' and 'adoptions', whereas 'private meetings' and 'TCC meetings' are held behind closed doors.[608] Although invitations of non-Council members are permissible even for private meetings, the different formats are, ia, characterised by their different arrangements regarding the participation of third parties.[609] The participation of third parties includes a right to speak at Council meetings but not a right to vote.[610]

'Informal Consultations' are a category of their own. These consultations are not considered 'meetings' by Council members and do not allow for the involvement of UN member states that are not members of the Council. They involve various formats of close interaction between the Council with Secretariat members and senior officials.[611] As opposed to the aforementioned meeting formats, no official records are kept of informal consultations. Council members have agreed, however, that the Council president provides member states with substantive and detailed briefings shortly after informal consultations of the whole.[612] Another informal meeting format are the so-called 'Arria-formula' meetings.[613] These meetings shall serve Council

607 UNSC Note by the President 507 (2010) UN Doc S/2010/507 [36].

608 ibid [36 (a) (iii), (b) (iii)].

609 ibid. In open debates, non-Council members may be invited to participate in discussions upon their request; in debates, 'non-Council members that are directly concerned or affected or have a special interest in the matter under consideration may be invited to participate in the discussion upon their request'; in briefings, 'only Council members may deliver statements' and during adoptions, 'non-Council members may or may not be invited to participate in the discussion upon their request'. In private meetings, 'any Member of the United Nations which is not a member of the Security Council, members of the Secretariat and other persons may be invited to be present or to participate in the discussion, upon their request, in accordance with rule 37 or 39 of the provisional rules of procedure'. In TCC meetings, 'parties described in resolution 1353 (2001) are invited to participate in the discussion, in accordance with the resolution'. UNSC Res 1353 (13 June 2001) UN Doc S/RES/1353 refers to troop-contributing countries.

610 This follows directly from art 27 (1) UN Charter, which provides only Council members with a vote but no other entities.

611 UNSC Note by the President 507 (2010) UN Doc S/2010/507 [20–27]. Sievers and Daws (n 496) 65.

612 ‹http://www.un.org/ar/sc/pdf/methods/meetings.pdf› accessed 14 July 2017. UNSC Note by the President 507 (2010) UN Doc S/2010/507 [3]. This practice has been in place since 1994. See, Sievers and Daws (n 496) 73.

613 For the 'common understanding' on the conduct of Arria-formula meetings of the Informal Working Group on Documentation and Other Procedural Questions, see 5601st

members 'as a flexible and informal forum for enhancing their deliberations'.[614] In contrast to informal consultations, these meetings allow for the participation of third parties such as non-Council member states, relevant organisations or individuals and are therefore considered improvements of the Council's accessibility and legitimacy by some authors.[615] They provide the Council with an opportunity to hear from non-governmental actors and Council members have agreed to use such meetings to intensify their interaction with representatives of NGOs and civil society to get a better understanding of certain situations under their consideration.[616] With regard to other aspects, however, they lag behind informal consultations such as, eg, their publicity as they are usually not announced in the daily Journal of the United Nations and only incompletely recorded in the Council's annual reports.[617] They are not considered an activity of the Council and thus commonly convened at the initiative of one or more Council members who independently invite the remaining Council members to join the meeting.[618]

The Council also regularly holds so-called 'open debates' on which occasion it invites non-Council members, members of other UN organs or civil society representatives to briefings.[619] The impact of such forms of inclusion on the substance of Council decisions has usually been considered small, however.[620] Even though the Council reaffirmed its commitment to increase the recourse to open meetings particularly in the early stages of its considerations of an agenda item, a considerable amount of important negotiations are still taking place during informal consultations.[621]

Council Meeting on Briefings by Chairmen of subsidiary bodies of the Security Council, UN Doc S/PV.5601 (20 December 2006) [13].

614 UNSC Note by the President 507 (2010) UN Doc S/2010/507 [65].

615 ibid [65]; Johnstone, 'Security Council Deliberations' (n 24) 461; True-Frost (n 20) 135.

616 UNSC Note by the President 507 (2010) UN Doc S/2010/507 [65]; Sievers and Daws (n 496) 77.

617 UN Secretariat Background Note on the Arria-Formula Meetings of the Security Council Members ‹http://www.un.org/en/sc/about/methods/bgarriaformula.shtml› accessed 14 July 2017; Sievers and Daws (n 496) 76.

618 Background Note on Arria-Formula Meetings (n 617).

619 See UNSC Note by the President 922 (2012) UN Doc S/2012/922 [3–8] on the organisation of open debates with the aim of benefitting from contributions of the wider UN membership.

620 True-Frost (n 20) 135.

621 Rudolf Dolzer and Charlotte Kreuter-Kirchhof, 'Article 31' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012) para 32. See also UNSC Note by the President 507 (2010) UN Doc S/2010/507 [28] (which resolves that the Council will revert more often to open meetings to increase the transparency of its work).

The Council has traditionally been accused of a lack of transparency with regard to its decision-making process.[622] Whereas in the beginning, the Council primarily held public meetings, informal consultations in the absence of the public in the Council's consultation room started to be increasingly held since the 1980s.[623] Although the Council's Provisional Rules of Procedure establish the rule that the Council shall meet in public unless it decides otherwise, an essential part of the drafting process and negotiations resulting in Council resolutions takes place confidentially in closed consultations or even more informal outside Council consultations among delegates of Council members states.[624] In its public meetings, the Council usually only presents resolutions that its members have agreed upon in private and in advance in all their detail.[625] Besides obvious concerns regarding the legitimacy of confidential Council meetings, the deficiency in transparency of Council deliberations is particularly troublesome when trying to determine how the Council has reached at a decision or attempting to construe the meaning of unclear Council wording.

4. Voting & Special Voting Rights

At some point of the deliberations on the text of a resolution – when it has been agreed upon in its entirety or when agreement among all Council members seems impossible –, the sponsoring states put the draft to a vote.[626] In order to adopt a decision, each Council member has one vote.[627] Article 27 UN Charter requires that decisions on procedural matters be adopted by an affirmative vote of nine Council members, whereas decisions on all other matters additionally require the concurring votes of the five permanent Council members.[628] As a consequence of the voting procedure as foreseen in art 27 of the UN Charter, unanimity is not required in order to adopt a Council decision which is arrived

622 For a detailed discussion of the issue, see Antonios Tzanakopoulos, 'Transparency in the Security Council' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 367–391. See also Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 328 f.

623 Wood, 'Security Council Working Methods and Procedure: Recent Developments' (n 599) 155; Eitel (n 491) 59; Dolzer and Kreuter-Kirchhof (n 621) para 32; Sievers and Daws (n 496) 72 f.

624 Rules of Procedure Security Council (n 404) r 48; Johnstone, 'Security Council Deliberations' (n 24) 461; Sievers and Daws (n 496) 70.

625 Eitel (n 491) 59.

626 Sievers and Daws (n 496) 396.

627 art 27 (1) UN Charter.

628 art 27 (2) and (3) UN Charter.

at by voting as opposed to presidential statements, letters or notes.[629] Nine votes can be sufficient to adopt decisions binding on all UN member states. When venturing into new territory such as law-making, adjudication, preventive action or taking on new agenda items, the Council has, however, tried to ensure unanimity of its members or invited non-members of the Council to broad consultations in order to enhance the acceptance of its decisions.[630]

To the extent that all Council members have one vote, they can be considered to enjoy formal equality.[631] The veto right of the P5 as provided for in art 27 (3) UN Charter, however, substantially curtails – or qualifies – this understanding in practice.[632] The veto right conceded to the great powers was considered an indispensable curtailment of the principle of sovereign equality and was meant to ensure that they were and remained truly committed to their enhanced responsibility in maintaining international peace and security.[633] Its crucial role in binding the great powers to community interests is mirrored in the perception of the veto as the 'foundation on which the UN was built', reflecting the circumstance that the great powers would not have consented to the creation of an organ capable of issuing binding decisions had they not been granted the right to prevent such acts.[634] Whereas the number of official vetoes is rather low in comparison to the number of adopted resolutions, it is the great powers' informal use of their voting privilege in closed consultations that allows them to exert great influence on the Council's decision-making process and to dominate the organ's deliberations and output.[635] Consequently, the content of every Council resolution reflects at least the passive consent of the P5 or does not contain language they fear could work against their political interests at present or in the future. Attempts to reform the voting privilege of the P5 – also tied to specific subject matters such as the responsibility to protect – remained

629 Sievers and Daws (n 496) 379.

630 Krisch, 'The General Framework' (n 10) para 44 (referring to Johnstone, 'Legislation and Adjudication in the UN Security Council' (n 474) 292f and Talmon, 'The Security Council as World Legislature' (n 482) 186–188).

631 Johnstone, 'Security Council Deliberations' (n 24) 461.

632 For a constitutionalist interpretation and reconciliation of the principle of sovereign equality in art 2 (1) with the membership- and voting privileges of the P5 in arts 23 (1) and 27 (3) UN Charter, see Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutionalist Perspective* (Kluwer Law International 1998) 289 ff.

633 Mahbubani (n 552) 255; Fassbender, 'Article 2(1)' (n 550) para 64.

634 Andrew Boyd, *Fifteen Men on a Powder Keg* (Methuen 1971) 63; Paul Kennedy, *The Parliament of Man: The United Nations and the Quest for World Government* (Penguin Allen Lane 2006) 26f; David Bosco, *Five to Rule them All: The UN Security Council and the Making of the Modern World* (OUP 2009) 30.

635 Eitel (n 491) 55; Mahbubani (n 552) 259; Security Council Report, 'The Veto' (19 October 2015) 7; Chesterman, Johnstone and Malone (n 7) 651.

unsuccessful to the present day due to the arrangement in art 108 UN Charter that such amendments would require the approval of all permanent members of the Council.[636] To interpret the content of Council decisions, an understanding of the interests of the great powers is thus pivotal, whereas the content of a resolution in turn allows for the drawing of conclusions with regard to the position of the P5 on a particular subject matter.

As a result of the Council's working methods and voting rules it must thus be concluded that if in doubt, Council resolutions are dominated by the positions of the P5 and sometimes even only one or a few of them. This must be kept in mind when trying to assess what may be inferred from such documents about a process of ideation in the international society.

C. Council Representativeness of the wider UN Membership

When imposing binding rule of law measures on UN member- or third states or disseminating its rule of law understanding by way of (non-coercive) persuasion, the question to what degree the Council is representative of the wider UN membership takes centre stage.[637] The representativeness of a body is 'a function of its composition and the relative participatory rights of its members'.[638] Whereas the concept of representativeness is not explicitly enshrined as a legal principle in the UN Charter, it is reflected in Charter articles on the composition and decision-making procedure of the Council.[639] With regard to the Council, the question of representativeness is often associated with the legitimacy of its function and powers and the related obligations of UN member states.[640] In the context of the Council's rule of law agenda, the question further pertains to the perceived legitimacy of interferences with the internal governance structure of states. While this is an important concern, the measure of the Council's representativeness also matters when trying to determine whether and to what degree Council resolutions including

636 Chesterman, Johnstone and Malone (n 7) 650f (referring to the Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (December 2001) [6.20f] and the Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility (2004) UN Doc A/59/565 [256–259].

637 Finnemore and Sikkink (n 24) 895, 902 (on persuasion as a process of norm emergence).

638 Fassbender, *UN Security Council Reform and the Right of Veto* (n 632) 296.

639 ibid 300 (qualifying that '[i]f representativeness means that a body truly reflects the dissimilarity of its constituent members, Articles 23 and 27 of the Charter can be read as having given effect to the concept by introducing special rights for certain states in accordance with their respective status and role').

640 See, eg, Hassler (n 560) 96.

references to the rule of law or some of its elements are representative of a process of ideation within the wider UN membership. The issue of representativeness, thus, also relates to the question of whether measures of a more or less representative Council may reveal something about the potential universality of the notions and concepts it develops or may at least contribute to the development of a universal notion of certain rule of law principles.

1. The Council acting on behalf of UN Members

Article 24 (1) UN Charter stipulates that in discharging its primary responsibility for the maintenance of international peace and security, the Council acts 'on behalf of' the United Nations' members. The wording of the provision could be read to imply a classical model of representation, ie that a selected number of a group of actors represents the larger part of the group and is obliged to act in their best interest when representing them.[641] It could, however, also be understood as a mere rule of attribution, meaning that every act of the organ is attributable to the UN members, including acts, the represented actors might not be supportive of. Legally, the Council as a UN organ acts on behalf of the organisation and not on behalf of UN member states.[642] Since UN member states have created the organisation with the expectation that it fulfil particular functions in their interest, acting on behalf of the organisation, however, may in many cases coincide with what the organ would be doing if acting on behalf of UN member states. Certainly, the phrase 'on their behalf' may be interpreted to imply that the Council *should* be acting in the interest of all UN member states even though it is composed of only a few representatives of the international community of states.[643] At least, arts 49, 56 and 103 UN Charter seem to establish an obligation of loyalty of the UN membership and its organs to the organisation's fundamental principles and purposes. This obligation of loyalty requires that UN member states implement Council resolutions but also implies their freedom not to implement Council

641 Peters, 'The Responsibility to Protect' (n 566) 314 ('Members of the Security Council act as delegates of *all other* UN members, and as *trustees* of the international community.').

642 Peters, 'Article 24' (n 452) para 45 with reference in n 77 to art 6 (1) DARIO, which holds that '[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization' (Report of the ILC, 63rd Session, UNGA Res 66/10 GAOR 66th Session Supp 10). See also Kelsen (n 471) 280 (who goes as far as to qualify the statement that the Council acts on behalf of the UN member states as incorrect); Orakhelashvili, *Collective Security* (n 483) 22.

643 Peters, 'Article 24' (n 452) para 45; Sievers and Daws (n 496) 7.

resolutions that run counter the UN purposes and principles.[644] It, thus, also implies the existence of an obligation of loyalty on behalf of the Council. This obligation of loyalty may be understood to entail a minimum version of representation which requires the Council not to issue resolutions that force UN member states to violate their international law obligations or even core values and principles of their own constitutions.[645] Indirectly, the obligation of loyalty may thus result in the representation of member states' positions in Council documents if acknowledged by the Council.

2. Inclusivity to enhance Representativeness

An obvious factor affecting the Council's representativeness of the wider UN membership is its composition. While changes to the Council's membership or the tenure of non-permanent members were not feasible until today, the Council has incrementally and informally implemented modest changes to its working methods and procedures in order to enhance the inclusiveness of its decision-making process.[646] To the extent that any Council composition mindful of preserving the Council's particular function would always be exclusive and could, thus, only partially address concerns with regard to the representativeness of the body's membership, reform of the Council's working methods and procedure seems to be the more promising field of reform with regard to an enhanced representativeness of the body's decisions.[647] The Council's lack of representativeness with regard to its composition does not, eg, keep it from involving non-Council members and non-UN member states in Council discussions in an attempt to enhance the representativeness of its

644 Mehrdad Payandeh, 'Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte' (2006) 66 *ZaöRV* 41, 62 citing Doehring (n 523) 105 ff.

645 Peters, 'Article 25' (n 493) paras 28 & 193.

646 The last change to the Council membership was effectuated in 1965 when the number of Council members was raised from eleven to fifteen based on UNGA, Questions of Equitable Representation on the Security Council and the Economic and Social Council, UNGA Res 1991 A (XVIII) (17 December 1963) UN Doc A/RES/1991 (XVIII), entering into force on 31 August 1965, (1965) UNYB 232. See also, Annex Letter Permanent Representative of Finland S/2015/292 (n 598) [4] (in his keynote address on the occasion of the twelfth annual workshop for newly elected Council members, Gareth Evans, the former Minister for Foreign Affairs of Australia, noted that 'even modest proposals, such as allowing non-permanent members to serve consecutive terms, had not gained traction').

647 Of course, abolishing permanent membership and establishing a neutral, depoliticised election procedure of Council members would address these concerns but such measures seem to be out of question at the present time. For the position that the greatest potential for Council reform consists in 'incremental and informal adjustments' see, Wood, 'Security Council Working Methods and Procedure: Recent Developments' (n 599) 161.

deliberations and the resulting documents. An inclusive approach towards non-Council members seems particularly important when the Council acts under chapter VII and issues binding measures against UN member- or third states.[648]

As a point of departure, art 31 of the UN Charter in connection with rule 37 of the Council's Provisional Rules of Procedure provide for the involvement of non-Council members in the discussions before the Council if the Council considers their interests to be specially affected or when a member brings a dispute or situation in accordance with art 34 UN Charter to the Council's attention. Article 32 of the Charter provides states parties to a dispute under consideration of the Council which are not members of the Council or the United Nations with the right to participate in Council deliberations related to the dispute.[649] The participation rights of non-Council members invited according to rule 37 or art 32 UN Charter involve the right to submit proposals and draft resolutions which can be put to a vote at the request of a Council member but do not extend to a right to vote on draft Council decisions.[650]

In the majority of cases, the Council has granted the right to participate when receiving requests from states.[651] The question nevertheless surfaced whether art 31 UN Charter provides a right to participate once it has been established that a state is 'specially affected' or whether the participation is entirely subject to the Council's discretion.[652] Particularly in the context of Council legislation which directly affects the entire community of states, it has been argued that states should enjoy a right of participation and to the holding of public or private meetings.[653] The recognition of a right to participation based on art 31, however, seems to depend on the Council's fact-based assessment of whether a state is specially affected, thereby leaving the exercise of the right at the Council's discretion.[654] The provision's reach is further limited by the fact that art 31 is considered to only apply to formal Council meetings and the frequent recourse of the Council to informal meeting formats.[655]

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[648] Sievers and Daws (n 496) 59 f.

[649] Dolzer and Kreuter-Kirchhof (n 621) para 7.

[650] Rules of Procedure Security Council (n 404) r 38. Arts 31 and 32 UN Charter explicitly hold that participation in discussions shall occur 'without vote'.

[651] Dolzer and Kreuter-Kirchhof (n 621) para 19.

[652] It seems less of a debate that art 32 UN Charter establishes a right to participate for states, parties to a dispute.

[653] Talmon, 'The Security Council as World Legislature' (n 482) 187; *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-based International System* (n 16) para 35.

[654] Dolzer and Kreuter-Kirchhof (n 621) para 24.

[655] ibid para 35.

The Council's own efforts to address the perceived deficiencies of its working methods and procedures started in 1994 following a French initiative and continue to the present day.[656] In the 2005 World Summit Outcome Document, the General Assembly endorsed a more representative and transparent Council in order to enhance, ia, the legitimacy of its decisions and recommended the increased involvement of non-Council member states in the work of the Council to enhance its accountability to the UN membership and the transparency of its work.[657] These suggestions attest to longstanding calls from non-Council- and elected Council member states to increase the inclusiveness and representativeness of the Council which – among others – resulted in the creation of the Security Council Informal Working Group on Documentation and Other Procedural Questions in June 1993 under whose auspices several presidential notes were published with the aim of improving the Council's working methods.[658]

The most central pieces of self-imposed reform were included in presidential notes S/2006/507 and S/2010/507, which consolidated a multitude of previous notes on Council working methods.[659] Hereby, the Council expressed its commitment to hold more open meetings, particularly at the early stages of its consideration of a matter.[660] Essential for the present context, the Council also organised several open debates on the promotion and strengthening of the rule of law in the maintenance of international peace and security, thus providing a platform for UN member states to deliberate on the content and function of the rule of law.[661]

To improve its access to first-hand experience and expertise when drafting responses to situations on its agenda, the Council further set out to consult and cooperate more closely and directly with regional and subregional organisations, troop- and police-contributing countries as well as member states parties to a conflict or other interested and affected parties.[662]

656 Sievers and Daws (n 496) 15.

657 UNGA, 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 [153f].

658 Most of the Council's work to improve its working methods has been published in the form of presidential notes under the auspices of the Informal Working Group on Documentation and Other Procedural Questions. See ‹http://www.un.org/en/sc/about/methods/introduction.shtml› accessed 14 July 2017.

659 UNSC Note by the President 507 (2006) UN Doc S/2006/507 and UNSC Note by the President 507 (2010) UN Doc S/2010/507; ‹http://www.un.org/en/sc/about/methods/introduction.shtml› accessed 14 July 2017.

660 UNSC Note by the President 507 (2010) UN Doc S/2010/507 [28].

661 See n 4.

662 UNSC Res 1353 (13 June 2001) UN Doc S/RES/1353/2001; UNSC Note by the President 56 (2002) UN Doc S/2002/56; UNSC Presidential Statement 24 (2009) UN Doc S/PRST/2009/24; UNSC Presidential Statement 1 (2010) UN Doc S/PRST/2010/1;

The Council also expressed its intention to informally consult with the broader UN membership when drafting, eg, resolutions, presidential- or press statements and to seek the views of non-Council members particularly interested or concerned.[663] Additional measures envisaged by the Council include the organisation of informal exchanges of views with the wider UN membership when preparing the draft introduction to the Council's annual report, the hearing of the broader membership on the working methods of the Council, including in open debates on the implementation of presidential note S/2010/507, or improving the communication between the Council and the General Assembly as a body representative of the entire UN membership.[664] Additionally, non-Council member states can coalise with members on the Council, an example being the traditionally close political ties between the US and Israel, create groups of friends of states, regional groups or groups of like-minded states that influence Council deliberations through their members temporarily sitting on the Council or through the lobbying of the Council by coordinated proposals on specific subject-matters.[665]

Particularly in the context of legislative resolutions, the Council has made an effort to address concerns regarding the involvement of non-Council members in order to enhance the legitimacy of its decisions, thereby improving the representativeness of the process of their creation. With regard to resolution 1373 (2001) on measures to counter the financing of terrorism, several operative paragraphs were based on provisions of the already existing International Convention for the Suppression of the Financing of Terrorism as well as on

UNSC Note by the President 507 (2010) UN Doc S/2010/507 [32, 33; 59]; UNSC Presidential Statement 12 (2013) UN Doc S/PRST/2013/12; UNSC Note by the President 515 (2013) UN Doc S/2013/515 [2 (f) (g)]; UNSC Note by the President 630 (2013) UN Doc S/2013/630 (on consultations with TCC and PCC).

663 UNSC Note by the President 507 (2010) UN Doc S/2010/507 [43] (it specifically referred to interested member states, including countries directly involved or specifically affected, neighbouring states, countries with particular contributions to make, regional organisations and Groups of Friends); also see UNSC Note by the President 268 (2014) UN Doc S/2014/268 for a reiteration and UNSC Note by the President 402 (2012) UN Doc S/2012/402 [10] (holding that the 'members of the Security Council will consider ways and means of further enhancing interaction with and seeking the views of non-Council members, particularly the interested or concerned States, on issues on its agenda').

664 UNSC Note by the President 507 (2010) UN Doc S/2010/507 [60]; UNSC Note by the President 922 (2012) UN Doc S/2012/922 [9]; UNSC Note by the President 515 (2013) UN Doc S/2013/515 [2 (h)].

665 Wolfram (n 559) 166–179. On the theoretically considerable impact of informal groups of states on the deliberations and decision-making of the Council, see Jochen Prantl, *The UN Security Council and Informal Groups of States* (OUP 2006).

General Assembly resolutions, which had either enjoyed unanimity or garnered majority support among UN member states.[666] The Convention, however, had neither entered into force, nor had the majority of states to whom the resolution applied signed or ratified the treaty.[667] As a response to legitimacy concerns in connection with resolution 1373 (2001), the Council arranged for more inclusive deliberations, involving open debates, when drafting resolutions 1422 (2002) and 1487 (2003) on the exemption from ICC investigation and prosecution of peacekeeping personnel from member states not parties to the Rome Statute.[668] In the case of resolution 1540 (2004) on the proliferation of weapons of mass destruction to non-state actors, broad consultations with UN member states were held in order to legitimise the Council enacting norms of a general-abstract character on an issue with regard to which member states had not managed to arrive at an agreement in international treaties and filling gaps of the existing non-proliferation treaty regime.[669] Negotiations leading to the adoption of the resolution were 'intentionally porous' and non-Council members, NGOs and the media were allowed to follow Council deliberations and provide input.[670]

Resolutions 1373 (2001) and 1540 (2004), albeit criticised for their legislative character, were considered as more or less legitimate in light of the fact that the majority of member states were in agreement regarding the necessity of the enacted provisions.[671] The overall approval of the legislative resolutions by the UN membership has to be considered as an essential element contributing to the legality of Council law-making in addition to its potential support by the text of the Charter.[672]

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666 Szasz (n 505) 902f; Martinez (n 469) 335.

667 International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197. See Szasz (n 505) 903 (observing that when resolution 1373 was adopted, only four states had ratified and only forty-six states signed the Convention).

668 Talmon, 'The Security Council as World Legislature' (n 482) 188; Johnstone, 'Legislation and Adjudication in the UN Security Council' (n 474) 292; Martinez (n 469) 353.

669 Johnstone, 'Legislation and Adjudication in the UN Security Council' (n 474) 292f (noting that even 'changes were made in the draft as a result of the broad consultations'); Masahiko Asada, 'Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation' (2009) 13 *J. Conflict & Sec. L.* 303, 315.

670 Merav Datan, 'Security Council Resolution 1540: WMD And Non-State Trafficking' (28 May 2004) ‹http://www.acronym.org.uk/old/dd/dd79/79md.htm› accessed 14 July 2017.

671 Martinez (n 469) 350 f.

672 ibid 335 (qualifying the unanimous decisions adopting resolutions 1373 (2001) and 1540 (2004) and 'the general support for them shown by the General Assembly' as subsequent

The holding of open debates before adopting resolutions during which affected states can share their concerns with the Council and attempts to achieve their unanimous adoption, are conducive but not sufficient ways to address the body's lacking inclusiveness.[673]

The illustrated efforts, however, have led to the general assessment that the Council has developed a more open and transparent relationship with non-Council members and other actors relevant for fulfilling its primary responsibility of maintaining international peace and security such as TCC and PCC, the wider UN membership, other UN organs such as ECOSOC, UNGA and the Secretariat, NGOs and civil society.[674]

3. Transparency to enhance Representativeness

A Charter-based tool aiming at a certain degree of transparency of the Council's work are its annual reports to the General Assembly based on arts 15 (1) and 24 (3) of the UN Charter.[675] Unfortunately, these reports have so far been of only limited analytical value due to their 'largely descriptive approach' and do not amount to 'a meaningful and substantive exchange of views between the Security Council and the General Assembly'.[676]

The Council, however, also enacted several informal measures in order to increase the transparency of its work and thereby enhance its accountability to non-Council members as a crucial element of its representativeness. To mitigate the confidential nature of informal consultations of the whole, Council members have agreed that the president provides member states with substantive and detailed briefings shortly after the holding of such meetings.[677] Council members also encouraged the president to hold informal briefings on the programme of work after its adoption open to all UN member states.[678] In addition, Council members agreed to:

practice according to art 31 (3) (b) VCLT with regard to art 41 UN Charter in the sense of an approval of its interpretation as a legal basis for Council law-making).

673 Peters, 'Security Council Resolution 2178 (2014)' (n 481) (discussing the 'deficits of inclusiveness and transparency' of Council resolutions as a possible obstacle to their direct effect but holding in this context 'that res. 2178 was adopted unanimously and was acclaimed by 50 states taking the floor at the summit, but still the procedure of deliberation and adoption could and should be improved').

674 Hulton (n 164) 241–244; Johnstone, 'The Security Council as Legislature' (n 511) 88f; Dolzer and Kreuter-Kirchhof (n 621) para 34.

675 Tzanakopoulos, 'Transparency in the Security Council' (n 622) 368.

676 Mahbubani (n 552) 264; Security Council Working Methods: A Tale of Two Councils (n 594) 10.

677 UNSC Note by the President 507 (2010) UN Doc S/2010/507 [3].

678 ibid para 4.

> [C]onsider making draft resolutions and presidential statements as well as other draft documents available as appropriate to non-members of the Council as soon as such documents are introduced within informal consultations of the whole, or earlier, if so authorized by the authors of the draft document.[679]

The rather soft language, however, is to be noted, as the Council only 'agrees to consider'. These measures are further contrasted by clear attempts of the Council to remain fully in charge of what reaches the public and what remains confidential, exemplified, eg, by proposals to limit the number of representatives of the UN Secretariat and UN agencies present at informal consultations.[680]

D. Conclusion

As argued above, the question whether Council documents may reflect an emerging or already existent consensus among UN member states with regard to the function and content of the rule of law depends on the body's representativeness of the wider UN membership and thus, ia, on its composition as well as the inclusiveness and transparency of its deliberations and decision-making process. Due to the body's restricted membership, the only chances UN member states have to affect Council deliberations and decisions by way of its composition are either their active election as non-permanent Council members or – more mediated – their passive election of other member states to sit on the Council. The political dynamics of Council elections which depend, ia, on the financial and diplomatic capabilities of the candidates, however, curtail the potential of the annual event to result in the representation of all UN member states, a factor further exacerbated by the considerable membership of the organisation and the thus great pool of potential candidates.

Even more decisive seems the fact that the permanent Council members – and the P3 in particular – exert great influence on the selection of agenda items and the concrete design of Council measures, often bypassing elected member states in this process. Such developments have been deplored by elected and non-Council member states in response to which the Council resolved to involve elected Council members more intensively in the initiation and drafting process of Council documents.

Another criterion of the body's representativeness relates to its willingness to take into account the interests and demands of non-Council members as well as to its accountability to the wider UN membership. The Council has made use

679 ibid para 44.

680 UNSC Note by the President 749 (2007) UN Doc S/2007/749 [2].

of the Charter-based mechanisms to involve non-Council members and adapted its working methods to allow for more inclusive deliberations, eg through open debates or consultations with troop- and police-contributing countries or states affected by a conflict. Its accountability to non-Council members was also enhanced by increasing the transparency of its work, eg by providing briefings after informal Council meetings.

The Council's efforts to address concerns with regard to its representativeness must be taken seriously and have certainly at times enhanced its perceived legitimacy as exemplified by its adapted procedure to adopt legislative resolutions. However, due to its limited composition, the politicised elections to its non-permanent seats, the far reaching powers of its permanent members and the insufficient inclusivity and transparency of its deliberations, its representativeness of non-Council members does not seem substantial enough for a convincing claim that the content of its resolutions – at least potentially – reflects the views of the wider UN membership. Of course, the Council must be and is concerned about its legitimacy as far as it affects the effective implementation of its decisions and as Ian Johnstone asserted, Council 'debates in private are animated by arguments that will be used later to justify positions in public', which might result in Council endeavours to ensure a certain degree of acceptability of the content of its decisions even if for instrumental reasons.[681] Its documents will, thus, usually try to reflect positions that are acceptable to the majority of UN member states.[682] Also, the body's member states are deeply involved in the broader international discourse on law and politics and thus influenced by notions, interests and positions reflected in it.[683] In this context, Cora True-Frost rightly observed that Council positions may be influenced to accept certain norms 'by social pressure from the community of other IOs' or by other member states' acceptance of that norm rather than because the members themselves have internalized the norm'.[684] It can, thus, be assumed that 'the degree to which states and international organizations make reference to (…) emerging legal norms when making decisions and articulating policies' is one factor in identifying the evolution of consensus on certain issues in international law.[685] These sources of impact, however, seem too fleeting and uncertain to allow for the conclusion that the

681 Johnstone, 'Security Council Deliberations' (n 24) 463.

682 See Månsson (n 11) 91 (who even assumes that Council 'resolutions are reflective of a general consensus at the international level as to the current status of international human rights law').

683 cf Andreopoulos (n 462) 112.

684 True-Frost (n 20) 122.

685 Cronin (n 473) 68.

Council's references to the rule of law reflect an emerging or already existing consensus about the concept among the international community of states or the broader international society.

IV. The Role of the Security Council as an International Actor Contributing to the Emergence of a Global Concept of the Rule of Law

As has been illustrated, the Council's composition, its deliberations and decision-making processes are not sufficiently representative of the wider UN membership to infer that the content of Council documents and the terms and concepts they contain may reflect an emerging or already existing consensus among UN member states regarding the function and content of the rule of law. When investigating the implications of Council references to the rule of law, the focus must thus rather be on whether Council documents may initiate, affect or steer the emergence of a global understanding of the function and content of the rule of law.

From a legal perspective, legally binding rule of law standards that are regularly implemented in states by subsidiary bodies of the Council, ie peacekeeping operations or political missions, are most relevant with regard to a potential diffusion of a Council understanding of the rule of law. Such measures directly shape the legal and factual situation of the countries concerned by way of coercive imposition.[686] Consent-based rule of law reforms by the Council in states subject to UN peacekeeping or peacebuilding programmes may be equally coercive if the consenting country heavily depends on outside support and consequently considers itself forced to accept the programme designed by the Council and its implementing actors.[687] Such rule of law measures oblige states or UN peace operations to implement rule of law reform as foreseen by the Council and thus have a high potential of affecting the addressed state's future rule of law understanding. In political terms, the Council's use of its enforcement powers can be described as coercion 'whereby (. . .) institutions influence the behavior of other states by escalating the benefits of conformity or the costs of nonconformity through material rewards and punishments'.[688]

686 Von Bogdandy, Dann and Goldmann (n 147) 11. See also, Katharina Holzinger and Christoph Knill, 'Causes and Conditions of Cross-National Policy Convergence' (2005) 12 *J. Eur. Pub. Pol'y* 775, 781 (who observe that 'supranational institutions often play an important role in coercive policy transfer').

687 Von Bogdandy, Dann and Goldmann (n 147) 12–13.

688 The sustainability of such rule of law measures in the affected countries, ie whether they are capable of affecting long-term changes in their legal-political structure, depends on

It is, however, not only coercive rule of law measures in Council documents that may affect the emergence of a global understanding of the rule of law.[689] A social-constructivist analysis allows inquiring into the process of ideation that may be initiated by Council documents and to what extent and for what actors they may construe the meaning of the rule of law. It allows considering the influence of ideas on state behaviour and world politics rather than exclusively focusing on the impact of material capabilities and costs.[690] Social constructivism assumes that state interests and behaviour are also shaped by meaning, norms, ideas and social values and that 'states are socialized to want certain things by the international society in which they and the people in them live'.[691] From this angle it does not matter much whether rule of law standards espoused in Council resolutions are binding or non-binding, whether they require implementation or not and by whom. Even if non-binding and not enforced coercively, they may still contribute to the emergence of the rule of law as an international norm understood as a collective expectation for the proper behaviour of states and thus ultimately affect how states construe their identity and interests.[692]

Importantly, when dealing with the influence of the Council – an organ of an international organisation – on state behaviour, a social constructivist analysis views international organisations as independent agents in the global distribution of ideas.[693] They are not considered mere instruments of states to pursue their interests more effectively but as so-called 'agents of change'

the 'domestic structure of the target state, that is, the nature of its political institutions, state-society relations, and the values and norms embedded in its political culture'. See, Thomas Risse-Kappen, 'Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War' (1994) 48 *IO* 185, 187. See also Goodman and Jinks (n 48) 633 (who observe that 'coercion does not necessarily involve any change in the target actor's underlying preferences').

689 True-Frost (n 20) 178–181 (on the fact that 'coercive force and material rewards are not the sole mechanisms that may be used to effectively diffuse norms' and on the utility of non-coercive soft law for norm diffusion).

690 Wendt, *Social Theory of International Politics* (n 33) ch 3. The present thesis focuses on states as the traditional addressees of Council resolutions. The realm of agents that might be involved in and influenced by an ideational process regarding the meaning of the rule of law stimulated by Council documents, however, may encompass other agents of the international society that interact with the Council.

691 Finnemore (n 41) 2 f.

692 For this definition of norms, see Katzenstein (n 54) 5. See also Risse, '"Let's Argue!"' (n 33) 5 ('Socially shared ideas—be it norms ("collective expectations about proper behavior for a given identity") or social knowledge about cause-and-effect relationships —not only regulate behavior but also constitute the identity of actors.').

693 David Dolowitz and David Marsh, 'Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making' (2000) 13 *Governance* 5, 11.

capable of shaping the interests and identities of states and other actors of the international society.[694] International organisations or their organs can even figure as so-called norm entrepreneurs – agents with 'strong notions about appropriate or desirable behaviour in their community'.[695] To be successful, norm entrepreneurs at the international level require an organisational platform.[696] The UN and also the Security Council as an institution qualify as such organisational platforms. Due to the Council's pivotal function – which is reflected in its mandate, powers and composition –, it enjoys considerable authority in defining how concepts such as 'peace' and 'security' are understood in the international society and in identifying the basic requirements for their maintenance.[697] The fact that the Council has invoked the concept of the rule of law for more than twenty years now suggests the existence of an at least tentative intersubjective understanding among Council members (certainly the P5) of the concept's function and maybe even content in the context of peace and security maintenance.[698] They are, thus, accurately described as an interpretive community whose members 'collectively are continuously engaged in construing the UN Charter on issues of security' and in this context attribute meaning to the principle of the rule of law.[699]

If the Council persistently portrays the rule of law as a means to achieve and maintain state stability and as a prerequisite of international peace and security, it may contribute to the creation of a collective understanding among states and other agents of the international society about the function of the rule of law and maybe even – more specifically – about how the rule of law must be conceptualised to fulfil this particular function. Council documents articulating rule of law standards could thus contribute to the emergence of the rule of law as

694 Finnemore (n 41) 12f, 22; Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004) 7, 11.

695 Finnemore and Sikkink (n 24) 896. For an (incomplete) overview of literature on international organisations as norm diffusers, see Susan Park, 'Theorizing Norm Diffusion Within International Organizations' (2006) 43 *In'l Pol*. 342–344. On the Security Council as a norm promoter, see True-Frost (n 20) 176 f.

696 Finnemore and Sikkink (n 24) 899 f.

697 Barnett and Finnemore (n 694) 32 (on how international organisations 'can fix meanings in ways that orient action and establish boundaries for acceptable action'). See also, Michael Barnett, 'The New United Nations Politics of Peace: From Juridical Sovereignty to Empirical Sovereignty' (1995) 1 *Global Governance* 79, 90 f.

698 Johnstone, 'Security Council Deliberations' (n 24) 460 (who claims that the P5 'have learned about each other from working together and have developed shared understandings').

699 Schachter (n 489) 269.

an international norm that redefines how states conceive their own identities and interests.[700]

Consequently, all Council documents which contribute to an evolving understanding of what the Council may mean when referring to the rule of law, are relevant from a social-constructivist perspective – not only those that have legal consequences due to their legal bindingness.

Norm research has proposed several criteria that determine the potential influence of norms.[701] They relate to their intrinsic formal and substantive qualities. Drawing loosely on such norm research it is suggested here that the odds of the Council to affect the emergence of a global understanding of the function and content of the rule of law depend on the precision of its language, the consistency of its reactions (ie invocations of particular rule of law guarantees in response to comparable situations) and the legitimacy of the institutions and procedures it relates to the rule of law.[702] These requirements

[700] Finnemore and Sikkink (n 24) 902.

[701] ibid 906.

[702] The following claims have been developed primarily with respect to the preconditions of compliance with international norms (originating in international treaty- or customary law) that are legally binding. This thesis proceeds based on the assumption that they apply equally to the emergence of norms that are not legally binding and draws loosely on Jeffrey Legro, 'Which Norms Matter? Revisiting the "Failure" of Internationalism' (1997) 51 *IO* 31, 34 (identifying 'specificity' as one feature of norm robustness which 'refers to how well the guidelines for restraint and use are defined and understood'); Franck, *Fairness in International Law and Institutions* (n 518) 30f (identifying determinacy of international rules as one condition of their legitimacy and ensuing compliance and observing that '[r]ules which have a readily accessible meaning and which say what they expect of those who are addressed are more likely to have a real impact on conduct.'. Franck further considers coherence of rules a crucial determinant of their legitimacy and the related compliance-pull which involves, ia, consistency, which requires 'that a rule, whatever its content, be applied uniformly in every "similar" or "applicable" instance'). See, ibid 38; Abram Chayes and Antonia Handler Chayes, 'On Compliance' (1993) 47 *IO* 175, 188 (identifying, ia, ambiguity and indeterminacy of treaty language as circumstances lying 'at the root of behavior that may seem prima facie to violate treaty requirements'); Friedrich Kratochwil, *Rules, Norms, and Decisions* (CUP 1989) 78–81 (who invokes the concept of *norm explicitness* as a related concept to precision as a determinant of norm emergence and considers explicit formulation necessary 'in cases in which the interacting parties do not share in a common history or culture' and in light of the 'imprecision of tacit rules'). See also Friedrich Kratochwil, 'How Do Norms Matter?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 35, 57 (for an approval of Franck's proposed requirements for a compliance-pull of international norms). Onuf investigates which speech acts have the potential of producing rules but unfortunately does not examine what role specificity, determinacy or

determine the potential of Council documents to diffuse an understanding of the concept's meaning.

If Council references to the rule of law, its function and content are vague or inconsistent, they are unlikely to affect an influential process of ideation in the international society as regards the meaning of the rule of law. This means concretely that the more precisely the Council frames its language when invoking the rule of law and its sub-guarantees, the clearer it becomes why the rule of law is implied and what is required for the rule of law to be fulfilled. Clarity of Council invocations of the rule of law further requires consistency of its reactions, ie that the Council consistently refers to the rule of law and sub-guarantees of it in reaction to similar circumstances. Both the precision of Council language when describing the function or content of the rule of law and the consistent use of references to it affect the intelligibility of Council action and are thus crucial prerequisites for a potential impact of Council resolutions on a meaningful process of ideation in the international society with regard to the meaning of the rule of law and its related emergence as an international norm that (re-)defines state identities and interests.

Another crucial element determining the potential of Council references to the rule of law or its sub-guarantees to contribute to the emergence of an international norm is their perceived legitimacy in the international society.[703] Franck suggested that the perceived legitimacy of rules depends, ia, on their procedural fairness, ie 'the extent to which the rules are made and applied in accordance with what the participants perceive as right process' which relates, ia, to the question whether the rules were 'made by those duly authorized'.[704] The present thesis proposes that in lieu of substantial involvement of states in Council deliberations on the meaning of the rule of law, Council rule of law standards are most likely perceived legitimate if they relate directly to guarantees established in regional or international human rights treaties, in whose elaboration a multitude of states were directly involved.[705] Drawing on

precision of language play in the determination of rule-candidates among speech acts. See, Onuf (n 36) 78–95.

703 Bianchi (n 462) 887 (holding that 'the ultimate test of the legitimacy of the SC's action remains the level of acceptance of its practice by the UN Member States').

704 Franck, *Fairness in International Law and Institutions* (n 518) 7 (focusing, however, on rules of treaty- and customary international law).

705 For a similar argument see Cronin (n 473) 58 ('As the main decision-making body within the world's only universal-membership organization, the Security Council has developed the authority to interpret and implement consensus-based international law. Thus, so long as the Council acts on the basis of generally accepted legal norms, the expansion of the Council's legal authority has been accepted as legitimate, even though there was no formal process of achieving state consent').

regional and international human rights law does not only contribute to the legitimacy of rule of law standards advanced by the Council with regard to procedural fairness but also on a substantive level with regard to their content. Finnemore and Sikkink observe that 'norm entrepreneurs must speak to aspects of belief systems or life worlds that transcend a specific cultural or political context' and thus invoke the need for norms to be universal in order to be influential – a requirement that can be approached by basing rule of law standards on regional and international human rights law.[706] The legitimacy of Council-promoted rule of law standards drawing on regional and international human rights law is further enhanced by the fact that such an approach would be in line with the purpose of the United Nations to promote and encourage respect for human rights according to art 1 (3) as well as with art 55 (c) UN Charter.[707] Further, an interpretation of Council resolutions in line with – at least international – human rights law reflects the rule of interpretation that Council resolutions should be read to contribute to the realisation of the purposes and principles of the United Nations.

[706] Finnemore and Sikkink (n 24) 907. The present thesis understands universality both formally and substantively. Formally, universality relates to the validity and bindingness of international law for all states. Substantively, it relates to substantive international rights or obligations that are binding for all states. See André Nollkaemper, 'Universality' (MPEPIL 2011) paras 2, 5. On contestations concerning the universality of regional and international human rights law, see Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP 2016) 35–40. See also, Philip Alston and Ryan Goodman, *International Human Rights* (OUP 2013) 532 (who observe that '[o]n their face, human rights instruments (which in their treaty form mean to impose legal obligations, to convert moral rules into legal rules) are surely on the "universalist" side of this debate' in their discussion of universalist and cultural-relativist approaches to the question as to whether universalism is possible and normatively desirable). China, a member of the P5, has traditionally been sceptical of the imposition of international human rights standards. If, however, state consent had been guaranteed, China has not been opposed to the promotion of international human rights standards via specific country mandates such as, eg, UN Special Rapporteurs. See, Chan (n 330) 130.

[707] On the success of UN statebuilding that draws on existing international human rights norms see, eg, Susan Woodward, *The Ideology of Failed States: Why Intervention Fails* (CUP 2017) 54.

Part 3 – The Council Conceptualisation of the Rule of Law

I. Methodological Questions

A. Selection of Relevant Council Resolutions

The selection of documents based on which the present thesis assesses the function ascribed to the rule of law in Council resolutions and analyses aspects of the content of a possible Council rule of law understanding, follows a text-based search of all Council resolutions for resolutions that explicitly contain the phrase 'rule of law'.[708] The focus on decisions explicitly referring to the rule of law is chosen to ensure that only those documents are analysed which relate to situations in which the Council evidently considered the principle implied and relevant. Since the rule of law does not have a functional equivalent or common synonym, it did not seem useful to search for alternative terms.

While the Council may act in the format of resolutions, presidential statements, letters and notes by the president or statements to the press, the thesis focuses on resolutions due to their legal and political relevance. Resolutions are the Council's preferred instrument to act.[709] It has been its practice to revert to resolutions when intending to enact legally binding decisions or to attribute sufficient political weight to an issue on its agenda.[710] This text-based selection of Council resolutions has resulted in a focus on Council resolutions issued between the late 1990s and today as the Council started to invoke the rule of law repeatedly only after 1996.[711]

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708 For this purpose, the thesis made use of the UN Official Document System search mask ‹https://documents.un.org/prod/ods.nsf/xpSearchResultsE.xsp›. It encompasses Council resolutions issued until and including 24 June 2017.

709 Wood, 'Security Council' (n 569) para 13.

710 Sievers and Daws (n 496) 376–378, 402.

711 After the first invocation of the rule of law in a resolution on the situation in the Congo in 1961, ie UNSC Res 161 (21 February 1961) UN Doc S/4741 [section B, preamble, indent 2], the Council invoked the rule of law again with regard to the situation in Burundi more than 30 years later. See, UNSC Res 1040 (29 January 1996) UN Doc S/RES/1040 [2].

B. Interpretation of Council Resolutions

The ICJ held that 'the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance' for the interpretation of Council resolutions. It substantiated this statement, observing that 'differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account'.[712] The court did not, however, identify these factors. It only referred to 'statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions' as sources supporting the interpretation of Council resolutions.[713] In its earlier Namibia advisory opinion, the Council had identified the sources of interpretation that should be consulted to determine the bindingness of provisions in Council resolutions. It referred to 'the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council' and highlighted the centrality of Council language for interpretation, cautioning that '[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect'.[714]

The interpretation tools enumerated by the court do not conflict with the interpretation rules of the VCLT, nor do they really expand them. To the extent that the ICJ did not identify alternative factors that need to be considered when interpreting Council resolutions, the present analysis interprets Council resolutions in good faith in accordance with the ordinary meaning to be given to the terms of the resolution in their context and in the light of its object and purpose.[715]

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712 *Accordance with International Law* (n 573) [442, para 94]. For positions in favour of an analogy between treaties and resolutions with regard to their interpretation see, eg, Frowein, 'Unilateral Interpretation of Security Council Resolutions' (n 22) 99; Talmon, 'The Security Council as World Legislature' (n 482) 190; Orakhelashvili, *Collective Security* (n 483) 42; Peters, 'Article 25' (n 493) para 26. For a position against such an analogous application, see, eg, Efthymios Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis' (2007) 56 *Int'l & Comp. L.Q.* 83, 94.

713 *Accordance with International Law* (n 573) [442, para 94].

714 *Legal Consequences* (n 454) [114].

715 art 31 (1) VCLT. See also Orakhelashvili, *Collective Security* (n 483) 40 (who observes that '[a]lthough not formally applicable to resolutions, Article 31 and 32 of the

Focusing on the ordinary meaning of the terms when interpreting resolutions does justice to the circumstance that Council members should not be expected to consent to resolutions containing language that could be interpreted against their political will and thus increases the likeliness of an adequate interpretation.[716] The subjective views or intentions of Council members which do not emerge clearly from the terms of a resolution or its object and purpose, are generally considered irrelevant in the present analysis.[717] This relates to the fact that the positions of individual Council members cannot be considered as representing the view of the Council as a body and takes into account that Council decisions are often binding on states, which were not involved in the drafting process of the resolution as opposed to international treaties.[718] For the latter reason, Frowein suggested that the interpretation of resolutions should be guided by the objective view of a neutral observer.[719] Ultimately, however, the Council or any body it has authorised to do so, enjoy the right of authentic interpretation of its documents, as 'it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it'.[720] While there are multiple actors

Convention constitute customary law on interpretation which, given that there is no alterative set of interpretative rules, must be deemed to apply to resolutions').

716 It is, of course, also possible that Council members deliberately decide to use vague wording in resolutions in order to allow for consensus and the adoption of a text. In general, however, Council members will carefully draft the language of Council documents so as to avoid political or legal consequences they do not approve of. See, eg, Wood, 'The Interpretation of Security Council Resolutions' (n 480) 82; Månsson (n 11) 99; Wolfram (n 559) 156; Security Council Action under Chapter VII: Myths and Realities (n 491) 6 (speaking of 'constructive ambiguity'). With regard to resolutions that are intended by Council members to allow for different interpretations, see Michael Byers 'Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity' (2004) 10 *Global Governance* 165, 170–173.

717 *Accordance with International Law* (n 573) [442, para 94] ('Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body.').

718 *Accordance with International Law* (n 573) [442, para 94] ('Security Council resolutions can be binding on all Member States (. . .), irrespective of whether they played any part in their formulation'). See also Frowein, 'Unilateral Interpretation of Security Council Resolutions' (n 22) 99; Peters, 'Article 25' (n 493) para 26 (who, however, puts the alleged differences between international treaties and Council resolutions into perspective).

719 Frowein, 'Unilateral Interpretation of Security Council Resolutions' (n 22) 99.

720 PCIJ, *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)* (Advisory Opinion of 6 December 1923) PCIJ Series B no 8 [80]. See also, *Certain Expenses* (n 457) [168] (holding that every UN organ is the ultimate arbiter of its own

involved in the interpretation of Council resolutions such as, eg, the Secretariat, the ICJ or UN member states, the Council is not bound by their interpretation.[721] Their interpretive acts can be taken into account, however, when analysing Council decisions as long as the Council has not objected to or clearly disregarded them in subsequent acts.

The present thesis reverts primarily to a comparative study of Council resolutions on the same or a similar agenda item as well as to Secretary-General reports as sources of interpretation of Council resolutions. This selection reflects the circumstance that most crucial Council negotiations leading to the adoption of a resolution take place informally behind closed doors and the absence of 'an institutional memory of the proceedings of the informal consultations'.[722] It is, thus, rarely possible to construe the meaning of a resolution with reference to Council negotiations that preceded its issuance.

Secretary-General reports are an important source of background information to the extent that Council resolutions are often based on them, include parts of them or expressly commission the Secretary-General to implement particular measures on the ground and report back on the situation that has triggered the issuance of a resolution and on the implementation of Council decisions.[723] These reports do, thus, provide insights as to the circumstances that have initiated Council action and shed light on the implementation of Council resolutions. The thesis thereby remains aware of the fact that conclusions drawn from Secretary-General reports for the interpretation of Council resolutions are never absolutely conclusive and that subsequent Council resolutions contradicting an interpretation based on such sources would prevail.[724]

An additional reference point for the interpretation of Council resolutions are the legal limitations that apply to the Council's actions. This includes general international law at least in those cases in which the Council has

jurisdiction in light of the fact that 'proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted').

721 Papastavridis (n 712) 90 f.

722 Mahbubani (n 552) 260; Talmon, 'The Security Council as World Legislature' (n 482) 190.

723 Wood, 'The Interpretation of Security Council Resolutions' (n 480) 80; Eitel (n 491) 57f; Orakhelashvili, *Collective Security* (n 483) 40 ('the difficulty of obtaining the Council's authoritative interpretation arguably means that in practice the Secretary-General will assert an authoritative interpretation of his delegated powers without that being subject to agreement with member States'); Sievers and Daws (n 496) 436.

724 Papastavridis (n 712) 91; Orakhelashvili, *Collective Security* (n 483) 39; Krisch, 'The General Framework' (n 10) para 55.

not expressly indicated an opposite intention.[725] A particularly important benchmark are further the purposes and principles of the United Nations. All Council resolutions must, thus, be interpreted to aspire to realise the maintenance of international peace and security, respect for the principle of self-determination and for human rights- and humanitarian law.[726]

C. Identification of Circumstances triggering Rule of Law References and their Purposes in Council Resolutions

Part 3, chapter II of the present thesis consists of a qualitative analysis of the selected Council resolutions in order to determine the circumstances triggering rule of law references by the Council which shall shed light on the purposes the Council seems to be pursuing when invoking the rule of law. This chapter serves a contextualisation of the Council's engagement with the rule of law. Council resolutions are predominantly issued to facilitate the pacific settlement of disputes or to address a threat to or breach of the peace.[727] The Council usually describes the concrete nature of such disputes, threats or breaches and the necessary measures to address them in its resolutions. Based on a comparative text-based analysis of all relevant Council resolutions, the study identifies the concrete nature of the disputes, threats or breaches of the peace that have triggered a reference to the rule of law and determines whether the rule of law is invoked as a measure to address these threats and disputes. This analysis will further be informed by pertinent reports of the UN Secretary-General, which are often a source of wording for Council decisions and provide background information on the situations that have prompted the Council to enact a decision.[728]

D. Identification of Rule of Law Requirements for National Judiciaries

Part 3, chapter III of the present thesis deals with the identification of sub-guarantees, which the Council associates, with the rule of law. For this purpose, the thesis focuses on rule of law requirements for national judiciaries as referred

[725] See, part 2 ch II C. 3.

[726] Krisch, 'The General Framework' (n 10) para 57.

[727] See ch VI UN Charter on the Pacific Settlement of Disputes and ch VII UN Charter on Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression.

[728] For the impact of the Secretary-General on the content of SC decisions see, Rules of Procedure Security Council (n 404) r 39. See also Eitel (n 491) 58.

to in Council resolutions. As the present thesis examines rule of law requirements for national judiciaries, it does not consider the statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, which were adopted by the Council in the resolutions establishing the two courts.[729] Even though these statutes feature several fair trial guarantees and thus rule of law requirements pertaining to the judiciary, they bind international bodies and are thus considered less influential with regard to the question of whether the Council's rule of law requirements for judiciaries may affect how states conceive the rule of law nationally.[730]

This part of the thesis applies the legal methodology of text-based analysis, focusing on those resolutions that explicitly refer to the rule of law and analysing their wording to ascertain which rule of law requirements the Council imposes on national judiciaries. Occasionally, the thesis also considers resolutions that do not explicitly invoke the rule of law but that use terms or language that the Council clearly related to the principle in other resolutions. The Council, eg, consistently portrayed the independence of the judiciary as an element of the rule of law starting with resolution 1493 (2003) on the situation in the Democratic Republic of the Congo.[731] In advance to the issuance of the said resolution, however, the Council invoked the principle of judicial independence in three preceding resolutions, which did not relate the principle to the rule of law.[732] Such resolutions are also included in the present analysis if they invoke principles that the Council clearly and repeatedly portrayed as elements of the rule of law in other resolutions. The identification of rule of law institutions and procedures in Council resolutions is further backed up by the foundational chapter on the concept of the rule of law as well as by reports of the UN Secretary-General.

729 UNSC Res 827 (25 May 1993) UN Doc S/RES/827; UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

730 The establishment of the tribunals should, however, be counted as an element of the Council's rule of law work to the extent that they contributed to the enforcement of international humanitarian law and aimed to ensure accountability for the violation of international crimes. In this sense, resolution 1966 (2010), which established the International Residual Mechanism for the two tribunals acknowledged 'the considerable contribution the Tribunals have made to (. . .) the re-establishment of the rule of law in the countries of the former Yugoslavia and in Rwanda'. See UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966 (2010) [preamble, indent 3].

731 UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493 [11].

732 UNSC Res 923 (31 May 1994) UN Doc S/RES/923 [preamble, indent 6]; UNSC Res 1436 (24 September 2002) UN Doc S/RES/1436 [7]; UNSC Res 1470 (28 March 2003) UN Doc S/RES/1470 [7].

To identify the possible sources that have informed the Council's references to the rule of law, the thesis takes a closer look at regional and international human rights law as several rule of law requirements for national judiciaries in Council resolutions seem to explicitly invoke or resonate with human rights guarantees as provided for in regional and international human rights treaties. To ascertain whether the Council borrows (aspects of) its rule of law standards from existing regional and international human rights law, the thesis examines selected human rights guarantees of the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

The thesis then undertakes a comparative legal analysis of the scope of those human rights guarantees, which seem to be implied by the Council's rule of law language. The concrete selection of regional and international human rights treaties reflects the human rights obligations applicable to those countries primarily addressed by Council rule of law measures. The ICCPR enjoys almost universal membership, thus usually also including the members of the UN Security Council – another reason for a possible borrowing practice of the Council.[733] Of fifteen states with regard to which the Council issued observations, recommendations and decisions pertaining to rule of law requirements for national judiciaries, fourteen are members of the ICCPR, of which eight have also ratified the First Optional Protocol to the ICCPR.[734] Furthermore, all African states addressed by the resolutions analysed in the present thesis except for South Sudan, are members of the ACHPR, and Haiti is a member state of the ACHR.[735]

As another determinative factor, most European Council members will be members of the European Convention for the Protection of Human Rights and

[733] Of the P5, the United States, France, the Russian Federation and the United Kingdom of Great Britain and Northern Ireland have ratified the ICCPR. France and the Russian Federation have further ratified the First Optional Protocol to the ICCPR. China only signed the ICCPR and has taken no action with regard to the First Optional Protocol. ‹http://indicators.ohchr.org/› accessed 14 July 2017.

[734] Afghanistan, Burundi, the Central African Republic, Chad, Côte d'Ivoire, the Democratic Republic of the Congo, Guinea-Bissau, Haiti, Liberia, Libya, Sierra Leone, Somalia, Sudan and Timor-Leste have ratified the ICCPR. The Central African Republic, Chad, Côte d'Ivoire, the Democratic Republic of the Congo, Guinea-Bissau, Libya, Sierra Leone and Somalia have further ratified the First Optional Protocol to the ICCPR. South Sudan by contrast has not even signed the ICCPR. See ‹http://indicators.ohchr.org/› accessed 14 July 2017.

[735] For the ACHPR see ‹http://www.achpr.org/instruments/achpr/ratification/› accessed 14 July 2017. For the ACHR see ‹https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm› accessed 14 July 2017.

Fundamental Freedoms.[736] Even though no resolution analysed in the present thesis was issued against European UN member states, the comparative legal analysis also examines the scope of selected human rights guarantees of the ECHR. This relates to the circumstance that the rich jurisprudence of the European Commission of Human Rights and especially the European Court of Human Rights on the scope of the human rights guarantees contained in the ECHR figures as a crucial point of reference for the interpretation of human rights guarantees contained in the ACHR and ACHPR. The same applies to the jurisprudence of the UN Human Rights Committee on the guarantees contained in the ICCPR.[737]

An analysis of the scope of those human rights guarantees that are seemingly implied by Council rule of law requirements for national judiciaries shall assist in determining whether the interpretation of these guarantees by the competent regional and international human rights bodies informs the Council's decision to invoke them. Concretely, this means that the thesis tries to determine whether the Council refers to certain rule of law requirements that resonate with particular human rights guarantees in reaction to situations that are considered encroachments on these guarantees by human rights bodies responsible for their interpretation.

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[736] 47 states have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, among them three permanent Council members, ie the United Kingdom of Great Britain and Northern Ireland, France and the Russian Federation. See ‹https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=sl7ucxce› accessed 14 July 2017.

[737] On the borrowing practice of the IACtHR and the IACHR from the ICCPR and the ECHR see, eg, IACHR, *Garcia v Peru* (Case No 11.006, Report No 1/95) (7 February 1995); IACHR, *Raquel Martín de Mejía v Peru* (Case No 10.970, Report No 5/96) (1 March 1996); IACHR, *Andrews v the United States of America* (Case No 11.139, Report No 57/96) (6 December 1996) [159 ff]; IACtHR, *Genie Lacayo v Nicaragua* (Judgment of 29 January 1997; Series C No 30) (Merits, Reparations and Costs) [77]; IACtHR, *Constitutional Court v Peru* (Judgment of 31 January 2001; Series C No 71) (Merits, Reparations and Costs) [73–75]. See also, eg, Laurence Burgogue-Larsen and Amaya Úbeda de Torres, 'The Right to Due Process' in *The Inter-American Court of Human Rights* (OUP 2011) paras 25.03, 25.20f & 25.27f; Yves Haeck and others, *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015) 743; Thomas Antkowiak and Alejandra Gonza, *The American Convention on Human Rights* (OUP 2017) 175 f. On the borrowing practice of the AComHPR from the ICCPR and the ECHR see, eg, AComHPR, *Media Rights Agenda v Nigeria*, Com No 224/98 (2000) [51f]; AComHPR, *Civil Liberties Organisation et al v Nigeria*, Com No 218/98 (2001) [35 ff]; AComHPR, *Article 19 v Eritrea*, Com No 275/03 (2007) [97, 99]. See also Bronwen Manby, 'Civil and Political Rights in the African Charter on Human and Peoples' Rights: Articles 1–7' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (2nd edn, CUP 2010) 171, 206, 212.

As articulated above, the present thesis proceeds based on the assumption that universalism of rule of law standards relates to their legitimacy and favourably affects norm influence. Thus, if the Council borrows from regional and international human rights law, it can claim that its rule of law understanding is at least relatively universal. Accordingly, the prospects of its successful reception in states affected by Council rule of law measures may be relatively good.

II. The Function of the Rule of Law in Council Resolutions

A. Introduction

The present chapter examines the circumstances that have triggered references to the rule of law in Security Council resolutions. More precisely, it looks into the question which purposes the Council pursues when invoking the rule of law in the fulfilment of its primary responsibility to maintain international peace and security. The chapter thereby contextualises Council references to the rule of law.

B. The Council's Functional Approach to the Rule of Law

The rule of law as a concept gained traction in Council resolutions during the past two decades. The first explicit reference to the rule of law in a Council resolution dates back to the year 1961 in response to a threat to international peace and security stemming from an impending civil war in the Congo.[738] The Security Council noted 'with deep regret and concern the systematic violations of human rights and fundamental freedoms and the general absence of the rule of law in the Congo'. More than thirty years passed until the Council picked up on the term again and expressed its support to the efforts of the Secretary-General to facilitate a comprehensive political dialogue in response to a coup d'état by the Burundian armed forces with the objective, among others, of promoting the rule of law in the country.[739] The two resolutions illustrate a changing attitude of the Council towards the rule of law. Whereas in the 1961 resolution, the rule of law reference was included in the preambular part and not connected to any UN activities promoting the rule of law, the Burundi resolution mentioned the rule of law in an operative paragraph and referred to an involvement of the UN with regard to the re-establishment of the rule of law in the country.

738 UNSC Res 161 (21 February 1961) UN Doc S/4741 [section B, preamble, indent 2].
739 UNSC Res 1040 (29 January 1996) UN Doc S/RES/1040 [2].

The Burundi resolution, thus, marked the beginning of an episode – lasting until today – during which the Security Council referred more and more often to the rule of law. It did so particularly in country-specific resolutions when establishing UN peace operations in conflict- and post-conflict states or when adapting their respective mandates.[740] Other security-relevant phenomena that have triggered references to the rule of law in Council resolutions are terrorism, piracy, sexual violence in conflict or the proliferation of small arms and light weapons. Council resolutions responding to these phenomena present the rule of law as a principle serving the purpose of mitigating or eradicating them. The Council, thus, approaches the rule of law from a functional perspective: It employs the rule of law as a tool catering to the fulfilment of its primary responsibility to maintain international peace and security. Its endeavours in this regard can be read in light of the UN rationale that security, human rights and development can only be achieved within a broad framework of the rule of law.[741]

Functional approaches to the rule of law are readily employed by international organisations.[742] They are attractive due to their ends-based focus, approaching the rule of law as a means to achieve a desired outcome.[743] The Council has taken on an active part in this international trend and discovered the rule of law as a tool conducive to the fulfilment of its mandate to maintain international peace and security.[744]

C. The Purposes attributed to the Rule of Law in Council Resolutions

An analysis of Council resolutions which can be considered to speak on the purposes served by the rule of law, broadly reveals three broad categories: The Council views the rule of law as (1) catering to peace, security and stability, as

740 Sannerholm (n 3) 51. The term 'UN peace operation' is meant to include UN special political-, peacebuilding- as well as peacekeeping missions.

741 UNGA-UNSC Report of the Secretary-General, 'Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform' (2008) UN Doc A/62/659-S/2008/39 [1].

742 Chesterman 'An International Rule of Law?' (n 18) 343.

743 Rachel Kleinfeld, 'Competing Definitions of the Rule of Law' in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace 2006) 31.

744 Chesterman 'An International Rule of Law?' (n 18) 343. The Council's language of the rule of law appears to develop in sync with its human rights language, which also assumed a more prominent role in Council resolutions in the past three decades. See Månsson (n 11) 79.

(2) facilitating conflict prevention, conflict management and peacebuilding, and as (3) contributing to the prevention of and fight against crime.

Whereas an expansive interpretation of relevant Council resolutions may suggest even more categories, these are the purposes that can be identified based on a literal reading of the text of Council resolutions in combination with relevant background information found in Secretary-General reports.[745]

The fact that most resolutions speaking on the purposes served by the rule of law are country-specific rather than thematic, underlines another obvious factor with regard to the results of the present analysis: Since the Council predominantly develops the content of its resolutions in reaction to concrete situations, its language on an overarching theme such as the rule of law will always be selective, as will be the analysis of this language.[746] The purposes attributed to the rule of law in Council resolutions can thus not be qualified as representing the Council's conclusive view on the subject and it is not suggested here that the Council might not consider the rule of law to be conducive to other goals and tasks which have not yet emerged on its agenda.

The following sections will discuss and analyse the purposes served by the rule of law as can be inferred from Council resolutions.

1. Rule of Law Catering to Peace, Security and Stability

In developing its broadly framed mandate, the Council generally suggests that the goals it pursues and the tools it employs to achieve them are tied to its primary responsibility to maintain international peace and security.[747] Accordingly, the rule of law is contextualised in Council resolutions in close connection with the goal of attaining peace, security and stability. This appears to be the most obvious way for the Council to approach the rule of law to the extent that its mandate is geared towards the attainment of these goals. Paragraphs emphasising how the rule of law caters to peace, security and stability are predominantly found in country-specific resolutions with few exceptions in thematic resolutions and seem to appear just as often in resolutions dealing with countries supported by peacekeeping operations as in

745 For the reasons why this interpretative approach is chosen, see part 3 ch I. 3.

746 Of the 120 Council resolutions examined in the present thesis that speak on the purposes of the rule of law, 97 are country-specific resolutions and five topic-specific (eg on foreign terrorist fighters), as compared to 18 thematic resolutions.

747 With regard to the nature and practice of the Council's discretion under arts 39–42 UN Charter see, eg, de Wet, *The Chapter VII Powers of the United Nations Security Council* (n 477) 134-74, 182-87; Orakhelashvili, 'The Power of the UN Security Council to Determine the Existence of a "Threat to the Peace"' (n 471) 61.

resolutions mandating peacebuilding or special political missions, underlining that the rule of law is considered crucial in different phases of a conflict for the attainment of peace, security and stability.[748]

Some paragraphs plainly attest to the Council's view that the rule of law is a crucial requirement of peace, security and stability. In this spirit, eg, Council resolutions on Afghanistan reaffirmed that the country's *peaceful future* lies in the building of a state based on the rule of law.[749] With regard to the situation in Haiti, the Council emphasised that the rule of law, among other factors, remains key to the *stability* of the country.[750] Regarding the situation in Guinea-Bissau, the Council held that *addressing the root causes of instability* required particular attention to the rule of law.[751] In Liberia, the Council expressed its appreciation to the international community for its support to consolidate *peace, security and stability*, welcoming in particular contributions to support Liberia's efforts with regard to, ia, the rule of law.[752]

Another type of paragraph, highlighting the linkages between the rule of law, peace, security and stability is found in connection with the tasks of UN peace operations. These references are, however, not necessarily more concrete despite their inclusion in mission mandates. Council resolutions regularly emphasise that the rule of law activities of UN peace missions are supposed to promote peace, security and stability in the countries they were sent to support. The thematic resolution on multidimensional peacekeeping missions notes that such missions may be mandated by the Council to 'support the strengthening of rule of law institutions of the host country (…) within the scope of respective mandates, in helping national authorities develop critical rule of law priorities and strategies to address the needs of police, judicial institutions and corrections system (…) as a *vital contribution to building peace*'.[753] In this spirit, the Council required the UN Assistance Mission in Afghanistan

748 Out of 97 resolutions, 47 were issued in a peacekeeping-, 48 in a peacebuilding context or during an ongoing special political mission, one in a development context and one during pre-mission deployment.

749 UNSC Res 2069 (9 October 2012) UN Doc S/RES/2069 [preamble, indent 33]; UNSC Res 2096 (19 March 2013) UN Doc S/RES/2096 [preamble, indent 19]; UNSC Res 2120 (10 October 2013) UN Doc S/RES/2120 [preamble, indent 34]; UNSC Res 2210 (16 March 2015) UN Doc S/RES/2210 [preamble, indent 18]; UNSC Res 2274 (15 March 2016) UN Doc S/RES/2274 [preamble, indent 19] (emphasis added).

750 UNSC Res 1658 (14 February 2006) UN Doc S/RES/1658 [preamble, indent 8]; UNSC Res 1702 (15 August 2006) UN Doc S/RES/1702 [preamble, indent 5] (emphasis added).

751 UNSC Res 2203 (18 February 2015) UN Doc S/RES/2203 [4]; UNSC Res 2267 (26 February 2016) UN Doc S/RES/2267 [5] (emphasis added).

752 UNSC Res 2333 (23 December 2016) UN Doc S/RES/2333 [preamble, indent 14] (emphasis added).

753 UNSC Res 2086 (21 January 2013) UN Doc S/RES/2086 [8 (c)] (emphasis added).

(UNAMA) and the SRSG to support efforts of the governing authority in Afghanistan and later the Afghan government to improve the rule of law throughout the country *with a view to helping bring the benefits of peace*.[754] Similarly, the Council decided that the UN Operation in Côte d'Ivoire (UNOCI) was to assist the government in re-establishing the rule of law throughout the country in order to *contribute to the remaining tasks of the peace process*.[755] In a similar vein, the Council held that the advice and technical assistance in support of the rule of law by the UN Integrated Peacebuilding Office in the Central African Republic (BINUCA) was directed at the *stabilisation of the security situation* in the country.[756] Assistance with the restoration and maintenance of the rule of law was also required of the UN Stabilization Mission in Haiti (MINUSTAH) in order to contribute to the creation of a *secure and stable environment*, whereas a substantially strengthened rule of law capacity of a new UN mission in

754 The respective paragraph was included in several resolutions on the situation in Afghanistan with similar wording. The changing realities on the ground with regard to the institutions in charge of the governing responsibility is reflected in the changing of the addressee of UNAMA's and the SRSG's support. See UNSC Res 1806 (20 March 2008) UN Doc S/RES/1806 [4 (e)] ('support efforts, including through the Independent Directorate for Local Governance, to improve (…) the rule of law'); UNSC Res 1917 (22 March 2010) UN Doc S/RES/1917 [6 (b)] (very generally requiring UNAMA and the SRSG to 'support and strengthen efforts to improve (…) the rule of law'); UNSC Res 1974 (22 March 2011) UN Doc S/RES/1974 [6 (c)] ('support the efforts of the Afghan Government to improve (…) the rule of law'); UNSC Res 2041 (22 March 2012) UN Doc S/RES/2041 [7 (b)] ('support the efforts of the Afghan Government, in fulfilling its commitments as stated at the London, Kabul and Bonn Conferences, to improve (…) the rule of law'); UNSC Res 2096 (19 March 2013) UN Doc S/RES/2096 [7 (b)] ('support the efforts of the Afghan Government, in fulfilling its commitments as stated at the London, Kabul and Bonn Conferences, to improve (…) the rule of law'); UNSC Res 2145 (17 March 2014) UN Doc S/RES/2145 [6 (b)] ('support the efforts of the Afghan Government, in fulfilling its commitments as stated at the London, Kabul, Bonn and Tokyo Conferences, to improve (…) the rule of law'); UNSC Res 2210 (16 March 2015) UN Doc S/RES/2210 [7 (b)] ('support the efforts of the Afghan Government, in fulfilling its commitments as stated at the London, Kabul, Bonn and Tokyo Conferences, to improve (…) the rule of law'); UNSC Res 2274 (15 March 2016) UN Doc S/RES/2274 [8 (b)] ('support the efforts of the Afghan Government in fulfilling its commitments as stated at the London, Kabul, Bonn and Tokyo Conferences, to improve (…) the rule of law'); UNSC Res 2344 (17 March 2017) UN Doc S/RES/2344 [6 (b)] ('support the efforts of the Afghan Government in fulfilling its commitments as stated at the London, Kabul, Bonn and Tokyo Conferences, to improve (…) the rule of law') (emphasis added).

755 UNSC Res 1933 (30 June 2010) UN Doc S/RES/1933 [16 (j)] (emphasis added).

756 UNSC Res 2121 (10 October 2013) UN Doc S/RES/2121 [10 (c)]; UNSC Res 2134 (28 January 2014) UN Doc S/RES/2134 [2 (d)] (emphasis added).

Somalia was considered necessary for it to provide advice on, ia, *security and stabilisation*.[757]

Beyond attesting to the Council's general assessment that the rule of law caters to peace, security and stability, a comparative survey of relevant resolutions suggests that the Council considers the rule of law conducive to the *sustainability* of peace, security and stability. In line with their predominantly abstract character, the majority of such paragraphs are found in the preambular parts of Council resolutions, often providing the contextual background for more concrete rule of law measures in operative paragraphs. Most of these paragraphs highlight in one way or another that the Council does not consider the rule of law as a tool geared towards addressing emergency situations or urgent threats but rather as a structural measure to consolidate peace and stability in the long term. This makes sense taking into account that rule of law structures and institutions are neither quickly established nor easily maintained but need to be cultivated in order to emerge and last.[758] In this spirit, resolutions on the situation in Guinea-Bissau stressed that the *consolidation of peace and stability* can only result from, among others, the promotion of the rule of law.[759] Resolutions on the situation in Sudan and South Sudan stressed the need for an approach to *peace consolidation* and *sustainable peace* respectively, that strengthens coherence between a variety of activities, including rule of law activities.[760] The same formulation is found in the thematic resolution on Women, Peace and Security, shedding light on the background against which the Council included the paragraphs in the Sudan resolutions.[761] Three thematic resolutions on UN peacekeeping operations and conflict prevention broaden the

[757] UNSC Res 1542 (30 April 2004) UN Doc S/RES/1542 [7 (d)]; UNSC Res 2093 (6 March 2013) UN Doc S/RES/2093 [22 (c)] (emphasis added).

[758] Working Paper prepared by the Secretariat, 'Promoting the Rule of Law and Strengthening the Criminal Justice System', Tenth UN Congress on the Prevention of Crime and the Treatment of Offenders (14 December 1999) UN Doc A/CONF.187/3 [7f]

[759] UNSC Res 2092 (22 February 2013) UN Doc S/RES/2092 [preamble, indent 4]; UNSC Res 2103 (22 May 2013) UN Doc S/RES/2103 [preamble, indent 4]; UNSC Res 2157 (29 May 2014) UN Doc S/RES/2157 [preamble, indent 5]; UNSC Res 2186 (25 November 2014) UN Doc S/RES/2186 [preamble, indent 5]; UNSC Res 2203 (18 February 2015) UN Doc S/RES/2203 [preamble, indent 7]; UNSC Res 2267 (26 February 2016) UN Doc S/RES/2267 [preamble, indent 7]; UNSC Res 2343 (23 February 2017) UN Doc S/RES/2343 [preamble, indent 9] (emphasis added).

[760] UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996 [preamble, indent 4]; UNSC Res 2057 (5 July 2012) UN Doc S/RES/2057 [preamble, indent 10]; UNSC Res 2109 (11 July 2013) UN Doc S/RES/2109 [preamble, indent 12]; UNSC Res 2241 (9 October 2015) UN Doc S/RES/2241 [preamble, indent 17]; UNSC Res 2252 (15 December 2015) UN Doc S/RES/2252 [preamble, indent 21] (emphasis added).

[761] UNSC Res 2122 (18 October 2013) UN Doc S/RES/2122 [preamble, indent 11].

context in accordance with their more general thematic focus when emphasising that a comprehensive approach to *sustainable peace* requires the strengthening of the rule of law not only at the national but also at the international level.[762] The rule of law as a crucial ingredient of the peace consolidation process is also highlighted in a resolution on Burundi, where the Council took note of the progress achieved in *key peace consolidation areas* which includes ensuring that the security forces and justice institutions effectively protect the rule of law.[763] In the Central African Republic, the Council emphasised that respect for the rule of law was necessary, ia, for *lasting peace*, while *lasting stability* in Liberia required, ia, a well-functioning, accountable, sustainable and effective rule of law sector.[764]

Comparable to the preambular paragraphs, several operative paragraphs emphasise the connection between the rule of law and the *sustainability* of peace

762 UNSC Res 2171 (21 August 2014) UN Doc S/RES/2171 [preamble, indent 9]; UNSC Res 2185 (20 November 2014) UN Doc S/RES/2185 [preamble, indent 3]; UNSC Res 2282 (27 April 2016) UN Doc S/RES/2282 [preamble, indent 12] (emphasis added).

763 UNSC Res 1858 (22 December 2008) UN Doc S/RES/1858 [preamble, indent 5] (emphasis added).

764 On the Central African Republic, see UNSC Res 2088 (24 January 2013) UN Doc S/RES/2088 [preamble, indent 12]. Regarding the situation in Liberia, the text of the paragraph was included in various resolutions with slight changes in language reflecting the changing realities on the ground: UNSC Res 1885 (15 September 2009) UN Doc S/RES/1885 [preamble, indent 5] ('lasting stability in Liberia and the subregion will require well-functioning and sustainable (…) rule of law sector(s)'); UNSC Res 2008 (16 September 2011) UN Doc S/RES/2008 [preamble, indent 4] ('lasting stability in Liberia and the subregion will require well-functioning and sustainable government institutions, including (…) rule of law sector(s)'); UNSC Res 2066 (17 September 2012) UN Doc S/RES/2066 [preamble, indent 7] ('lasting stability in Liberia and the subregion will require well-functioning, accountable, and sustainable government institutions, including (…) rule of law sector(s)'); UNSC Res 2116 (18 September 2013) UN Doc S/RES/2116 [preamble, indent 4) ('lasting stability in Liberia and the subregion will require well-functioning, accountable, and sustainable government institutions, including security and rule of law sector(s)'); UNSC Res 2176 (15 September 2014) UN Doc S/RES/2176 [preamble, indent 3] ('lasting stability in Liberia will require the Government of Liberia to sustain well-functioning and accountable government institutions, particularly of the rule of law (…) sector(s)'); UNSC Res 2237 (2 September 2015) UN Doc S/RES/2237 [preamble, indent 7] ('lasting stability in Liberia will require the Government of Liberia to sustain effective and accountable government institutions, particularly in the rule of law (…) sector(s)'); UNSC Res 2288 (25 May 2016) UN Doc S/RES/2288 [preamble, indent 9] ('lasting stability in Liberia will require the Government of Liberia to sustain effective and accountable government institutions, particularly in the rule of law (…) security sector(s)'); UNSC Res 2308 (14 September 2016) UN Doc S/RES/2308 [preamble, indent 4] ('lasting stability requires the Government of Liberia to maintain well-functioning, accountable and responsive national institutions, particularly to provide for rule of law') (emphasis added).

and stability. The support of the UN Integrated Office in Burundi (BINUB) to the Burundian government in consolidating the rule of law, in particular by strengthening the justice and corrections system, including independence and capacity of the judiciary, was thus included in the mission's *peace consolidation* mandate.[765] Similarly, the *stabilisation and peace consolidation* mandate of the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) involved supporting the efforts of the Congolese government to develop rule of law institutions and territorial administration.[766] The UN Mission in the Sudan (UNMIS) was mandated to assist the parties to the Comprehensive- and the Darfur Peace Agreement respectively, in promoting the rule of law *with the aim of contributing to long-term peace and stability.*[767]

Although the Council's wording varies, references to lasting, long-term and sustainable peace or to the consolidation of peace can all be read as testifying to the same expectation: That the rule of law cater to conditions or state structures that foster the sustainability of peace, security and stability.

2. Rule of Law as a Facilitator of Conflict Prevention, Conflict Management and Peacebuilding

a. The Rule of Law as a Key Element of Conflict Management

On a more concrete level, albeit ultimately directed at the same ends as the preceding category, the Council views the rule of law as serving the purposes of conflict prevention, peacekeeping, conflict resolution and peacebuilding.

On the occasion of an open debate on the agenda item 'the promotion and strengthening of the rule of law in the maintenance of international peace and security', the president of the Security Council held that 'the Council emphasizes the importance of the rule of law as one of the key elements of conflict prevention, peacekeeping, conflict resolution and peacebuilding'.[768] The General Assembly adopted this wording subsequently in its Declaration on the rule of law at the national and international levels, in which it also recognised the positive contribution of the Council to the rule of law while discharging its primary responsibility for the maintenance of international peace and security, thus furnishing the Council's assessment with enhanced legitimacy and representativeness.[769] The Council later reaffirmed the

765 UNSC Res 1719 (25 October 2006) UN Doc S/RES/1719 [2 (d)] (emphasis added).
766 UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925 [12 (p)] (emphasis added).
767 UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590 [4 (a) (viii)]; UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706 [8 (k)] (emphasis added).
768 UNSC Presidential Statement 1 (2012) UN Doc S/PRST/2012/1.
769 Declaration of the High-level Meeting A/RES/67/1 (n 395) [18; 28].

assessment in thematic resolutions on Women, Peace and Security and security sector reform as well as in country-specific resolutions on the situation in Sudan and South Sudan.[770] Even though the Council reverts to more precise language in this context when describing the purposes served by the rule of law, it is ultimately still peace, security and stability that shall be attained through conflict prevention, peacekeeping, conflict resolution and peacebuilding. The second purpose ascribed to the rule of law in Council resolutions can thus be qualified as a specification of the first and most general one, ie, the attainment of peace, security and stability.

b. Conflict Prevention

As the Secretary-General observed in one of his reports on the strengthening and coordination of United Nations rule of law activities, it is increasingly recognised at the national level 'that States marked by weak rule of law (…) pose significant threats to peace and security'.[771] In line with this general observation, several thematic Council resolutions have acknowledged the role of the rule of law in preventing armed conflict and its recurrence as well as in addressing its root causes.

Conflict prevention was described in the Brahimi Report as addressing the structural sources of conflict in order to build a solid foundation for peace and attempting to reinforce those foundations, usually in the form of diplomatic initiatives.[772] Preventive diplomacy, a concept coined by former Secretary-General Dag Hammarskjöld, was defined in the *Agenda for Peace* as 'action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur'.[773]

Although a primary responsibility of UN member states, conflict prevention has also been a field of UN engagement.[774] On the occasion of a high-level

[770] UNSC Res 2122 (18 October 2013) UN Doc S/RES/2122 [preamble, indent 11]; UNSC Res 2151 (28 April 2014) UN Doc S/RES/2151 [preamble, indent 15]; UNSC Res 2241 (9 October 2015) UN Doc S/RES/2241 [preamble, indent 17]; UNSC Res 2252 (15 December 2015) UN Doc S/RES/2252 [preamble, indent 21]; UNSC Res 2327 (16 December 2016) UN Doc S/RES/2327 [preamble, indent 23].

[771] SG Report A/68/213/Add.1 (n 395) [42].

[772] Report of the Panel on United Nations Peace Operations (2000) UN Doc A/55/305-S/2000/809 (Brahimi Report) [10].

[773] UNGA Report of the Secretary-General, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping' (1992) UN Doc A/47/277-S/24111 [20]; UNSC Report of the Secretary-General, 'Preventive Diplomacy: Delivering Results' (2011) UN Doc S/2011/552 [1].

[774] art 33 UN Charter holds that 'parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a

meeting on the agenda item 'the responsibility of the Security Council in the maintenance of international peace and security' in 1992, the Council president prominently observed that 'non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security', thus indicating the Council's awareness of its potential role in addressing the root causes of future conflicts.[775] Whereas the Council was originally more engaged in responding to conflicts and emergencies that had already occurred, the Secretary-General observed in 2011 that the Council had gotten more involved in recent years with conflict prevention.[776] The Council itself had stressed its crucial role in this field in a thematic resolution on the inclusion of disarmament, demobilisation and reintegration components in the mandates of UN peacekeeping and peacebuilding operations, expressing 'its determination to pursue the objective of prevention of armed conflict as an integral part of its primary responsibility for the maintenance of international peace and security'.[777] Its activities to further the goal of conflict prevention range from the holding of 'informal interactive dialogues' on situations that might result in conflicts, over 'horizon scanning' briefings on current and emerging conflicts with the Department of Political Affairs of the UN Secretariat, to the strengthening of its relationship with regional organisations, the issuance of targeted sanctions and the creation of political and peacekeeping missions with the respective mandate to prevent conflicts from escalating or recurring.[778]

solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'. See SG Report S/2011/552 (n 773) [10–34]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations and Conflict Prevention: A Collective Recommitment' (2015) UN Doc S/2015/730 [2]. See also UNSC Res 1366 (30 August 2001) UN Doc S/RES/1366 [2] (where the Council stresses 'that the essential responsibility for conflict prevention rests with national Governments, and that the United Nations and the international community can play an important role in support of national efforts for conflict prevention and can assist in building national capacity in this field').

775 UNSC Note by the President 23500 (1992) UN Doc S/23500 [3].

776 SG Report S/2011/552 (n 773) [12].

777 UNSC Res 1366 (30 August 2001) UN Doc S/RES/1366 [1].

778 SG Report S/2011/552 (n 773) [12–14] (further Council initiatives in the context of conflict prevention are luncheons with the Secretary-General to informally discuss items not yet on its agenda, the consideration of the item 'Peace and Security in Africa', initiatives by its president and press communiqués aimed at creating political momentum for prevention activities and the support of mediation initiatives by the UN and regional actors).

Given the broad range of tools available to the Council, its ability to employ its far reaching powers when getting involved and its related privileged position to affect state interests and identities, the fact that it considers the rule of law as a crucial element of conflict prevention, proves of great significance. The first resolution expressly stressing the importance of the rule of law as an essential factor in the prevention of conflicts was issued in the context of conflict prevention and the promotion of durable peace and security in Africa in 1998.[779] A later resolution included 'a democratic society based on a strong rule of law' in a list of the biggest deterrents to violent conflict when trying to address the root causes of conflict.[780] The rule of law as a crucial component of a strategy to address the root causes of conflict has generally been a recurring theme in Council thematic resolutions. It has been addressed in thematic resolutions on the strengthening of the Council's effectiveness in conflict prevention in Africa, the protection of civilians in armed conflict, conflict prevention in general, the role of policing in peacekeeping and post-conflict peacebuilding or on small arms and light weapons.[781] Whereas the general message – that the rule of law caters to the prevention of conflict – remains the same, thematic resolutions cast a different light on the purpose of the rule of law in the context of conflict prevention in line with their respective thematic focus. They generally assert the value of the rule of law in confronting abstract threats to international peace and security independently of individual conflicts. Resolutions on the protection of civilians in armed conflict view the rule of law as an essential requirement of conflict prevention with a view to enhancing the protection of civilians on a long-term basis, while the thematic resolution on small arms and light weapons portrays rule of law activities and addressing the root causes of conflict as necessary long-term measures to accompany short-term measures against the illicit transfer, destabilising accumulation and misuse of small arms and light weapons.[782]

779 UNSC Res 1170 (28 May 1998) UN Doc S/RES/1170 [preamble, indent 13].

780 UNSC Res 1327 (13 November 2000) UN Doc S/RES/1327 [Annex V, 1].

781 UNSC Res 1625 (14 September 2005) UN Doc S/RES/1625 [Annex, preamble, indent 6]; UNSC Res 1738 (23 December 2006) UN Doc S/RES/1738 [preamble, indent 9]; UNSC Res 2171 (21 August 2014) UN Doc S/RES/2171 [preamble, indent 9]; UNSC Res 2185 (20 November 2014) UN Doc S/RES/2185 [preamble, indent 3]; UNSC Res 2220 (22 May 2015) UN Doc S/RES/2220 [preamble, indent 12].

782 For resolutions on the protection of civilians see, eg, UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 [preamble, indent 6]; UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 [2]; UNSC Res 1738 (23 December 2006) UN Doc S/RES/1738 [preamble, indent 9]; UNSC Res 2222 (27 May 2015) UN Doc S/RES/2222 [preamble, indent 19]. For resolutions on small arms and light weapons, see UNSC Res 2220 (22 May 2015) UN Doc S/RES/2220 [preamble, indent 12]. For background information

While most resolutions seem to focus on national rule of law measures in order to avert the emergence of conflict, the thematic resolutions on conflict prevention and on the role of policing in peacekeeping and post-conflict peacebuilding additionally require the strengthening of the international rule of law as an operational and structural measure for the prevention of armed conflict.[783]

c. Peacekeeping and Peacebuilding

i. Rule of Law as an Element of Peacekeeping and Peacebuilding

Strengthening the rule of law is a central element of UN peacebuilding.[784] This is underlined, ia, by the mandates of several UN peacebuilding missions. The mandate of the UN Integrated Peacebuilding Office in Guinea-Bissau (UNOGBIS), for example, involved the active support of efforts of the UN system and Guinea Bissau's other partners, towards strengthening state institutions and structures to enable them to uphold the rule of law.[785] The UN Integrated Peacebuilding Office in Sierra Leone (UNIPSIL) was requested to support Sierra Leone in meeting its peacebuilding priorities, which included strengthening the capacity of the country's rule of law institutions.[786] In Somalia, the mandate of the UN Assistance Mission (UNSOM) involved the provision of strategic and policy advice on the rule of law as part of its task to support the peacebuilding and state-building process of the country.[787]

Nowadays, however, not only UN peacebuilding- but also UN peacekeeping missions are tasked with rule of law activities to accomplish their strategic goals.

Traditionally, rule of law activities were not included in the mandates of UN peacekeeping missions. Original UN peacekeeping was of a predominantly military nature, directed at preserving peace where fighting was suspended, at observing cease-fires and force separations as well as at assisting with the

on the respective paragraph, see UNSC Report of the Secretary-General, 'Small Arms and Light Weapons' (2015) UN Doc S/2015/289 [85–90].

783 UNSC Res 2171 (21 August 2014) UN Doc S/RES/2171 [preamble, indent 9]; UNSC Res 2185 (20 November 2014) UN Doc S/RES/2185 [preamble, indent 3].

784 Brahimi Report A/55/305-S/2000/809 (n 772) [13]. See also, eg, UNSC Res 2143 (7 March 2014) UN Doc S/RES/2143 [preamble, indent 14] (depicting rule of law activities as an element of strategies for peacebuilding priorities).

785 UNSC Res 1580 (22 December 2004) UN Doc S/RES/1580 [2 (h)].

786 UNSC Res 2065 (12 September 2012) UN Doc S/RES/2065 [11].

787 UNSC Res 2093 (6 March 2013) UN Doc S/RES/2093 [22 (c)]; UNSC Res 2102 (2 May 2013) UN Doc S/RES/2102 [2 (b) (ii)]; UNSC Res 2158 (29 May 2014) UN Doc S/RES/2158 [1 (b) (ii)].

implementation of agreements achieved by peacemakers.[788] During the 1990s, however, the nature of UN peacekeeping changed to become more multidimensional.[789] Today, UN multidimensional peacekeeping also involves political measures to resolve conflict and comprises police and civilian capabilities directed at building peace and implementing comprehensive peace agreements and the UN supports national authorities in the development of peacebuilding strategies in the context of multidimensional peacekeeping.[790] As a consequence, multidimensional UN peacekeeping operations can be mandated by the Council to engage in peacebuilding tasks such as rule of law-related activities.[791] Strengthening rule of law institutions and helping national authorities develop critical rule of law priorities is thus no longer reserved for UN peacebuilding but can also figure in its peacekeeping agenda.[792] For example, despite being a peacekeeping mission, the UN Mission in the Republic of South Sudan (UNMISS) was required to work out a plan for UN system support to specific peacebuilding tasks such as rule of law and justice sector support.[793]

Council resolutions that invoke the rule of law imply that it caters to several different peacekeeping and peacebuilding goals such as the restoration and extension of state authority, the protection of civilians, the fight against impunity, post-conflict transition, national reconciliation, or democratic governance. As was just illustrated, a clear-cut delineation between peacekeeping and peacebuilding goals and activities is often impossible. When discussing the rule of law as a means to achieve various peacekeeping and

788 SG Report A/47/277-S/24111 (n 773) [15]; Brahimi Report A/55/305-S/2000/809 (n 772) [12].

789 Brahimi Report A/55/305-S/2000/809 (n 772) [12].

790 UNDPKO, United Nations Peacekeeping Operations: Principles and Guidelines (New York 2008) (Capstone Doctrine) 22. See also UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996 [preamble, indent 8]; UNSC Res 2057 (5 July 2012) UN Doc S/RES/2057 [preamble, indent 13]; UNSC Res 2086 (21 January 2013) UN Doc S/RES/2086 [preamble, indent 11]; UNSC Res 2109 (11 July 2013) UN Doc S/RES/2109 [preamble, indent 16]; UNSC Res 2143 (7 March 2014) UN Doc S/RES/2143 [preamble, indent 14] (all resolutions emphasise the vital role of the United Nations in supporting national authorities in developing strategies for peacebuilding priorities in the context of multidimensional peacekeeping). See also UNSC Res 2057 (5 July 2012) UN Doc S/RES/2057 [21] and UNSC Res 2109 (11 July 2013) UN Doc S/RES/2109 [29] (both resolutions explicitly speak of the peacebuilding tasks of the UN peacekeeping mission in South Sudan).

791 UNDPKO, Capstone Doctrine (n 790) 26.

792 ibid 25f; UNSC Res 2086 (21 January 2013) UN Doc S/RES/2086 [8 (c)].

793 UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996 [18]; UNSC Res 2057 (5 July 2012) UN Doc S/RES/2057 [21].

peacebuilding goals, the following chapters thus forgo an attribution of the purposes served by the rule of law to either a peacekeeping or a peacebuilding context since most of them are relevant to both fields.

ii. Restoration and Extension of State Authority

Mandates of UN peace missions imply that the Council considers the rule of law as serving the purpose of contributing to the restoration and extension of state authority in countries affected by conflict or crisis. Even though the restoration and extension of state authority is considered a critical peacebuilding activity, the Council also tasked UN peacekeeping operations with the establishment of the rule of law in order to restore and extend state authority.[794] UN peace missions support the restoration and extension of state authority 'by creating an enabling security environment, providing political leadership or coordinating the efforts of other international actors'.[795] This support may 'include efforts to develop political participation', 'operational support to the immediate activities of state institutions', 'small-scale capacity-building or support to larger processes of constitutional or institutional restructuring'.[796]

Along these lines, MONUSCO was mandated to support the government of the Democratic Republic of the Congo in the consolidation of state authority throughout the territory through the deployment of, ia, rule of law institutions.[797] Similarly in Mali, the Council required the Secretary-General to provide support to Malian rule of law institutions in order to extend Malian state authority.[798] Accordingly, the subsequently created UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) was tasked to support national and international efforts towards the rebuilding of the Malian rule of law and justice sectors as part of its mandate to support the re-establishment of state authority throughout the country.[799] The mandate of MINUSTAH in Haiti to support the government's decentralisation efforts with a view to further enhancing the government's ability to extend state authority can most likely be added to this category, considering that the government's decentralisation efforts aimed, ia, at building institutional capacity in the rule of law.[800]

794 UNDPKO, Capstone Doctrine (n 790) 26.

795 ibid 27 f.

796 ibid 28.

797 UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925 [6 (iii)]; UNSC Res 1991 (28 June 2011) UN Doc S/RES/1991 [4 (c)]; UNSC Res 2053 (27 June 2012) UN Doc S/RES/2053 [4 (c)].

798 UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085 [12].

799 UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100 [16 (a) (iii)]; UNSC Res 2164 (25 June 2014) UN Doc S/RES/2164 [13 (c) (ii)].

800 UNSC Res 2070 (12 October 2012) UN Doc S/RES/2070 [7].

iii. Protection of Civilians

The rule of law figures as an important parameter in Council resolutions recommending or deciding on the requirements of an effective protection of civilians. Thematic resolutions on the protection of civilians in armed conflict portray the promotion of the rule of law as a necessary measure to address the causes of armed conflict in order to enhance the protection of civilians on a long-term basis.[801] The re-establishment of the rule of law was also listed among the specific measures for the protection of civilians that should be included by conflict parties in peace processes and agreements as well as in post-conflict recovery and reconstruction planning.[802]

Against this backdrop, UN peace operations are mandated by the Council to support the development of the rule of law in order to enhance and strengthen the protection of civilians under threat, in line with the basic tenet that 'unarmed strategies must be at the forefront of United Nations efforts to protect civilians'.[803] In this vein, eg, the Council required UNOCI to support the Ivorian parties in implementing the recommendations of the Working Group on Children and Armed Conflict, notably to ensure that the rule of law be strengthened.[804]

It also called on national governments to strengthen their rule of law institutions and structures in order to ensure the protection of civilians. For example, in the Democratic Republic of the Congo, the Council repeatedly encouraged, urged and called upon the government to establish and later consolidate the rule of law in order to protect the civilian population which involved, ia, the deployment of an accountable civil administration, in particular the police, judiciary, prison and territorial administration.[805]

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801 UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 [preamble, indent 6]; UNSC Res 1738 (23 December 2006) UN Doc S/RES/1738 [preamble, indent 9]; UNSC Res 2222 (27 May 2015) UN Doc S/RES/2222 [preamble, indent 19].

802 UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 [11].

803 Report of the High-level Independent Panel on Peace Operations on Uniting our Strengths for Peace: Politics, Partnership and People (2015) UN Doc A/70/95–S/2015/446 [86].

804 UNSC Res 1933 (30 June 2010) UN Doc S/RES/1933 [13].

805 UNSC Res 1991 (28 June 2011) UN Doc S/RES/1991 [2]; UNSC Res 2053 (27 June 2012) UN Doc S/RES/2053 [3]; UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098 [preamble, indent 24]; UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147 [preamble, indent 28] (here, the wording changed to 'the consolidation of the rule of law' from the previous 'the establishment of the rule of law', allegedly reflecting the progress in the re-establishment of the rule of law); UNSC Res 2211 (26 March 2015) UN Doc S/RES/2211 [16]; UNSC Res 2277 (30 March 2016) UN Doc S/RES/2277 [2]; UNSC Res 2348 (31 March 2017) UN Doc S/RES/2348 [21].

iv. Fighting Impunity

In its thematic resolution on the role of multidimensional peacekeeping missions, the Council identified the strengthening of rule of law institutions as a vital contribution to ending impunity and thus included it in its list of possible tasks of UN multidimensional peacekeeping missions.[806] In this spirit, the Council mandated UNMIS in Sudan to assist the parties to the Comprehensive- and Darfur Peace Agreements in promoting the rule of law with the aim to, ia, combat impunity.[807] Far more concrete, the mandate of the UN Organization Mission in the Democratic Republic of the Congo (MONUC) to support the strengthening of the rule of law included assistance in the investigation of human rights violations and the publishing of its findings, with a view to putting an end to impunity.[808]

v. Post-Conflict Transition

In its resolutions on the situation in Liberia, the Council emphasised repeatedly that the consolidation of Liberia's post-conflict transition required the extension of the rule of law throughout the country and eventually called on the UN Mission in Liberia (UNMIL) to enhance its support for rule of law reforms with a view to contributing to a sustainable transition planning process.[809]

With a slightly different focus but ultimately also underlining the crucial role assigned to the rule of law in the facilitation of a sustainable post-conflict transition, the Council reiterated the need that the transitional period in Libya be underpinned by a commitment to the rule of law in several of its resolutions dealing with the country.[810] The UN Support Mission in Libya (UNSMIL) was consequently established in order to, ia, support Libyan efforts to promote the rule of law which involved 'supporting the development and implementation of

806 UNSC Res 2086 (21 January 2013) UN Doc S/RES/2086 [8 (c)].

807 UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590 [4 (a) (viii)]; UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706 [8 (k)].

808 UNSC Res 1756 (15 May 2007) UN Doc S/RES/1756 [3 (c)]; UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856 [4 (c)].

809 UNSC Res 1750 (30 March 2007) UN Doc S/RES/1750 [preamble, indent 8]; UNSC Res 1777 (20 September 2007) UN Doc S/RES/1777 [preamble, indent 9]; UNSC Res 1836 (29 September 2008) UN Doc S/RES/1836 [preamble, indent 11]; UNSC Res 2066 (17 September 2012) UN Doc S/RES/2066 [8].

810 UNSC Res 2009 (16 September 2011) UN Doc S/RES/2009 [2]; UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016 [2]; UNSC Res 2040 (12 March 2012) UN Doc S/RES/2040 [2]; UNSC Res 2095 (14 March 2013) UN Doc S/RES/2095 [2]; UNSC Res 2144 (14 March 2014) UN Doc S/RES/2144 [1].

a comprehensive transitional justice strategy' and evolved later to supporting the full implementation of Libya's transitional justice law.[811]

vi. National Reconciliation

The Council pointed out repeatedly that it considers the rule of a law to contribute to national reconciliation. National reconciliation refers to a process of reconciling societies that have been divided by the political dynamics of a conflict into various internal, national or international factions.[812]

Council resolutions on the situation in Guinea-Bissau reaffirmed that the government and all stakeholders must remain committed to national reconciliation, which is achieved, ia, through the promotion of the rule of law.[813] The Council also repeatedly recognised that sustainable progress on the rule of law and national reconciliation in Haiti are mutually reinforcing, underpinning its position that the rule of law contributes to or is at least connected to the achievement of national reconciliation.[814] The Council also emphasised the connection between the rule of law and national reconciliation in its resolutions on the situation in Libya. In this context, however, it rather

811 UNSC Res 2040 (12 March 2012) UN Doc S/RES/2040 [6 (b)]; UNSC Res 2095 (14 March 2013) UN Doc S/RES/2095 [7 (b)]; UNSC Res 2144 (14 March 2014) UN Doc S/RES/2144 [6 (b)].

812 UNGA, International Year of Reconciliation, 2009, UNGA Res 61/17 (23 January 2007) UN Doc A/RES/61/17 [preamble, indent 2] ('Recognizing that reconciliation processes are particularly necessary and urgent in countries and regions of the world which have suffered or are suffering situations of conflict that have affected and divided societies in their various internal, national and international facets'). On the lack of an established definition of the concept of reconciliation see, eg, Tamar Hermann, 'Reconciliation: Reflections on the Theoretical and Practical Utility of the Term' in Yaacov Bar-Siman-Tov (ed), *From Conflict to Reconciliation* (OUP 2004) 37, 41–49 or Pierre Hazan, 'Reconciliation' in Chetail Vincent (ed), *Post-conflict Peacebuilding: A Lexicon* (OUP 2009) 256, 259–261.

813 UNSC Res 1949 (23 November 2010) UN Doc S/RES/1949 [preamble, indent 6]; UNSC Res 2030 (21 December 2011) UN Doc S/RES/2030 [preamble, indent 5].

814 UNSC Res 1743 (15 February 2007) UN Doc S/RES/1743 [preamble, indent 4]; UNSC Res 1780 (15 October 2007) UN Doc S/RES/1780 [preamble, indent 5]; UNSC Res 1840 (14 October 2008) UN Doc S/RES/1840 [preamble, indent 8]; UNSC Res 1892 (13 October 2009) UN Doc S/RES/1892 [preamble, indent 7]; UNSC Res 1944 (14 October 2010) UN Doc S/RES/1944 [preamble, indent 11]; UNSC Res 2012 (14 October 2011) UN Doc S/RES/2012 [preamble, indent 13]; UNSC Res 2070 (12 October 2012) UN Doc S/RES/2070 [preamble, indent 20]; UNSC Res 2119 (10 October 2013) UN Doc S/RES/2119 [preamble, indent 16]; UNSC Res 2180 (14 October 2014) UN Doc S/RES/2180 [preamble, indent 8]; UNSC Res 2243 (14 October 2015) UN Doc S/RES/2243 [preamble, indent 10]; UNSC Res 2313 (13 October 2016) UN Doc S/RES/2313 [preamble, indent 17].

seemed to enumerate the two goals as independent prerequisites of achieving a sustainable transitional period in the country.[815] Nonetheless, UNSMIL was mandated by the Council to support Libyan efforts to promote the rule of law, which explicitly included the provision of assistance towards national reconciliation.[816] In a similar vein, MONUC was mandated to strengthen democratic institutions and the rule of law in the Democratic Republic of the Congo and, to that end, promote national reconciliation.[817]

Whereas fostering national reconciliation is a typical element of peacebuilding as was the case in Guinea-Bissau and Libya, its achievement can also figure in a peacekeeping context as it did in the cases of Haiti and the Democratic Republic of the Congo.[818] Fostering national reconciliation aims at achieving sustainable peace and was thus identified by the High-level Independent Panel on Peace Operations as a crucial element of the mandates of UN peace operations.[819] The purpose of the rule of law to contribute to national reconciliation is thus ultimately directed at serving the attainment and consolidation of peace, security and stability.

vii. Elections and Democratic Governance

Council resolutions have emphasised the crucial role of the rule of law in creating the necessary conditions for successful elections and in fostering democratic governance. In order to support the Burundian government in achieving democratic governance in the country, BINUB was tasked by the Council to consolidate the rule of law, which required in particular the strengthening of the justice and corrections system, including the independence and capacity of the judiciary.[820]

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815 UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016 [preamble, indent 4; 2]; UNSC Res 2040 (12 March 2012) UN Doc S/RES/2040 [preamble, indent 4; 2]; UNSC Res 2095 (14 March 2013) UN Doc S/RES/2095 [preamble, indent 4; 2]; UNSC Res 2144 (14 March 2014) UN Doc S/RES/2144 [preamble, indent 4; 1].

816 UNSC Res 2040 (12 March 2012) UN Doc S/RES/2040 [6 (b)]; UNSC Res 2095 (14 March 2013) UN Doc S/RES/2095 [7 (b)].

817 UNSC Res 1756 (15 May 2007) UN Doc S/RES/1756 [3 (b)]; UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856 [4 (b)].

818 Christian Schaller, 'Towards an International Legal Framework for Post-conflict Peacebuilding' (German Institute for International and Security Affairs, February 2009) 9; UNDPKO, Capstone Doctrine (n 790) 24.

819 Report of the High-level Independent Panel on Peace Operations A/70/95–S/2015/446 (n 803) [160]. See also UNGA, International Year of Reconciliation, 2009, UNGA Res 61/17 (23 January 2007) UN Doc A/RES/61/17 [preamble, indent 7] (qualifying reconciliation processes as 'necessary to and a condition for the establishment of firm and lasting peace').

820 UNSC Res 1719 (25 October 2006) UN Doc S/RES/1719 [2 (d)].

In a resolution dealing, ia, with the run-up to the next electoral cycle in the Central African Republic, the Council urged the government to ensure that the rule of law be fully respected, which it described as 'essential for democracy'.[821] Invoking the other side of the coin, the Council repeatedly underlined the importance of elections for the establishment and later promotion of the rule of law in the Democratic Republic of the Congo.[822] MONUC's mandate to support the strengthening of democratic institutions and the rule of law in the Democratic Republic of the Congo consequently involved providing advice to strengthen democratic institutions and processes at the national, provincial, regional and local levels, assistance to the Congolese authorities in the organisation, preparation and conduct of local elections and the establishment of a secure and peaceful environment for the holding of free and transparent elections.[823]

3. Preventing and Fighting Crime

The third purpose that Council resolutions can be considered to ascribe to the rule of law, is to serve the effective prevention of and fight against crimes that constitute or contribute to the emergence of a threat to international peace and security or are committed in the context of armed conflict. Here again, the prevention of and fight against crime is a crucial element of the Council's general endeavour to maintain peace, security and stability and the rule of law ultimately caters to this overarching goal. Resolutions highlighting the important role of the rule of law in this context were issued in response to terrorism, piracy, sexual violence in conflict or the illicit transfer, accumulation and misuse of small arms and light weapons. The following section will discuss these linkages in more detail.

821 UNSC Res 2031 (21 December 2011) UN Doc S/RES/2031 [5].

822 UNSC Res 1621 (6 September 2005) UN Doc S/RES/1621 [preamble, indent 3]; UNSC Res 1635 (28 October 2005) UN Doc S/RES/1635 [preamble, indent 3]; UNSC Res 1649 (21 December 2005) UN Doc S/RES/1649 [preamble, indent 2]; UNSC Res 1671 (25 April 2006) UN Doc S/RES/1671 [preamble, indent 3]; UNSC Res 1693 (30 June 2006) UN Doc S/RES/1693 [preamble, indent 3]; UNSC Res 1711 (29 September 2006) UN Doc S/RES/1711 [preamble, indent 4]; UNSC Res 1756 (15 May 2007) UN Doc S/RES/1756 [preamble, indent 7]; UNSC Res 1794 (21 December 2007) UN Doc S/RES/1794 [preamble, indent 19]; UNSC Res 1797 (20 January 2008) UN Doc S/RES/1797 [30 January 2008) [preamble, indent 3]; UNSC Res 1906 (23 December 2009) UN Doc S/RES/1906 [preamble, indent 13]; UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925 [preamble, indent 10].

823 UNSC Res 1756 (15 May 2007) UN Doc S/RES/1756 [3 (a) (d) (e)]; UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856 [4 (a) (d) (e)].

a. Terrorism

The need to respect the rule of law as an essential requirement of a successful counter-terrorism effort was highlighted by several Council resolutions.[824] Council resolutions containing counter-terrorism measures present the rule of law as serving a crucial purpose in the context of counter-terrorism efforts after the commission of terrorist acts as well as in preventing them. Remarkably, the Council consistently emphasises the rule of law's function in enhancing the *effectiveness* of counter-terrorism measures, which might be counter-intuitive at first sight from a perspective of efficient intelligence- or law enforcement operations to curb terrorist threats.[825] The position, however, may be read as suggesting that respect for the rule of law will cater to the legitimacy of counter-terrorism measures and thus eventually enhance their effectiveness. This connection is often emphasised with respect to the Council's listing procedure regarding sanctions against alleged terrorists whose efficiency proved to be hampered by challenges in national and regional courts of UN member states due to their encroachments upon human rights guarantees.[826]

An alternative reading could relate to the Council's repeated finding that a failure of member states to comply with their obligations under international law when countering terrorism, in particular international human rights-,

[824] UNSC Res 2129 (17 December 2013) UN Doc S/RES/2129 [preamble, indent 5]; UNSC Res 2170 (15 August 2014) UN Doc S/RES/2170 [preamble, indent 8]; UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178 [preamble, indent 7]; UNSC Res 2214 (27 March 2015) UN Doc S/RES/2214 [6]. The same wording was used in previous resolutions but restricted to respect for human rights. See UNSC Res 1963 (20 December 2010) UN Doc S/RES/1963 [10].

[825] UNSC Res 1963 (20 December 2010) UN Doc S/RES/1963 [10]; UNSC Res 2129 (17 December 2013) UN Doc S/RES/2129 [preamble, indent 5; 21]; UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178 [preamble, indent 7]; UNSC Res 2214 (27 March 2015) UN Doc S/RES/2214 [6].

[826] See, eg, Bianchi (n 462) 904f (anticipating challenges before domestic courts); Chesterman, "I'll Take Manhattan" (n 16) 71–73; Proposal to the United Nations Security Council by the Group of Like-Minded States on Targeted Sanctions: Fair and Clear Procedures for a More Effective UN Sanctions System (New York, 12 November 2015) ‹http://www.new-york-un.diplo.de/contentblob/4662362/Daten/6041651/151112fairclearproceduressanctions.pdf› accessed 14 July 2017; Veronika Fikfak, 'Judicial Strategies and their Impact on the Development of the International Rule of Law' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016) 45, 53 f. For an overview of targeted sanctions regimes and national and regional case law challenging them see, eg, Farrall, *United Nations Sanctions* (n 16); Thomas Biersteker, 'Targeted Sanctions and Individual Human Rights' (2009-10) 65 *Int'l J.* 99-117; Monika Heupel, 'Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards' (2009) 85 *Int'l Aff.* 307–321; Kanetake (n 385) 267.

refugee- and humanitarian law, including those flowing from the UN Charter, is one of the factors contributing to an increased radicalisation and thus eventually to terrorism.[827] The latter finding also underlines that respect for the rule of law has preventive effects with regard to the emergence of terrorist threats. This seems to be confirmed by several resolutions explicitly noting the importance of respect for the rule of law to effectively prevent terrorism.[828] Also resolutions on the extension of the mandate of the Counter-Terrorism Committee Executive Directorate (CTED) describe the promotion of the rule of law as a measure to address the conditions conducive to the spread of terrorism, thus indicating that respect for the rule of law may work against the emergence of terrorist threats.[829]

Respect for the rule of law is also considered crucial with regard to measures taken after the commission of terrorist acts. The Council, thus, repeatedly encouraged the CTED to further develop its activities in the area of rule of law and counter-terrorism and to ensure that all human rights and rule of law issues relevant to the implementation of resolutions 1373 (2001) and 1624 (2005) be addressed.[830] To the extent that these resolutions do not only contain measures of a preventive nature but also measures addressing the situation after a terrorist act was (sometimes only allegedly) committed, the Council's encouragement can be read to emphasise the importance of the rule of law also with regard to non-preventive counter-terrorism efforts.

Several resolutions shed light on what the Council might be referring to when speaking of *respect for the rule of law* in the context of counter-terrorism. Many paragraphs highlighting the importance of respect for the rule of law to effectively prevent and combat terrorism also reaffirm that member states must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights-,

827 UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178 [preamble, indent 7]; UNSC Res 2214 (27 March 2015) UN Doc S/RES/2214 [6].

828 UNSC Res 2129 (17 December 2013) UN Doc S/RES/2129 [preamble, indent 5]; UNSC Res 2170 (15 August 2014) UN Doc S/RES/2170 [preamble, indent 8]; UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178 [preamble, indent 7]; UNSC Res 2214 (27 March 2015) UN Doc S/RES/2214 [6].

829 UNSC Res 1963 (20 December 2010) UN Doc S/RES/1963 [preamble, indent 4]; UNSC Res 2129 (17 December 2013) UN Doc S/RES/2129 [preamble, indent 3].

830 UNSC Res 2129 (17 December 2013) UN Doc S/RES/2129 [21]; UNSC Res 1963 (20 December 2010) UN Doc S/RES/1963 [10] (also encouraging the CTED to further develop its activities regarding rule of law and counter-terrorism but only asking it to ensure that all human rights issues are addressed when implementing resolutions 1373 (2001) and 1624 (2005)).

refugee-, and humanitarian law.[831] Considering the implied connection, respect for the rule of law in the context of counter-terrorism may thus be understood as to invoke the rule of international law, emphasising the aspect of the international rule of law that relates to the compliance of international legal subjects with their international law obligations.[832] The above-mentioned encouragement directed at the CTED to ensure that all human rights and rule of law issues relevant to the implementation of resolutions 1373 (2001) and 1624 (2005) be addressed, further underlines the Council's focus on the international rule of law: It requests one of its subsidiary organs to ensure that member states respect their international obligations under human rights-, refugee- and humanitarian law and all relevant rule of law issues when implementing the respective counter-terrorism resolutions.[833]

831 UNSC Res 2129 (17 December 2013) UN Doc S/RES/2129 [preamble, indent 5]; UNSC Res 2170 (15 August 2014) UN Doc S/RES/2170 [preamble, indent 8]; UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178 [preamble, indent 7]; UNSC Res 2214 (27 March 2015) UN Doc S/RES/2214 [6]. The reference to UN member states' international law obligations in countering terrorism was originally not contained in paragraphs also highlighting the necessity to respect the rule of law, see UNSC Res 1535 (26 March 2004) UN Doc S/RES/1535 [preamble, indent 4]; UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566 [preamble, indent 6]; UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624 [preamble, indent 2; 4]; UNSC Res 1787 (10 December 2007) UN Doc S/RES/1787 [preamble, indent 4]; UNSC Res 1805 (20 March 2008) UN Doc S/RES/1805 [preamble, indent 8]; UNSC Res 1963 (20 December 2010) UN Doc S/RES/1963 [preamble, indent 13]. See also, Annex of the Letter dated 17 August 2011 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the Secretary-General (1 September 2011) UN Doc S/2011/463 [281, 286] (specifying that 'while it is true that human rights law affords some flexibility in addressing security challenges, States must respect certain core principles in all circumstances, including the principles of necessity, proportionality, legality and non-discrimination (. . .) States are also obliged at all times to respect rights that are non-derogable under international law or that have attained the status of jus cogens, such as the right of all persons to be free from torture and the prohibition against enforced disappearances'. Since '[c]ounter-terrorism measures in some States take place in the context of armed conflict', they raise 'questions of compliance with international humanitarian law. The use of deadly force in such situations must respect the principle of distinction and proportionality, and violations should be subject to accountability').

832 See, eg, Ian Hurd, 'Three Models of the International Rule of Law' (2015) 23 *Revista de Filosofía de la Universidad del Norte* 37, 39–41 or – for a similar argument – Beaulac (n 385) 206 f.

833 UNSC Res 2129 (17 December 2013) UN Doc S/RES/2129 [21]; UNSC Res 1963 (20 December 2010) UN Doc S/RES/1963 [10]. See Security Council Committee established pursuant to Resolution 1373 (2001) concerning Counter-Terrorism (ed), *Conclusions for Policy Guidance regarding Human Rights and the CTC* (25 May 2006) UN Doc S/AC.40/2006/PG.2 and the recommendations to Member States, the CTC and CTED contained in the Annex of the Letter dated 17 August 2011 from the Chair of the

In light of the fact that terrorist acts are qualified as threats to international peace and security, the rule of law employed as a means to curb such threats, again ultimately serves the purpose of facilitating the maintenance of international peace and security.[834]

b. Piracy

Council resolutions on the fight against piracy and armed robbery at sea off the coast of Somalia have repeatedly emphasised that respect for the rule of law is necessary to create the conditions for a full and durable eradication of piracy and armed robbery.[835] The abstract nature of this phrase makes it difficult to assess what role exactly the Council ascribes to the rule of law in the fight against piracy in Somalia. One possible interpretation could be that the phrase, which is found in most Council resolutions on piracy and armed robbery off the coast of Somalia, is linked to the lacking law enforcement capacity of the Somali government to effectively control its territory and sea in order to prevent and combat piracy.[836] The Secretary-General planned to address this lack of law enforcement power, ia, by assisting the 'Transitional Federal Government and the Alliance for the Re-Liberation of Somalia in developing and coordinating a coherent strategy to build Somalia's Transitional Security Forces and Police, *rule of law* and correctional facilities'.[837] He specified in a

Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the Secretary-General (1 September 2011) UN Doc S/2011/463 [289].

834 See, eg, UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 [preamble, indent 3]; UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566 [preamble, indent 7]; UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904 [preamble, indent 2]; UNSC Res 1963 (20 December 2010) UN Doc S/RES/1963 [preamble, indent 3]; UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178; UNSC Res 2253 (17 December 2015) UN Doc S/RES/2253 [preamble, indents 2 & 3].

835 UNSC Res 1838 (7 October 2008) UN Doc S/RES/1838 [preamble, indent 11]; UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 [preamble, indent 10]; UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897 [preamble, indent 13]; UNSC Res 1918 (27 April 2010) UN Doc S/RES/1918 [preamble, indent 16]; UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950 [preamble, indent 19]; UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020 [preamble, indent 25]; UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077 [preamble, indent 26]; UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125 [preamble, indent 30]; UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [preamble, indent 28]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [preamble, indent 31]; UNSC Res 2316 (9 November 2016) UN Doc S/RES/2316 [preamble, indent 31].

836 UNSC Report of the Secretary-General, 'Report of the Secretary-General pursuant to Security Council Resolution 1846 (2008)' (2009) UN Doc S/2009/146 [48].

837 ibid (emphasis added).

subsequent report that long-term as well as short-term measures to combat piracy and armed robbery required an integrated approach, which includes the further development of rule of law institutions.[838] In the same report, the Secretary-General also observed that 'it will be crucial for the Somali authorities to continue to re-establish (…) the rule of law (…) in order to address the root causes of piracy and armed robbery' and that 'there is a need for the authorities to demonstrate the political will to counter piracy and armed robbery at sea off the coast of Somalia by establishing an effective law enforcement and independent justice system'.[839] These paragraphs might support a reading of the reference to the necessity to respect the rule of law as to invoke a need to re-establish rule of law structures and institutions in the Somali state in order to be capable to address the regional piracy threat. Such a reading is further underpinned by the fact that all paragraphs in Council resolutions referring to the rule of law as a requirement to eradicate piracy, also count the strengthening of state institutions among the necessary factors to achieve this goal. The Council's request for assistance to the Transitional Federal Government and regional authorities in Somalia 'in establishing a system of governance, rule of law and police control in lawless areas where land-based activities related to piracy' are taking place, further supports this reading.[840] Council resolutions on the African Union Mission (AMISOM) or UNSOM in Somalia also highlight the necessity to re-establish and strengthen Somali security- and rule of law institutions.[841] Congruously, UNSOM was mandated to provide strategic policy advice on the rule of law, including police, justice and corrections.[842] Several Secretary-General reports further support this

838 UNSC Report of the Secretary-General, 'Report of the Secretary-General pursuant to Security Council Resolution 1846 (2008)' (2009) UN Doc S/2009/590 [87].

839 SG Report S/2009/590 (n 838) [92]. See also para 95 of the same report, which holds 'that the only sustainable solution will be effective governance, *the establishment of the rule of law* and security institutions and the creation of alternative livelihoods in Somalia for stable and inclusive economic growth' (emphasis added).

840 UNSC Res 1976 (11 April 2011) UN Doc S/RES/1976 [4].

841 UNSC Res 1863 (16 January 2009) UN Doc S/RES/1863 [22, 24]; UNSC Res 1872 (26 May 2009) UN Doc S/RES/1872 [10]; UNSC Res 1910 (28 January 2010) UN Doc S/RES/1910 [12]; UNSC Res 1964 (22 December 2010) UN Doc S/RES/1964 [12]; UNSC Res 2010 (30 September 2011) UN Doc S/RES/2010 [16]; UNSC Res 2067 (18 September 2012) UN Doc S/RES/2067 [5; 11]; UNSC Res 2093 (6 March 2013) UN Doc S/RES/2093 [preamble, indent 5]; UNSC Res 2124 (12 November 2013) UN Doc S/RES/2124 [25]; UNSC Res 2232 (28 July 2015) UN Doc S/RES/2232 [19]; UNSC Res 2275 (24 March 2016) UN Doc S/RES/2275 [preamble, indent 9].

842 UNSC Res 2093 (6 March 2013) UN Doc S/RES/2093 [22 (c)]; UNSC Res 2102 (2 May 2013) UN Doc S/RES/2102 [2 (b) (ii)]; UNSC Res 2158 (29 May 2014) UN Doc S/RES/2158 [1 (b) (ii)].

view and the Council's observation that the 'continuing limited capacity and domestic legislation to facilitate the custody and prosecution of suspected pirates after their capture has hindered more robust international action against the pirates off the coast of Somalia' also ties in with this reading.[843]

[843] For Secretary-General reports supporting this view, see UNSC Report of the Secretary-General, 'Report of the Secretary-General pursuant to Security Council Resolution 1897 (2009)' (2010) UN Doc S/2010/556 [67] ('As I have said previously, acts of piracy and armed robbery at sea off the coast of Somalia are a symptom of the instability and lack of rule of law in Somalia. The Transitional Federal Government is attempting to establish its governance structures and the rule of law, including through the development of the security and justice sectors'); UNSC Report of the Secretary-General, 'Report of the Secretary-General pursuant to Security Council Resolution 2020 (2011)' (2012) UN Doc S/2012/783 [75] ('A significant gap still exists in land-based programmes in Somalia to address piracy. This is primarily owing to the lack of security on the ground and lack of sufficient funding to support capacity-building and alternative livelihoods. An ever-greater emphasis must now be placed on providing focused assistance to States in the region and to authorities in Somalia to build their capacity to deal with the institutional and operational challenges to governance, the rule of law, maritime law enforcement and security, and economic growth. In addition, counter-piracy actions should run alongside a concerted effort to rebuild the civil structures and institutions of Somalia in close cooperation with the Somali authorities and civil society'); UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia' (2013) UN Doc S/2013/623 [71] ('The resilience of pirates points to the main challenge: the onshore rule of law and governance vacuum in which they operate. As the number of pirate attacks decreases and as the international community shows renewed commitment to supporting State-building and peacebuilding efforts in Somalia, now is the opportunity to undertake long-term and sustainable efforts to repress piracy, including the construction of viable and accountable Somali State structures, the re-establishment of responsive law enforcement capabilities both at sea and onshore.'); UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia' (2014) UN Doc S/2014/740 [23] ('The Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia, chaired by the Department of Political Affairs of the Secretariat, continues to provide financial assistance to strengthen the rule of law and the judicial and correctional capacity of States in the region to combat impunity of pirates. It also supports other activities relating to implementing the Contact Group's objective of addressing piracy in all its aspects. Priority is generally accorded to projects that improve prison and judicial systems, strengthen the rule of law through training and capacity-building and reform the legislative framework in Somalia and the States in the region'); UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia' (2015) UN Doc S/2015/776 [57; 66] ('I call upon the international community to increase its support to Somali efforts in the areas of governance, the rule of law and economic development to tackle the root causes of piracy off the coast of Somalia. (…) The activities to support development, governance and the rule of law in Somalia are the final "hard laps" that must be run if we are to secure sustained victory

Another possible interpretation of the phrase correlates closely with the position taken by the Council with regard to the fight against terrorism: The invocation of the rule of law relates to the requirement that all measures aimed at preventing and combatting piracy and armed robbery are supposed to respect the rule of law. If respect for the rule of law is understood to refer to the compliance of states with obligations under international law while countering piracy, Council resolutions on piracy in Somalia could be read to support such an interpretation as they contain manifold calls on states to act in accordance with international human rights law.

The Council, eg, repeatedly called on member states and the Somali authorities to *bring to justice* those who are using Somali territory to plan, facilitate, or undertake criminal acts of piracy and armed robbery and that all such measures should be consistent with applicable international human rights law.[844] More concretely, it required that *investigations* directed at persons suspected of acts of piracy and armed robbery, including their incitement or facilitation, be consistent with international human rights law.[845] Even more persistently the Council required that the *prosecution* of suspected pirates and of those inciting, facilitating or financing their acts, be consistent with applicable international human rights law or commended efforts undertaken in this

against piracy. Only through such efforts can we reach the bedrock that will underpin the elimination of piracy as a threat, namely, a peaceful and stable Somalia'). For the cited resolution text see, UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897 [preamble, indent 8]; UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950 [preamble, indent 11]; UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020 [preamble, indent 13]; UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077 [preamble, indent 14]; UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125 [preamble, indent 19]; UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [preamble, indent 17]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [preamble, indent 8].

844 UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897 [11]; UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950 [11]; UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020 [13]; UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077 [16]; UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125 [7]; UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [7]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [7] (emphasis added).

845 UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 [14]; UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897 [12]; UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950 [12]; UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020 [14]; UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077 [17]; UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125 [preamble, indent 28; 16]; UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [preamble, indent 26; 17]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [preamble, indent 29; 18] (emphasis added).

regard.[846] Finally, the Council emphasised at various occasions that it also expects the *imprisonment* of convicted pirates to be consistent with international human rights law as well as their *repatriation* back to Somalia under suitable prisoner transfer arrangements.[847] This reading could again be supported by the fact that all paragraphs referring to the rule of law as a requirement to eradicate piracy also call for respect of human rights in pursuing this objective.[848]

The Council did not qualify piracy as a threat to international peace and security. It rather determined that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia, which it considered to constitute a threat to international peace and security in the region.[849] To the

[846] UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 [14]; UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897 [preamble, indents 8 & 9; 12]; UNSC Res 1918 (27 April 2010) UN Doc S/RES/1918 [preamble, indents 6 & 13; 2]; UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950 [preamble, indent 13; 12; 13]; UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020 [14; 15]; UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077 [preamble, indent 18; 17; 18]; UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125 [preamble, indents 23 & 28; 16; 17; 19]; UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [preamble, indents 21 & 26; 17; 18]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [preamble, indents 21 & 29; 18; 19; 20] (emphasis added).

[847] UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897 [preamble, indents 8, 9 & 11]; UNSC Res 1918 (27 April 2010) UN Doc S/RES/1918 [preamble, indent 6; 2]; UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950 [preamble, indents 13, 14 & 17; 13]; UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020 [preamble, indent 23; 15]; UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077 [preamble, indents 18, 19 & 24; 18]; UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125 [preamble, indents 23 & 28; 19]; UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [preamble, indent 21, 22 & 26; 18]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [preamble, indents 21 & 29; 19; 20] (emphasis added).

[848] With regard to a possible derogation from derogable human rights law in accordance with art 103 UN Charter when states exercise enforcement powers based on chapter VII in detaining, transferring or prosecuting suspected pirates, some authors interpret the reference to international human rights law in Council resolutions on piracy as a clear sign that the Council did not intend to authorise derogations from human rights law. See, Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff 2014) 146f (citing Douglas Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (2010) 59 *Int'l & Comp. L.Q.* 141, 152).

[849] UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816 [preamble, indent 12]; UNSC Res 1838 (7 October 2008) UN Doc S/RES/1838 [preamble, indent 12]; UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 [preamble, indent 14]; UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851 [preamble, indent 11]; UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897 [preamble, indent 14]; UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950 [preamble, indent 20]; UNSC Res 1976 (11 April 2011) UN Doc S/RES/1976 [preamble, indent 18]; UNSC Res 2015 (24 October 2011) UN Doc S/RES/2015 [preamble,

extent that the rule of law shall cater to the eradication of piracy, however, it is ultimately one of the elements the Council considers necessary to address the security threat posed by the situation in Somalia.

c. Sexual Violence in Conflict

The rule of law is portrayed in Council resolutions as a crucial factor in addressing the occurrence of sexual violence in the context of conflict. Council resolution 1888 (2009) called upon the Secretary-General to identify and take appropriate measures to deploy rapidly a team of experts to situations of particular concern with respect to sexual violence in armed conflict in order to assist national authorities to strengthen the rule of law.[850] The said resolution brought into being the Office of the SRSG on Sexual Violence in Conflict and the Team of Experts on the Rule of Law and Sexual Violence in Conflict.[851]

The Council repeatedly emphasised the importance of deploying the team of experts to situations of particular concern with respect to sexual violence in order to assist national authorities to strengthen the rule of law and encouraged concerned member states to draw upon its experience also in assisting with the strengthening of civilian and military justice systems.[852] Since its inauguration, the team has been employed to several conflicts and assisted, ia, in creating a rapid response unit of trained gendarmes and police officers to improve investigations of sexual violence in the Central African Republic, in drafting a law on access to justice for victims of sexual violence in Colombia, in revising a rape- and sexual violence bill in Somaliland or in drafting a law on the protection of victims and witnesses in the Democratic Republic of the Congo.[853] Additionally, the SRSG on Sexual Violence in Conflict received

indent 17]; UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020 [preamble, indent 27]; UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077 [preamble, indent 29]. For the claim that the securitisation of piracy off the coast of Somalia was not connected to the state failure of Somalia but rather to concerns of Western states with regard to oil supplies, commercial fishery or a possible collaboration between pirates and Al-Shabaab, see Peter Lehr, 'Security Council Resolutions on Somali Piracy' in Vesselin Popovski and Trudy Fraser (eds), *The Security Council as Global Legislator* (Routledge 2014) 143, 153 f.

850 UNSC Res 1888 (30 September 2009) UN Doc S/RES/1888 [8].

851 ibid [4, 8]; Team of Experts on the Rule of Law and Sexual Violence in Conflict (ed), Progress Report January – May 2011 (New York 2011) [1].

852 UNSC Res 1960 (16 December 2010) UN Doc S/RES/1960 [preamble, indent 7]; UNSC Res 2106 (24 June 2013) UN Doc S/RES/2106 [18].

853 UNSC Report of the Secretary-General, 'Conflict-related Sexual Violence' (2015) UN Doc S/2015/203 [93]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Organizations Stabilization Mission in the Democratic Republic of Congo' (2016) UN Doc S/2016/233 [46]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2016) UN Doc S/2016/27 [66].

high-level commitments from the governments of the Central African Republic, Côte d'Ivoire, the Democratic Republic of the Congo, Guinea, Somalia and South Sudan to ensure accountability for sexual crimes and collaborated with Security Council sanctions committees regarding sanctions against individuals involved in the perpetration of sex crimes. These measures also have to be read in the context of UN rule of law activities to address sexual violence.[854]

Beyond these special measures to strengthen the rule of law in order to curb the occurrence of sexual violence in the context of conflict, this task can also be part of a UN peace operation's mandate. The Council, for example, required UNOCI to support Ivorian parties in ensuring that the rule of law be strengthened in order to address sexual violence against women and children.[855] In Burundi, the Council urged the government to adhere to the rule of law and hold accountable all those responsible for crimes involving violations of international humanitarian law or violations and abuses of human rights, including those involving sexual violence.[856] More generally, the Council stressed that trafficking in persons – a crime closely related to institutionalised sexual violence – undermines the rule of law.[857]

Taking into account the assessment that sexual violence in conflict has far reaching implications for efforts to consolidate peace, the Council's ambition to fight sexual crime in the context of conflict also qualifies as a sub-category of its overarching goal to maintain international peace and security and the rule of law serves this objective.[858]

d. Small Arms and Light Weapons

Lastly, Council resolutions suggest that the strengthening of the rule of law contributes to the mitigation or eradication of security threats connected to small arms and light weapons. In its thematic resolution on small arms and

854 SG Report A/70/206 (n 408) [31].

855 UNSC Res 1933 (30 June 2010) UN Doc S/RES/1933 [13] (the paragraph also required that 'all reported abuses are investigated and those responsible for such violations be brought to justice', which might be read as a substantiation of the requirement to strengthen the rule of law).

856 UNSC Res 2303 (29 July 2016) UN Doc S/RES/2303 [2].

857 UNSC Res 2331 (20 December 2016) UN Doc S/RES/2331 [1].

858 UNSC Report of the Secretary-General, 'Report of the Secretary-General pursuant to Security Council Resolution 1820' (2009) UN Doc S/2009/362 [6] (holding that 'conflict environments, characterized by a breakdown in the rule of law and a prevailing climate of impunity, create the conditions whereby parties, State and non-State alike, emboldened by their weapons, power and status, essentially enjoy free reign to inflict sexual violence, with far reaching implications for efforts to consolidate peace and secure development').

light weapons, the Council held that efforts of the United Nations aimed at addressing the illicit transfer, destabilising accumulation and misuse of small arms and light weapons should be part of a comprehensive and integrated approach that incorporates and strengthens coherence between political-, security-, development-, human rights- and rule of law activities.[859]

The position that a strengthened rule of law is key to tackling the illegal use, trade or circulation of small arms and light weapons is backed by the observation that a weak rule of law often coincides with a lacking capacity of state governments to control the circulation, trade or use of small arms and light weapons. Somalia, eg, was incapable of monitoring and enforcing the arms embargo established against it due to the insufficient capacity of its authorities and thus lacked control over the illicit circulation of small arms and light weapons across its borders.[860] Consequently, a UN rule of law- and security programme was tasked to strengthen the capacity of Somali authorities in order to support the management of and report on arms imported into the country.[861] To address such weaknesses, 'the United Nations, often supported by the global focal point for the police, justice and corrections, provides support to strengthen the effectiveness and accountability of institutions in such areas to uphold the rule of law'.[862]

The Council's reiteration that it may mandate UN peacekeeping operations and special political missions to assist host governments in capacity-building in order 'to address the illicit trafficking of small arms and light weapons, including inter alia through (…) strengthening judicial institutions, policing and other law enforcement capacities' is to be read in this light.[863]

Taking into account that access to illicit weapons by armed groups and civilians in post-conflict situations is viewed as contributing to the risk of relapsing into conflict and as diminishing the chances of achieving sustainable peace, the rule of law as a means to address the illicit use, trade or circulation of small arms and light weapons ultimately serves the goal of ensuring peace, security and stability.[864]

859 UNSC Res 2220 (22 May 2015) UN Doc S/RES/2220 [preamble, indent 12].
860 SG Report S/2015/289 (n 782) [62].
861 ibid.
862 ibid [86].
863 UNSC Res 2117 (26 September 2013) UN Doc S/RES/2117 [5]; UNSC Res 2185 (20 November 2014) UN Doc S/RES/2185 [25]; UNSC Res 2195 (19 December 2014) UN Doc S/RES/2195 [18].
864 SG Report S/2015/289 (n 782) [87].

D. Analysis

From an analysis of the circumstances that have triggered Council references to the rule of law, four main observations emerge. Firstly, the Council has invoked the rule of law primarily in country-specific rather than thematic resolutions allowing for inferences with regard to the principle's political and normative standing among Council members. Secondly, most invocations of the rule of law pertain to its function in the national realm rather than to its implications on an international level. Thirdly, the Council primarily invokes the constitutive rather than the restraining function of the rule of law, ie that aspect of the rule of law that relates to the creation of the very conditions that enable an entity to exercise public authority. Fourthly, the Council's engagement with the rule of law must be read in light of the tradition of the liberal peace thesis that considers law as a requirement to achieve and ensure peace.

1. Country-specific Situations

A first and rather plain observation relates to the fact that most paragraphs on the purposes served by the rule of law are found in country-specific resolutions rather than thematic resolutions. This differentiation matters greatly. Often, what is said in a country-specific resolution says much more about the degree of acceptability and validity of a specific subject matter under the Council's consideration than what is included in thematic resolutions.[865] This is particularly true if the Council supplements general paragraphs on the purposes served by the rule of law with a concrete mandate of a UN peace operation or concrete obligations for UN member states how to establish or strengthen the rule of law. The fact that the Council predominantly invokes the rule of law in country-specific resolutions is thus of crucial importance if it comes to assessing the political acceptance of a certain rule of law understanding and to the legal and political effects of a potential consensus with regard to the rule of law.

2. The National versus International Rule of Law

A related observation is the different prevalence of references to the national and international rule of law in Council resolutions. Mostly, the Council invokes the national rule of law. It usually reacts to rule of law deficits in countries affected by conflict or crisis and determines based on binding measures how the rule of law shall be re-established or strengthened, thereby imposing a constitutional

[865] Månsson (n 11) 99.

standard. The international rule of law is invoked only rarely in Council resolutions and very abstractly as opposed to the national rule of law.

Only two thematic resolutions contain explicit references to the international rule of law. The thematic resolutions on conflict prevention and on the role of policing in peacekeeping and post-conflict peacebuilding reiterate that the rule of law needs to be strengthened at the international level in order to prevent armed conflict and ensure sustainable peace.[866] Both references are only included in the preambular part. Then, of course, there are paragraphs that can be interpreted as implicitly invoking aspects of the international rule of law such as in resolutions on terrorism or piracy, which require member states to respect their international law obligations while preventing and fighting these crimes.

So far, the impression, thus, prevails that the Council is rather engaged in the promotion of the national rule of law than in the strengthening of the international rule of law. Quite clearly, thus, the Council's engagement with the rule of law does not contribute to a consolidation of the international rule of law or an international legal discourse on its concrete implications or addressees. This may relate to the fact that the Council itself is often criticised for being non-compliant with the international rule of law, which may also be said about some of its permanent members.[867]

3. The Constitutive and Restraining Function of the Rule of Law

Thirdly, one can observe that Council references to the rule of law invoke two of its most basic functions: The constitutive and the restraining function of the rule of law.[868] The constitutive function of the rule of law relates to the institutions, procedures and rights that are required to create an entity capable of exercising public authority – in the present context a state – and to the creation of conditions that enable it to provide 'essential public goods'.[869] Along these

[866] See, UNSC Res 2171 (21 August 2014) UN Doc S/RES/2171 [preamble, indent 9]; UNSC Res 2185 (20 November 2014) UN Doc S/RES/2185 [preamble, indent 3].

[867] See n 16.

[868] This idea takes its inspiration from Aust and Nolte (n 17) 53 who speak of the 'enabling' and 'constraining' function of the rule of law. Also see Christoph Möllers, 'Pouvoir Constituant–Constitution–Constitutionalisation' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2010) 169, 171–178 (who formulates a similar thought and speaks of 'order-founding' and 'power-shaping constitutional traditions' in the context of European constitutional theory. Whereas the first tradition is directed at determining the content and form of sovereign power, the second aims at restraining it).

[869] Magen Amichai, 'The Rule of Law and its Promotion Abroad: Three Problems of Scope' (2009) 45 *Stan. J. Int'l L.* 51, 72. See, eg, in the context of Afghanistan, where Council

lines, Fuller described the rule of law as a sine qua non for the existence of a legal system.[870] With this focus in mind, the rule of law primarily relates to the institutional and legal structures that ensure the physical security of the people living on the territory, which is supposed to be (re-)introduced to (enhanced) conditions of statehood.[871]

When invoking the restraining function of the rule of law, the existence of an entity capable of exercising public authority is presumed and the rule of law is supposed to prevent its arbitrary exercise or illegitimate encroachments upon rights and liberties of the individuals subjected to it.[872] This may be understood with Raz who qualified the rule of law as just one of the many virtues of a legal system.[873]

When the Council refers to the purpose of the rule of law to facilitate conflict prevention, conflict management, peacekeeping and peacebuilding, it is usually the constitutive function of the rule of law that is invoked: The Council primarily employs the rule of law in order to re-establish or stabilise conditions of statehood in this context in order to facilitate a state of peace and security. This is most obvious when the rule of law serves the purpose of restoring state authority as described above but also reflected in the mandates of UN peace operations to strengthen state institutions and structures to enable them to uphold the rule of law, to re-establish the rule of law or to strengthen the capacity of rule of law institutions.[874] When the Council calls on governments to establish the rule of law in order to protect its civilian population, it also appeals

resolutions repeatedly referred to the 'delivery of services in a timely and sustainable manner' as one of the goals to be pursued by the rule of law support provided by international civilian efforts: UNSC Res 1806 (20 March 2008) UN Doc S/RES/1806 [4 (e)]; UNSC Res 1917 (22 March 2010) UN Doc S/RES/1917 [6 (b)]; UNSC Res 1974 (22 March 2011) UN Doc S/RES/1974 [6 (c)]; UNSC Res 2041 (22 March 2012) UN Doc S/RES/2041 [7 (b)]; UNSC Res 2096 (19 March 2013) UN Doc S/RES/2096 [7 (b)]; UNSC Res 2145 (17 March 2014) UN Doc S/RES/2145 [6 (b)]; UNSC Res 2210 (16 March 2015) UN Doc S/RES/2210 [7 (b)].

870 Fuller (n 61) 39.

871 Amichai (n 869) 72.

872 Grote, 'Rule of Law, Rechtsstaat and "État de droit"' (n 64) 304. For a definition of 'public authority', see von Bogdandy, Dann and Goldmann (n 147) 11 who define it as the 'legal capacity to determine others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation'. In the present context, public authority is understood as legitimate authority.

873 Raz (n 61) 211, 219.

874 See, eg, UNSC Res 1933 (30 June 2010) UN Doc S/RES/1933 [16 (j)] (mandate UNOCI); UNSC Res 1580 (22 December 2004) UN Doc S/RES/1580 [2 (h)] (mandate UNOGBIS); UNSC Res 2065 (12 September 2012) UN Doc S/RES/2065 [11] (mandate UNIPSIL).

to the constitutive function of the rule of law which relates to the conditions of statehood required in order to ensure the physical security of civilians.[875]

By contrast, when the Council refers to the purpose of the rule of law to prevent and address crime, it generally invokes the restraining function of the rule of law: Here, the perspective usually is that measures taken to curb crimes such as terrorism or piracy shall respect the rights of alleged perpetrators and take place within rule of law structures. This is exemplified in the Council's call on member states to respect their obligations under international human rights-, refugee- or humanitarian law when countering terrorism or when prosecuting or imprisoning (alleged) pirates. In the case of piracy, the Council seems to imply both functions of the rule of law, its constitutive function – relating to the creation of sufficient state capacity of Somalia to prevent and fight piracy – as well as its restraining function – relating to the rule of law-conforming treatment of alleged perpetrators. Regarding the purposes ascribed to the rule of law in the context of sexual violence in conflict and small arms and light weapons, it is again the constitutive function of the rule of law that seems to be implied: The rule of law is invoked based on the observation that weak or non-existent rule of law structures nurture the emergence of these crimes.

4. The Liberal Peace Thesis

Lastly, the Council's use of the rule of law as a means to fulfil its mandate – the maintenance of international peace and security – can be related to the liberal peace thesis which in its origins dates back to the thinking of 18th century Enlightenment philosophers.[876] The concept of liberal peace rests on the assumption that national and international peace can only be ensured if states are politically stable and has in its modern form primarily relied on the export and establishment of free market economies and liberal democracies to achieve this goal.[877] Strengthening or even re-building states by reforming their rule of law systems with the justification of creating conditions for sustainable peace is an integral element of the liberal peace agenda.[878] The focus of Council resolutions on the constitutive function of the rule of law, thus, can be related to the legal jurisprudence of Locke who considered the establishment of law-based

875 See the resolutions in n 805 on the situation in the Democratic Republic of the Congo.

876 Paris, *At War's End* (n 6) 37.

877 Chandra Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice' in Vincent Chetail and Oliver Jütersonke (eds), *Peacebuilding*, vol II (Routledge 2015) 357, 358.

878 Oliver Richmond, 'Emancipatory Forms of Human Security and Liberal Peacebuilding' (2007) 62 *Int'l J.* 458, 462; Nollkaemper, 'Process of Legalisation' (n 5) 97.

regimes and constitutional restraints on sovereign power as crucial prerequisites for the existence of peaceful and stable societies.[879] Immanuel Kant also posited that the rule of law – enforced by a sovereign which is itself subject to the rule of law – was a necessary precondition for the peaceful co-existence of individuals and that republican states would not go to war with one another due to their republican constitution whereas wars would break out amongst liberal and non-liberal states.[880] Nowadays, this assumption is applied to liberal states that base their common identity on values such as democracy, human rights and the rule of law. Their commitment to these liberal values is assumed to contribute to and foster peace among them.[881] This rationale has largely informed post-Cold War statebuilding by states, international organisations and their organs such as the UN Security Council.[882]

III. No Council Definition of the Rule of Law

The fact that the Council has developed a notion of the function of the rule of law does not necessarily imply that it has committed itself to a definition of the principle. In a 2011 report, the UN Secretary-General observed that the Security Council had assumed 'an increased role in promoting the rule of law' as illustrated 'by a multitude of thematic resolutions and country-specific mandates'.[883] This development had commenced in the aftermath of the Cold War when the Council started to increasingly invoke the principle in its resolutions.[884] As has been illustrated, issue areas in which the Council most prominently invoked the rule of law are the prevention and fight against crime of a cross-border dimension or with cross-border effects such as terrorism, piracy or sexual violence, the stabilisation of crisis-affected states or the

879 Paris, *At War's End* (n 6) 47.

880 Immanuel Kant, 'Perpetual Peace. A Philosophical Sketch' in Hans Reiss (ed), *Kant: Political Writings* (2nd edn, CUP 1991) 93, 99–100; Michael Doyle, 'Liberalism and World Politics' (1986) 80 *Am. Polit. Sci. Rev.* 1151, 1160.

881 See, eg, Michael Doyle, 'Kant, Liberal Legacies, and Foreign Affairs' (1983) *Philos. Public. Aff.* 205, 213; Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) *EJIL* 503, 514; Russell Buchan, 'International Community and the Occupation of Iraq' (2007) 12 *J. Conflict & Sec. L.* 37, 51.

882 Korhonen (n 434) 15.

883 UNSC Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2011) UN Doc S/2011/634 [10].

884 Jeremy Farrall, 'Impossible Expectations? The UN Security Council's Promotion of the Rule of Law after Conflict' in Brett Bowden, Hilary Charlesworth and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (CUP 2009) 134, 139; Cross-Cutting Report on the Rule of Law (n 3) 7 f.

prevention and resolution of conflicts with significant regional or international ramifications. Particularly in the context of conflict prevention, peacekeeping, conflict resolution and peacebuilding, the Council also elaborated on the principle's function.[885] Additionally in 2003, the Council started holding open thematic debates on the promotion and strengthening of the rule of law in the maintenance of international peace and security, allowing UN member states to exchange their views on the elements and implications of the rule of law with the Council.[886] The significant role attributed to the rule of law by the Security Council seems to culminate in its qualification of a deteriorating security situation characterised by the 'absence of the rule of law' as a threat to international peace and security.[887]

Despite the obvious importance attributed to the concept in Council resolutions in recent years, none of them offer a definition.[888] It has generally been claimed that the rule of law is often approached as a vague political ideal that is supposed to bring about social and political change and that various concepts and activities may be associated with it.[889] As to the Council's engagement with the rule of law, authors have doubted that the Council has 'a coherent vision of the rule of law' in light of the manifold measures it relates to the term.[890] Others attempted to shed some light on the Council's engagement with the rule of law by creating categories of the references to it in Council resolutions.[891]

Only indirectly (and vaguely at that) has the Council expressed its commitment to the rule of law definition provided by the Secretary-General in its seminal report on the rule of law and transitional justice in conflict- and post-conflict societies.[892] In a presidential statement, the Council resolved to 'consider, as appropriate in its deliberations, the recommendations set out in paragraph 64 of the report' which requires that Security Council resolutions and mandates respect and implement several elements referred to in the rule of law definition provided for by the Secretary-General.[893] One has to note the very

885 Charlesworth and Farrall (n 3) 3.

886 See n 4.

887 See n 465.

888 See also, Farrall, 'Impossible Expectations? The UN Security Council's Promotion of the Rule of Law after Conflict' (n 884) 144.

889 Chesterman, 'Rule of Law' (n 74) para 23.

890 Aust and Nolte (n 17) 55.

891 See, Farrall, 'Impossible Expectations? The UN Security Council's Promotion of the Rule of Law after Conflict' (n 884) 144–146 and Farrall, 'Rule of Accountability or Rule of Law?' (n 19) 395–397 for an extended list of categories.

892 SG Report S/2004/616 (n 439) [6].

893 UNSC Presidential Statement 34 (2004) UN Doc S/PRST/2004/34.

soft language used by the Council and that it only pledged to *consider* the Secretary General's rule of law definition in its *deliberations*, not in its decisions.[894]

Although the Council has not come up with a definition of the rule of law, it nonetheless identified elements of the rule of law in its resolutions, thus contributing to a concretisation of what institutions or procedures it associates with the concept. In this vein, eg, it invoked the principle of separation of powers and constitutional checks and balances in close connection with the rule of law in several resolutions on Afghanistan and Guinea-Bissau.[895] In resolutions on thirteen different country situations, the Council invoked the need to respect due process – mainly in response to illegal or arbitrary pre-trial and prolonged detention or as a requirement for the investigation of crimes, prosecutions and trials.[896] It also

894 Cross-Cutting Report on the Rule of Law (n 3) 12.

895 On Afghanistan see UNSC Res 2274 (15 March 2016) UN Doc S/RES/2274 [preamble, indent 19]; UNSC Res 2210 (16 March 2015) UN Doc S/RES/2210 [preamble, indent 18]; UNSC Res 2145 (17 March 2014) UN Doc S/RES/2145 [preamble, indent 19]; UNSC Res 2120 (10 October 2013) UN Doc S/RES/2120 [preamble, indent 34]; UNSC Res 2096 (19 March 2013) UN Doc S/RES/2096 [preamble, indent 19]; UNSC Res 2069 (9 October 2012) UN Doc S/RES/2069 [preamble, indent 33]; UNSC Res 2041 (22 March 2013) UN Doc S/RES/2041 [preamble, indent 19]; UNSC Res 2011 (12 October 2011) UN Doc S/RES/2011 [preamble, indent 34]; UNSC Res 1974 (22 March 2011) UN Doc S/RES/1974 [preamble, indent 11] (in resolutions 2011 and 1974, however, the principle of separation of powers is referred to without a mention of the rule of law). On Guinea-Bissau see UNSC Res 2343 (23 February 2017) UN Doc S/RES/2343 [preamble, indent 8]; UNSC Res 2267 (26 February 2016) UN Doc S/RES/2267 [preamble, indent 6]; UNSC Res 2203 (18 February 2015) UN Doc S/RES/2203 [preamble, indent 6].

896 It is to be noted that the Council varied between depicting the principle of due process as an element of the rule of law or as a human rights guarantee. Two UN peace operations were mandated to implement due process guarantees in the Central African Republic and Libya. For MINUSCA's mandate, see UNSC Res 2217 (28 April 2015) UN Doc S/RES/2217 [32 (g) (ii)] & UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [34 (d) (vii)]. For UNSMIL's mandate, see UNSC Res 2095 (14 March 2013) UN Doc S/RES/2095 [7 (b)] & UNSC Res 2144 (14 March 2014) UN Doc S/RES/2144 [6 (b)]. The guarantee of due process was further included in operative, albeit non-binding provisions in UNSC Res 419 (24 November 1977) UN Doc S/RES/419 [4] (Benin); UNSC Res 1719 (25 October 2006) UN Doc S/RES/1719 [10] (Burundi); UNSC Res 1828 (31 July 2008) UN Doc S/RES/1828 [18] (Sudan); UNSC Res 1949 (23 November 2010) UN Doc S/RES/1949 [9; 10], UNSC Res 2030 (21 December 2011) UN Doc S/RES/2030 [9], UNSC Res 2103 (22 May 2013) UN Doc S/RES/2103 [6], UNSC Res 2157 (29 May 2014) UN Doc S/RES/2157 [3], UNSC Res 2186 (25 November 2014) UN Doc S/RES/2186 [3], UNSC Res 2203 (18 February 2015) UN Doc S/RES/2203 [6], UNSC Res 2267 (26 February 2016) UN Doc S/RES/2267 [10], UNSC Res 2343 (23 February 2017) UN Doc S/RES/2343 [13] (Guinea-Bissau); UNSC Res 2000 (27 July 2011) UN Doc S/RES/2000 [11] (Côte d'Ivoire); UN Doc 2040 (12 March 2012) UN Doc S/RES/2040 [4],

issued several resolutions requiring that the independence of the judiciary be re-established or guaranteed.[897]

The normative relevance of these references may be said to vary depending on whether the Council included them in binding or non-binding, operative or preambular paragraphs. The rule of law element of the separation of powers, eg, was only invoked in the preambular parts of the said resolutions, whereas the Council mandated UN peace operations to implement rule of law elements such as the independence of the judiciary or due process guarantees in national legal systems. Even though the Council has not come forward with a definition of the rule of law, the repeated use of clearly identifiable rule of law elements in its resolutions may – with the passage of time and dependent on a consistent use of references – result in a consolidation of the contours of a rule of law understanding of the UN organ. It will be the task of the following chapter to elaborate in detail on what criteria such a process depends and whether it can be observed with regard to rule of law criteria pertaining to national judiciaries.

UNSC Res 2095 (14 March 2013) UN Doc S/RES/2095 [5] (Libya); UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077 [20] (Somalia). Several references to the rule of law guarantee are found in preambular parts of Council resolutions: UNSC Res 1087 (11 December 1996) UN Doc S/RES/1087 [preamble, indent 6] (Angola); UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315 [preamble, indent 6] (Sierra Leone); UNSC Res 1608 (22 June 2005) UN Doc S/RES/1608 [preamble, indent 5], UNSC Res 1743 (15 February 2007) UN Doc S/RES/1743 [preamble, indent 5], UNSC Res 1780 (15 October 2007) UN Doc S/RES/1780 [preamble, indent 6], UNSC Res 1840 (14 October 2008) UN Doc S/RES/1840 [preamble, indent 9], UNSC Res 1892 (13 October 2009) UN Doc S/RES/1892 [preamble, indent 9], UNSC Res 1944 (14 October 2010) UN Doc S/RES/1944 [preamble, indent 12], UNSC Res 2012 (14 October 2011) UN Doc S/RES/2012 [preamble, indent 18], UNSC Res 2070 (12 October 2012) UN Doc S/RES/2070 [preamble, indent 25], UNSC Res 2119 (10 October 2013) UN Doc S/RES/2119 [preamble, indent 19], UNSC Res 2180 (14 October 2014) UN Doc S/RES/2180 [preamble, indent 20], UNSC Res 2243 (14 October 2015) UN Doc S/RES/2243 [preamble, indent 26], UNSC Res 2313 (13 October 2016) UN Doc S/RES/2313 [preamble, indent 33], UNSC Res 2350 (13 April 2017) UN Doc S/RES/2350 [preamble, indent 11] (Haiti); UNSC Res 1949 (23 November 2010) UN Doc S/RES/1949 [preamble, indent 3] (Guinea-Bissau); UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147 [preamble, indent 24] (DRC); UNSC Res 2272 (11 March 2016) UN Doc S/RES/2272 [preamble, indent 6] (thematic resolution on UN peacekeeping operations).

[897] On this see subsequent part 3 ch IV E. 1.

IV. Rule of Law Requirements for National Judiciaries

A. Introduction

As was just illustrated, the Council has invoked the rule of law in the context of the prevention and fight of crime, conflict management and the stabilisation of crisis-affected states. The Council's interest in the rule of law, however, was most evident in the field of UN peacekeeping and peacebuilding.[898] Until the late 1990s, the majority of peacekeeping operations authorised by the Council to re-establish or reform national rule of law structures focused on measures with regard to the local police. Recognising that police reform would only be sustainable if justice was administered effectively, the Council then started to mandate UN peace operations to also support or re-establish national judiciaries.[899] A decade later, rule of law support for national judiciaries had become an integral part of the mandates of UN peace operations as reflected in a thematic Council resolution which observed that the strengthening of rule of law institutions by multidimensional peacekeeping missions involved helping national authorities to address the needs of judicial institutions.[900] Accordingly, many Council resolutions of the past twenty years identified deficits affecting judicial institutions in conflict- and post-conflict states to be remedied in the name of the rule of law. Requirements for the judicial branch formulated by the Council relate to its independence and effectiveness, mandate the strengthening of its capacity, the re-establishment of its authority or require it to be impartial, fair, transparent and compliant with international standards.

The Council did not develop its language with regard to national judiciaries in the abstract with a claim to general application but always in reaction to specific situations where deficiencies in the rule of law or its absence contributed to a threat to international peace and security or where it considered the re-establishment of functioning rule of law institutions and procedures as a requirement to address a security threat.[901] The Council may not act based on

898 Charlesworth and Farrall (n 3) 3.

899 UNDPKO, Handbook for Judicial Affairs Officers (n 440) 21; UNDPKO, Handbook on United Nations Multidimensional Peacekeeping Operations (2003) 94.

900 UNSC Res 2086 (21 January 2013) UN Doc S/RES/2086 [8 (c)].

901 The Security Council clarified this in a thematic resolution on security sector reform where it highlighted the intimate connection between the rule of law, peace and security. See UNSC Res 2151 (28 April 2014) UN Doc S/RES/2151 [preamble, indent 8 & 15]. The UN Secretary-General too considers the rule of law a crucial condition to ensure peace and security. See SG Report A/62/659 – S/2008/39 (n 741) [1].

the sole purpose of reforming a state's rule of law system if its actions are not related to a threat to international peace and security.[902]

The repeated reference to similar or equal requirements for national judiciaries in reaction to different country situations, however, nonetheless indicates the possible evolution of general Council standards with regard to the institutional and procedural set-up of national judiciaries that satisfy rule of law guarantees pertaining to the judicial branch. Whereas many resolutions clearly identify requirements for the judiciary as elements of the rule of law, the wording of Council resolutions is sometimes more ambiguous but still allows for the inference that the Council considers the requirements for the judiciary intimately related to the rule of law. Such inferences seem plausible based on a comparative reading of Council resolutions, which qualify a specific requirement as a rule of law element, or when Secretary-General reports issued in relation to the same situation as a Council resolution establish the connection.

For example, whereas the Council had requested UNAMA in Afghanistan in an earlier resolution to 'support the establishment of a fair and transparent judicial system, *and* work towards the strengthening of the rule of law', it later adapted the wording to request the mission 'to support (. . .) the establishment of a fair and transparent justice system (. . .) *in order to* strengthen the rule of law'.[903] The two resolutions not only illustrate that the Council constantly adapts the wording of repeatedly used paragraphs in its resolutions but also that it often uses terms such as 'judicial system' and 'justice system' synonymously. Often, thus, Council resolutions must be read in comparison with preceding or subsequent resolutions on the same agenda item to allow for a clearer understanding of what exactly the Council was referring to when using certain terms and phrases.

Council resolution 1493 (2003), eg, urged 'the Government of National unity and Transition to ensure that (. . .) the establishment of a State based on the rule of law *and* of an independent judiciary are among its highest priorities'.[904] The Secretary-General report preceding the resolution discussed possible support scenarios to the national judiciary under the title 'Rule of Law', allowing for the inference that the Council's reference to the

[902] cf, eg, Nolte (n 480) 320f ('the Council may only act to counter threats to very important international values, in particular to the physical integrity of persons, but not, for example, to protect the proper functioning of a democratic system').

[903] UNSC Res 1536 (26 March 2004) UN Doc S/RES/1536 [10] and UNSC Res 1589 (24 March 2005) UN Doc S/RES/1589 [9].

[904] UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493 [11].

independence of the judiciary refers to the Secretary-General's situation report about the judiciary discussed as a rule of law issue.[905]

When formulating requirements for the judiciary or identifying how to address judicial deficits, the Council varied its language whose relation to the evolution of a Council understanding of the rule of law will be examined in the following chapter. In order to do so, the chapter attempts to determine the plausibility of a possible trend towards the legalisation of Council language and considers legalised Council language as a contribution to the evolution of a rule of law understanding of the Council. The notion of legalisation applied here coincides largely with the requirements identified for a possible Council impact on the emergence of the rule of law as an international norm within international society, ie precision of language, consistency of its reactions and legitimacy of the standards it relates to the rule of law.

B. Three Types of Council Language

When analysing Council language which identifies what should be done to address deficits affecting national judiciaries, three types of language can be distinguished: Non-technical, legalised and operational Council language.

1. Non-technical Council Language

A first type of Council language identifies a particular characteristic or virtue of the judiciary whose content – as opposed to legalised language – cannot be related to established rule of law guarantees as contained in international or regional (human rights) law. Examples are references to the 'capacity' or 'authority' of the judiciary. In the DRC, eg, the Council decided that MONUC should assist the government in strengthening the capacity of the judicial system and in Côte d'Ivoire, the Council mandated UNOCI to assist the government in re-establishing the authority of the judiciary.[906] The content of these judicial characteristics or virtues cannot be inferred from a comparison with similar notions in regional or international (human rights) law. Its determination requires an analysis of the concrete circumstances preceding the resolutions referring to them.

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[905] UNSC Report of the Secretary-General, 'Second Special Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (2003) UN Doc S/2003/566 [71, 73–75].

[906] UNSC Res 1756 (15 May 2007) UN Doc S/RES/1756 [2 (q)] (on the DRC); UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528 [6 (q)] (on Côte d'Ivoire).

2. Legalised Council Language

A second type of Council language can be qualified as 'legalised'. Legalisation – as understood here – relates to two elements. A *first element of legalisation* refers to a linguistic level, meaning that Council language resonates with or expressly invokes established rule of law institutions or procedures as guaranteed in regional or international law. Most relevant with regard to the specific context of national judiciaries is international and regional human rights law to the extent that it contains rights that establish concrete requirements for the judiciary such as, eg, the independence and impartiality of tribunals, the right to a fair and public hearing or the rights to expeditious proceedings and an effective remedy. From an exclusively linguistic perspective, of course, many human rights guarantees are not particularly precise. If their content, however, enjoys a relatively established meaning in regional and international human rights law due to their interpretation by the competent human rights bodies, the present thesis considers Council invocations of such human rights guarantees as 'precise' to the extent that they invoke – more or less – determinate concepts. The element of precision is central to the concept of legalisation, as it has traditionally been considered an essential feature of legal rules. This ties back to the writings of Hayek, Fuller and Raz who focused on law's capacity to guide human behaviour and thus, ia, on the specificity of the language of legal rules.[907]

The concepts used by the Council are more legalised, the more precisely they invoke rule of law guarantees as contained in regional or international (human rights) law.[908] Eg, if the Council authorises the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA)

[907] See, part 1 ch II A. See also, eg, Gidon Gottlieb, 'The Nature of International Law: Toward a Second Concept of Law' in Cyril Black and Richard Falk (eds), *The Future of the International Legal Order*, vol IV (Princeton University Press 1972) 331, 371f (crucial for the present context of Council resolutions, Gottlieb observes that '[h]ere again there looms a vast unmarcated terrain between the legal and the political – but the more specific the guidance in a system becomes, the more specific the norms, the policy goals and their application, the more "legal" this system becomes') and Friedrich Kratochwil, 'Is International Law "Proper" Law?' (1983) 69 *Arch. Rechts-Sozialphilos*. 13, 37f (on the 'specificity of guidance of legal rules when contrasted with "policy"').

[908] Kenneth Abbott and others, 'The Concept of Legalization' (2000) 54 *IO* 401, 412–415 (on the role of 'precision' for the concept of legalisation which requires obligation, precision and delegation. The authors also propose that 'precision and elaboration are especially significant hallmarks of legalization at the international level' due to the absence of a centralised legislature). See also Nollkaemper, 'Process of Legalisation' (n 5) 99 (who observes that 'some of the requirements of the rule of law may themselves constitute particular rules of law. That holds in particular for human rights, including such requirements as legality and independence of courts. There is little doubt that in this

to help reinforce the *independence of the judiciary* or UNAMA to support the establishment of a *fair and transparent judicial system* in Afghanistan, the reference to an independent judiciary quite precisely invokes the right to an independent tribunal as guaranteed in regional and international human rights law, whereas the reference to a fair and transparent judicial system resonates with fair trial rights but is less conclusive in this regard.[909]

The idea of legalisation with regard to Council language, thus, relates to the observation that the Council frames threats to international peace and security and the related measures to address such threats in 'legal and rights-oriented terms'.[910]

A *second element of legalisation* relates to the level of application and refers to the situation that the Council invokes a rule of law guarantee in reaction to circumstances that are considered encroachments on this particular guarantee by international or regional human rights bodies.

To the extent that Council action, ie its decisions and recommendations, consists of its language, a legalisation of its language coincides with a legalisation of its action.[911] Legalisation considered in this context, however, does not equal legalisation as understood by Abbott, Keohane *et al* which further involves 'obligation' and 'delegation' even though both elements are regularly fulfilled in the field of Council resolutions reforming national judiciaries if they issue binding measures and delegate their implementation to, eg, multidimensional peacekeeping missions.[912] The focus of legalisation as understood here, is on the fact that the Council invokes legal concepts instead of non-legal concepts to fulfil its task of maintaining international peace and security. The focus is not on legal effects, ie on the question whether the language used establishes legal obligations for third parties or not as it must be assumed that the Council considers also the implementation of the non-binding

respect human rights constitute the cornerstone of the rule of law, at the national level, that international law supports').

909 UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [35 (a) (i)] (on the CAR); UNSC Res 1536 (26 March 2004) UN Doc S/RES/1536 [10] (on Afghanistan).

910 Henriette Sinding Aasen and others, 'Introduction' in *Juridification and Social Citizenship in the Welfare State* (Edward Elgar 2014) 1, 2 referring to Lars Blichner and Anders Molander, 'Mapping Juridification' (2008) 14 *ELJ* 36, 44 ('Juridification as Increased Conflict Solving by Reference to Law').

911 This can be related to Austin's concept of performative utterances and his proposition that saying something may amount to doing something. See, John Austin, *How To Do Things With Words – Lecture VIII* (2nd edn, Harvard University Press 1975) 94.

912 Abbott and others (n 908) 401–419 (for whom legalisation 'refers to a particular set of characteristics that institutions may (or may not) possess. These characteristics are defined along three dimensions: obligation, precision, and delegation').

parts of its resolutions as conducive to the maintenance of international peace and security.

Importantly, the concept of legalisation as understood here, largely satisfies the proposed requirements for the Council to contribute to the emergence of the rule of law as an international norm that redefines state identities and interests. The requirement for the emergence of the rule of law as an international norm that Council language be precise, coincides with the element of legalisation that Council rule of law language resonates with or expressly invokes rule of law guarantees whose content enjoys a relatively established meaning in regional and international human rights law. The requirement that the Council consistently invokes rule of law guarantees in reaction to similar circumstances is satisfied if the element of legalisation is fulfilled that the Council invokes a rule of law guarantee in reaction to circumstances that are considered encroachments on this particular guarantee by international and regional human rights bodies. Further, the requirement that the Council's understanding of the rule of law must be considered legitimate in order to turn into an international norm, is served by both elements of legalisation. The invocation of rule of law guarantees as contained in regional and international human rights law in reaction to situations that would be considered interferences with these rights by regional and international human rights bodies, contributes to procedural fairness insofar as the Council invokes guarantees in whose elaboration most states were involved and to substantive legitimacy to the extent that it draws on universal standards which the Council shall promote and encourage respect for. It is, thus, claimed here that legalised Council language enjoys the highest likelihood of contributing to the emergence of the rule of law as an international norm that affects how states conceive their identities and interests to the extent that it largely satisfies the requirements proposed here for the emergence of norms.

3. Operational Council Language

A third type of language used by the Council when determining deficiencies in the judiciary or issuing measures to address such deficits can be characterised as operational to the extent that it describes the activities that need to be undertaken by governments, UN peace operations or other actors involved in rule of law reform. Such language includes references to a need to '(re-)establish', 'develop', 'reform', 'reinforce', 'strengthen' or 'support' the judiciary, judicial system, justice sector or judicial institutions, to 'develop', 'support' or 'implement' justice sector reform or to 'restore the administration of the judiciary'. Operational language in Council resolutions is recognised by its focus on a task or activity rather than a guarantee or quality that needs to be

safeguarded or achieved. It involves – often relatively abstract – instructions to an actor but rarely spells out concrete goals or measures that need to be achieved or undertaken in order to fulfil operational commands such as, eg, judicial reform.

C. Normative and Political Relevance of Council Language

The following analysis rests on the assumption that Council resolutions reflect the 'degree of acceptability and validity of a specific subject matter' under the Council's consideration.[913] It is further assumed that the degree of political consensus within the Council with regard to the importance of a subject matter is reflected in the legal effects of Council provisions addressing it and thus that there exists a direct connection between the normative effects of Council provisions and their political weight. Political consensus as to the importance of a subject matter is supposed to be highest if it is addressed in binding Council decisions and lowest if addressed in the preambular part of a resolution. In the middle field are non-binding provisions, which were issued in the operative part of resolutions as opposed to the preambular part. The highest degree of political consensus with regard to the importance of a particular subject matter seems to exist if the Council mandates its subsidiary organs to implement concrete measures with regard to it, eg, if it requires a UN peace mission to re-establish the independence of the judiciary in a given state. Delegation to Council subsidiary organs ensures a higher degree of involvement and control on behalf of the Council with regard to implementation than does delegation to UN member states, thus further underlining the Council's internal commitment.[914] The legal effect of Council provisions addressing a particular subject matter is thus understood to not only reflect its normative but also its political relevance – at least to a certain extent. This interpretation assumes the

913 Månsson (n 11) 79 f.

914 UNDPKO, Handbook Judicial Affairs Officers (n 440) 36. The present analysis does not discuss separately measures with regard to subject matters that shall be implemented by UN peacekeeping missions authorised to use force for their implementation to the extent that rule of law measures are typically not enforced with force. Cf Månsson (n 11) 80 (for the argument that 'peace operations are of particular relevance' as an indicator of the status of international human rights law for Council members and the wider UN membership 'since they are deemed, more than any other political instrument, to have 'shake[n] the foundations of the remit of sovereignty and human rights'. By deploying peace operations, tasked to implement international political decisions directly within a domestic context, the Security Council exercises a potential power of human rights implementation unknown to other international mechanisms.').

Council's awareness of the mechanisms of political precedent even though – of course – it is not bound by its previous decisions.[915]

The legal effect of Council provisions, however, does not necessarily determine the implications of Council language from a social-constructivist perspective.[916] The fact that the Council invokes the rule of law in its resolutions has been interpreted as to reflect 'an international consensus among states that the rule of law should operate in national systems'.[917] This claim of the existence of an *international* consensus ignores, ia, the Council's limited composition, the political character of elections for its non-permanent seats and the political dominance of its five permanent members. What seems more realistic from a social-constructivist perspective is the assumption that the Council's consistent use of specific terms, which are intimately related to the rule of law, reflects the existence of certain intersubjective understandings among Council members with regard to the meaning of these terms.[918] The consistent and repeated inclusion of such rule of law terms in Council resolutions in reaction to similar circumstances, then, may further result in their diffusion and thus enhanced reception and acceptance within the international society and in the emergence of the rule of law as an international norm if such standards are further perceived legitimate by, primarily, states.[919]

To summarise: With regard to the normative effects and the degree of political consensus among Council members regarding the importance of a particular subject matter, a different analysis of binding, non-binding but operative and preambular provisions in Council resolutions seems indispensable. With regard to the diffusion of certain concepts and terms within the international society, however, their inclusion in preambular, operative or binding provisions seems less relevant to the extent that language used in any part of a resolution may contribute to the emergence of common ideas or norms if used repeatedly in similar contexts and perceived legitimate by members of the international society.

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915 Alvarez (n 7) 194; Bruce Cronin and Ian Hurd, 'Conclusion: Assessing the Council's Authority' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 199, 203f; Peters, 'Article 25' (n 493) para 89; Harlan Grant Cohen, 'Theorizing Precedent in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 268, 277.

916 True-Frost (n 20) 178–181 (on the non-coercive diffusion of norms).

917 McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (n 140) 286. See also ibid, 'The Rule of Law Internationally' (n 398) 58.

918 Johnstone, 'Security Council Deliberations' (n 24) 460.

919 Finnemore (n 41) 13, 22 (focusing on how international organisations diffuse norms and thereby shape the interests and identities of states adopting these norms).

D. Non-technical Council Language

Non-technical Council language is characterised by references to particular judicial characteristics or virtues, which do not resonate with established rule of law guarantees as established in international or regional human rights law. Non-technical terms used by the Council to identify and address judicial deficits are the *capacity* and *authority* of the judiciary.

1. Capacity of the Judiciary

a. Council Resolutions Invoking the Concept of Judicial Capacity

When addressing rule of law deficits pertaining to the judiciary, several Council resolutions emphasised a need to build or strengthen the judiciary's capacity.[920] In its most authoritative form, the Council has mandated UN peace operations to strengthen or re-establish the capacity of the judiciary. It did so for the first time in reaction to the situation in Timor-Leste in 2006 when deciding that the UN Integrated Mission in Timor-Leste (UNMIT) would have the mandate to assist in building the capacity of state- and government institutions in areas where specialised expertise was required, such as the justice sector.[921] A couple of months later, the Council mandated MONUC in the Democratic Republic of the Congo to advise the government in strengthening the capacity of the judicial system, including the military justice system.[922] Similarly in the Central African Republic, BINUCA was authorised to help strengthen the capacities of the national judicial system.[923] After a transition from the AU-led International Support Mission (MISCA) to the UN Multidimensional Integrated Stabilization Mission (MINUSCA), the UN peacekeeping mission was tasked to

[920] The connection between the rule of law and the concept of judicial capacity is highlighted in many resolutions. See, eg, UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856 [4 (g)] (deciding 'that MONUC will also have the mandate (…) to support the strengthening of democratic institutions and the rule of law and, to that end, to (…) advise the Government of the Democratic Republic of the Congo in strengthening the capacity of the judicial (…) system(s)'). Or, eg, UNSC Res 2149 (10 April 2014) UN Doc S/RES/2149 [30 (f) (ii)] (deciding 'that the mandate of MINUSCA shall initially focus on (…) support for national and international justice and the rule of law: To help build the capacities, including through technical assistance, of the national judicial system') and UNSC Res 2217 (28 April 2015) UN Doc S/RES/2217 [33 (a) (i)] and UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [35 (a) (i)] (for the same formulation).

[921] UNSC Res 1704 (25 August 2006) UN Doc S/RES/1704 [4 (f)].

[922] UNSC Res 1756 (15 May 2007) UN Doc S/RES/1756 [2 (q)]; UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856 [4 (g)].

[923] UNSC Res 2121 (10 October 2013) UN Doc S/RES/2121 [10 (d)]; UNSC Res 2134 (28 January 2014) UN Doc S/RES/2134 [2 (e)].

help build the capacities of the national judicial system, including through technical assistance.[924]

Further references to a need to strengthen or build the capacity of the judiciary are found in operative, albeit non-binding paragraphs of Council resolutions, which are also indicative of what the Council may be invoking when referring to a lack of judicial capacity. The Council, eg, emphasised a need for the sustained support by the international community to Timor-Leste to further build capacities in the justice sector and underlined an ongoing need to strengthen national capacity in judicial line functions, including training and specialisation of national lawyers and judges.[925]

In Somalia, the Council urged states parties to the UN Convention on the Law of the Sea and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation to fully implement their relevant obligations under these Conventions and customary international law and cooperate with the UNODC, IMO, and other states and other international organisations to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.[926] It further urged the Somali authorities to develop the capacity of Somali courts to investigate and prosecute persons responsible for acts of piracy and armed robbery.[927]

In Liberia, the Council urged the government to intensify its efforts towards achieving progress on transition of security responsibilities from UNMIL to the national authorities, particularly with regard to improving the capacity and capability of the justice sector, including courts.[928]

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924 UNSC Res 2149 (10 April 2014) UN Doc S/RES/2149 [30 (f) (ii)]; UNSC Res 2217 (28 April 2015) UN Doc S/RES/2217 [33 (a) (i)]; UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [35 (a) (i)].

925 UNSC Res 1802 (25 February 2008) UN Doc S/RES/1802 [7]; UNSC Res 1867 (26 February 2009) UN Doc S/RES/1867 [9; 10]; UNSC Res 1912 (26 February 2010) UN Doc S/RES/1912 [10]; UNSC Res 1969 (24 February 2011) UN Doc S/RES/1969 [12]; UNSC Res 2037 (23 February 2012) UN Doc S/RES/2037 [11].

926 UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 [15]; UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897 [14]; UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950 [19]; UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020 [23]; UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077 [27]; UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125 [24]; UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [25]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [27]; UNSC Res 2316 (9 November 2016) UN Doc S/RES/2316 [27].

927 UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [4]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [4]; UNSC Res 2316 (9 November 2016) UN Doc S/RES/2316 [4].

928 UNSC Res 2190 (15 December 2014) UN Doc S/RES/2190 [4]; UNSC Res 2239 (17 September 2015) UN Doc S/RES/2239 [4].

In its weakest form, albeit still indicative of the Council's concept of 'judicial capacity', it has referred to judicial capacity problems in the preamble of its resolutions. Eg, with regard to piracy and armed robbery at sea off the coast of Somalia, the Council stressed the need to address problems caused by the limited capacity of the judicial system of Somalia and other states in the region to effectively prosecute suspected pirates and noted with appreciation the assistance and funding provided by UNODC, UNDP and other regional and international organisations and donors to enhance and develop the capacity of the judicial systems of Somalia, Kenya, Seychelles and other states in the region to prosecute suspected and imprison convicted pirates consistent with applicable international human rights law.[929] It further welcomed the work of the Working Group on Capacity Building of the Contact Group on Piracy off the Coast of Somalia to coordinate judicial capacity-building efforts to enable regional states to better tackle piracy.[930]

b. The UN Understanding of Judicial Capacity

Building the capacity of national rule of law institutions is a central element of UN peacekeeping.[931] It aims at the restoration of 'the ability of national actors and institutions to assume their responsibilities and to exercise their full authority, with due respect for internationally accepted norms and standards' and involves enhancing the capacity of the local judiciary, eg by the provision of judicial personnel.[932] Enhancing the capacity of the judiciary is also an integral element of the *UNODC Criminal Justice Assessment Toolkit*, which shall assist UN agencies, government officials or other organisations to assess criminal justice systems and implement criminal justice reform.[933] The Toolkit prescribes that technical assistance for the judiciary or courts may include

929 UNSC Res 1918 (27 April 2010) UN Doc S/RES/1918 [preamble, indents 5 & 6]; UNSC Res 1976 (11 April 2011) UN Doc S/RES/1976 [preamble, indents 11 & 12]; UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125 [preamble, indent 28]; UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [preamble, indents 26]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [preamble, indent 29]; UNSC Res 2316 (9 November 2016) UN Doc S/RES/2316 [preamble, indent 29].

930 UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [preamble, indent 10]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [preamble, indent 11]; UNSC Res 2316 (9 November 2016) UN Doc S/RES/2316 [preamble, indent 10].

931 OHCHR, Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector (2006) 31 f.

932 UNDPKO, Capstone Doctrine (n 790) 40; UNDPKO, Handbook Multidimensional Peacekeeping Operations (n 899) 96, 109.

933 ‹https://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html› accessed 14 July 2017.

enhancing their capacity 'to train and educate judges and judicial officers', 'to uphold human rights standards and norms in criminal cases', 'to develop and manage planning, research and information management', to use information technology, 'to collect data on caseload and workload' and to 'perform case flow analysis'.[934] The *UN Rule of Law Indicators* connect the concept of capacity to the availability of human and material resources necessary for institutions to perform their functions and to their administrative- and management capacity to deploy these resources effectively.[935] Whereas UN sources do not provide a definition of the concept of judicial capacity, they clearly establish the contours of the concept when identifying the measures required to enhance it. The focus of the concept, thus, seems to be on enabling judicial institutions to function.

c. Situations causing Council References to the Concept of Judicial Capacity

To understand what the Council may be referring to when observing a lack of capacity in national judiciaries or determining a need to build or strengthen judicial capacity, one needs to have a comparative look at the situations in response to which the Council made such observations or enacted such measures. Background information on the situation of the judiciary in a country with regard to which the Council has issued resolutions is found in Secretary-General reports. To the extent that the Council usually tasks the Secretary-General to report to it, present his observations and recommend measures with regard to a particular situation, the probability that Council resolutions are a reaction to these reports or even adopt their language, is high.[936]

Several Secretary-General reports plainly attest to a lack of capacity of national judiciaries in the countries concerned. In Timor-Leste, eg, the Secretary-General observed a vital need to further build capacities in the justice sector and observed that the capacities of the national judicial institutions were still insufficient to meet the country's needs.[937] More concretely, he deplored

[934] UNODC, Criminal Justice Assessment Toolkit 2: Access to Justice – The Independence, Impartiality and Integrity of the Judiciary (2006) 2; UNODC, Criminal Justice Assessment Toolkit 2: Access to Justice – The Courts (2006) 2 f.

[935] UNDPKO/OHCHR, The United Nations Rule of Law Indicators: Implementation Guide and Project Tools (2011) 3 f.

[936] Wood, 'The Interpretation of Security Council Resolutions' (n 480) 80; Eitel (n 491) 58; Orakhelashvili, *Collective Security* (n 483) 40.

[937] UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 August 2007 to 7 January 2008)' (2008) UN Doc S/2008/26 [59]. In an earlier report, the Secretary-General had observed an insufficient emphasis on the development of institutional capacity in the court system. See, UNSC Report of the Secretary-General, 'Report of the

that the capacity of the justice institutions to fairly and effectively detect, investigate, prosecute and adjudicate criminal offences, in particular those relating to corruption, violence against children, sexual assault and domestic violence, remained weak.[938] With regard to piracy and armed robbery off the coast of Somalia, the Special Adviser to the Secretary-General assessed that obstacles to the effective prosecution of piracy suspects and a streamlined transfer of prisoners to competent judicial authorities were, ia, of a capacity-related nature and noted Somalia's limited judicial capacity.[939] With regard to the Central African Republic, an International Commission of Inquiry reported the absence of a fully functioning judiciary and courts capable of protecting the population and the Secretary-General observed that a UN multidisciplinary team had confirmed an almost total lack of capacity of national counterparts, ia in the area of justice.[940] In the Democratic Republic of the Congo, the Secretary-General assessed that the justice sector lacked operational capacity and the ability to prosecute crimes and enforce judgements and observed in Liberia that challenges remained in terms of the capacity of the criminal justice system to bring cases with regard to serious crimes to trial in a timely manner.[941]

Secretary-General on Timor-Leste pursuant to Security Council resolution 1690 (2006)' (2006) UN Doc S/2006/628 [81].

938 UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 24 September 2009 to 20 January 2010)' (2010) UN Doc S/2010/85 [82]. The SG also reported about capacity-building measures aimed at strengthening the capacity of the Timorese judiciary. Eg, human rights training components were mainstreamed in all of the legal training programmes delivered to strengthen the technical skills and capacity of national justice actors and training courses were held for judges and prosecutors in an effort to further strengthen the capacity of national legal actors. See ibid [74]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 20 September 2011 to 6 January 2012)' (2012) UN Doc S/2012/43 [42].

939 UNSC Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia (2011) UN Doc S/2011/30 [44; 116f].

940 UNSC Preliminary Report of the International Commission of Inquiry on the Central African Republic, submitted pursuant to Security Council Resolution 2127 (2014) UN Doc S/2014/373 [121]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2014) UN Doc S/2014/562 [52].

941 On the DRC see, UNSC Report of the Secretary-General, 'Twenty-third report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (2007) UN Doc S/2007/156 [35] and UNSC Report of the Secretary-General, 'Twenty-sixth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (2008) UN Doc S/2008/433 [62]. On Liberia see, UNSC Report of the Secretary-General, 'Thirtieth

Whereas such general assessments hardly contribute to a clarification of what exactly judicial capacity amounts to, it is possible to discern a number of deficiencies that affected national judiciaries in different countries when comparing situations in reaction to which the Security Council observed a lack of judicial capacity. Circumstances that were repeatedly reported by the Secretary-General before the Council identified deficits in judicial capacity were inadequate or insufficient material resources at the disposal of judicial institutions, an inability of the judiciary to ensure accountability for human rights violations and committed crimes, an absence of (qualified) judicial personnel, insufficient or absent judicial infrastructure, a backlog of court cases and precarious security conditions for judicial personnel. These circumstances prevailed in most states in response to which the Council observed a lack of judicial capacity.

i. Inadequate or Insufficient Material Resources

Secretary-General reports preceding Council resolutions which determined a lack in judicial capacity or issued measures in this regard often observed that judicial institutions suffered from inadequate or insufficient material resources. In Timor-Leste, eg, resource constraints in the justice sector made international support necessary.[942] In Somalia, support measures illustrated the lack in judicial resources as the UN supported the judiciary with the provision of logistics, information technology, office equipment and copies of laws.[943] In the Central African Republic, an offensive of Séléka rebels had destroyed much of the justice system, including court dossiers and prosecutor files, and crucial judicial institutions such as the Supreme Court of Justice and the Inspectorate-General of Judicial Services lacked the necessary resources.[944] Also with regard to the Democratic Republic of the Congo it was reported that the military justice system did not have the necessary resources at command to

progress report of the Secretary-General on the United Nations Mission in Liberia' (2015) UN Doc S/2015/620 [47].

942 SG Report S/2008/26 (n 937) [37]; SG Report S/2010/85 (n 938) [24].

943 SG Report S/2009/590 (n 838) [45]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2011) UN Doc S/2011/277 [81; 83]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2011) UN Doc S/2011/549 [78]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia January 2015' (2015) UN Doc S/2015/51 [43].

944 UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2013) UN Doc S/2013/261 [32]; UNSC Report of the Secretary-General, 'Special Report of the Secretary-General on the strategic review of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic' (2016) UN Doc S/2016/565 [24].

ensure accountability for human rights abuses committed by members of the Congolese armed forces.[945]

ii. Inability of the Judiciary to ensure Accountability

The inability of the judiciary to ensure accountability for human rights violations and committed crimes was another circumstance regularly preceding Council resolutions referring to problems with regard to the capacity of the judiciary. In Timor-Leste, the Secretary General reported of the widespread perception that the justice system failed to hold criminal wrongdoers to account.[946] Four years later, deficiencies were still observed regarding efforts to confront impunity and require accountability and courts were reported to only slowly address cases of human rights violations by members of the national police and defence forces.[947]

In Somalia, UNPOS and UNDP engaged with the military justice system in southern and central Somalia to promote better accountability for members of the armed forces and it was reported that the justice system did not address gender-based violence.[948]

Also the situation in the Central African Republic was characterised by a lack of accountability, aggravated by the virtual absence of judicial authority outside Bangui, rampant impunity and an inability of the justice system to bring suspects to justice and try serious crimes.[949] Accordingly, the Secretary-General proposed that a UN human rights component should focus on supporting judicial institutions in swiftly investigating and prosecuting human rights violations and MINUSCA supported the creation of a national special criminal court to address serious violations of human rights- and international humanitarian law and the establishment of a national special investigative cell

945 SG Report S/2007/156 (n 941) [33].

946 SG Report S/2006/628 (n 937) [85].

947 SG Report S/2010/85 (n 938) [73]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 September 2010 to 7 January 2011)' (2011) UN Doc S/2011/32 [33]; SG Report S/2012/43 (n 938) [33].

948 UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2013) UN Doc S/2013/69 [40]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2014) UN Doc S/2014/140 [52].

949 UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2013) UN Doc S/2013/470 [30]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Central African Republic submitted pursuant to paragraph 48 of Security Council resolution 2127 (2013)' (2014) UN Doc S/2014/142 [26]; SG Report S/2014/562 (n 940) [16]; SG Report S/2016/565 (n 944) [24].

to investigate and prosecute serious crimes.[950] Problems with regard to the inability of the judicial system to ensure accountability in the CAR were also clearly reflected in Council resolutions which, eg, welcomed efforts of the Transitional Authorities to adopt legislation to establish a Special Criminal Court (SCC) with jurisdiction over serious violations of human rights and of international humanitarian law and mandated MINUSCA to provide technical assistance in order to facilitate the functioning of the SCC.[951]

In the Democratic Republic of the Congo, the justice sector was described to have historically lacked the ability to prosecute crimes and enforce judgments.[952] Members of the FARDC and security forces were not held accountable for human rights abuses and sexual and gender-based crimes, military courts managed only few convictions and a pervasive climate of impunity prevailed.[953]

Also in Liberia, challenges existed with regard to the capacity of the criminal justice system to bring cases of serious crimes to trial in a timely manner.[954]

iii. Absence of (Qualified) Judicial Personnel

Another circumstance preceding Council resolutions that invoked deficits with regard to judicial capacity was the absence of (qualified) judicial personnel. In Somalia, international support measures aimed at the training of judges, court support staff and prosecutors to enhance their capacity to prosecute and adjudicate serious criminal cases, including piracy.[955]

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950 SG Report S/2014/142 (n 949) [81]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2014) UN Doc S/2014/857 [47f]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2015) UN Doc S/2015/227 [49f]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2016) UN Doc S/2016/305 [42f]; SG Report S/2016/565 (n 944) [47].

951 UNSC Res 2217 (28 April 2015) UN Doc S/RES/2217 [preamble, indent 13; 32 (g) (ii)]; UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [34 (d) (vii)].

952 SG Report S/2007/156 (n 941) [35].

953 ibid [33; 36]; SG Report S/2008/433 (n 941) [62; 68].

954 SG Report S/2015/620 (n 941) [47].

955 SG Report S/2009/590 (n 838) [46]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2010) UN Doc S/2010/675 [84]; SG Report S/2011/277 (n 943) [81; 83]; SG Report S/2011/549 (n 943) [76; 80]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2012) UN Doc S/2012/643 [46; 60]; SG Report S/2012/783 (n 843) [47; 52]; SG Report S/2013/623 (n 843) [44; 53]; SG Report S/2014/140 (n 948) [49]; SG Report S/2014/740 (n 843) [23; 46]; SG Report S/2015/776 (n 843) [16]; UNSC Report of the Secretary-General, 'Report

With regard to Timor-Leste, the Secretary-General observed that the justice system needed continuous and specialised training to strengthen the skills and capacity of national justice actors, as it did not have sufficiently qualified officials to administer justice properly, fairly or effectively. Timorese justice officials further lacked an understanding of the applicable laws and procedures for the investigation of crimes.[956] Accordingly, support measures in Timor-Leste had a strong focus on the training of judicial personnel.[957]

In Somalia, only a small percentage of judges and prosecutors had enjoyed legal training and those in office were often ignorant of applicable statutory law and applied customary law, including sharia law, instead.[958] Consequently, programmes to enhance judicial capacity in the region included specialised courses to professionals of courts in countering piracy and maritime crime.[959]

In the Central African Republic, court magistrates remained absent from the interior of the country and magistrates without adequate professional training heard about 70 per cent of all criminal cases.[960] MINUSCA, thus, supported the deployment of magistrates and provided organised training sessions to court personnel.[961]

iv. Insufficient or Absent Judicial Infrastructure

Another factor observed in Secretary-General reports preceding Council resolutions which determined a lack in judicial capacity or enacted measures to address such lacking judicial capacity was an insufficient or absent judicial infrastructure. In Somalia, UN support measures were directed at the construction, re-establishment and development of court facilities.[962]

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of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia' (2016) UN Doc S/2016/843 [17].

956 SG Report S/2010/85 (n 938) [24; 73f; 82]; SG Report S/2012/43 (n 938) [42].

957 SG Report S/2006/628 (n 937) [80]; SG Report S/2008/26 (n 937) [37]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 9 July 2008 to 20 January 2009)' (2009) UN Doc S/2009/72 [33]; SG Report S/2010/85 (n 938) [74]; SG Report S/2011/32 (n 947) [41; 43]; SG Report S/2012/43 (n 938) [42].

958 Report Special Adviser Piracy S/2011/30 (n 939) [44; 116f].

959 SG Report S/2014/740 (n 843) [46].

960 UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2013) UN Doc S/2013/787 [51]; SG Report S/2014/142 (n 949) [26]; SG Report S/2016/565 (n 944) [24].

961 SG Report S/2016/305 (n 950) [44]; SG Report S/2016/565 (n 944) [23; 39].

962 SG Report S/2009/590 (n 838) [46]; SG Report S/2011/277 (n 943) [81]; SG Report S/2011/549 (n 943) [78]; SG Report S/2012/643 (n 955) [51]; SG Report S/2012/783 (n 843) [51]; UNSC 'Letter dated 19 April 2013 from the Secretary-General addressed to the President of the Security Council' (2013) UN Doc S/2013/239 [14]; SG Report S/

In Timor-Leste, access to independent, transparent and effective justice was impeded, ia, by a lack of adequate physical infrastructure.[963]

In the Central African Republic, most of the infrastructure that supported the justice system, including courthouses, appeal courts etc, had been destroyed and the state suffered from the absence of functioning criminal investigation, prosecution and judicial institutions which rendered the state largely incapable of providing basic services and protecting human rights.[964] Accordingly, MINUSCA supported the rehabilitation of courts in the CAR.[965]

In the Democratic Republic of the Congo, the Secretary-General observed that fewer than sixty of the required 180 first-instance courts existed and that judicial facilities were extremely dilapidated.[966]

v. Backlog of Court Cases

A backlog of court cases was also repeatedly reported prior to the issuance of Council resolutions that identified capacity problems of the judiciary. In Timor-Leste, the Secretary-General observed that as a consequence of a highly centralised court system with little delegated authority or responsibility, decision-making was often delayed or neglected.[967] Two years later, a continued need of the Timorese justice sector for support by the international community was observed, given, ia, its backlog of cases and the insufficient capacity of national judicial institutions to address the substantial case backlog which resulted, ia, in an impeded access of the people to independent, transparent and effective justice.[968] In Somalia, case management systems were expanded in the Garoowe and Hargeysa courts to expedite trials and dispose of the case backlog.[969] Also in the Central African Republic, support by

2013/623 (n 843) [44]; SG Report S/2014/740 (n 843) [47]; SG Report S/2015/776 (n 843) [16]; SG Report S/2016/27 (n 853) [49]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2016) UN Doc S/2016/430 [34]; SG Report S/2016/843 (n 955) [17].

963 SG Report S/2010/85 (n 938) [24; 82].

964 SG Report S/2013/261 (n 944) [32]; SG Report S/2013/470 (n 949) [30]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Central African Republic submitted pursuant to paragraph 22 of Security Council resolution 2121 (2013)' (2013) UN Doc S/2013/677 [8]; SG Report S/2013/787 (n 960) [51]; SG Report S/2014/142 (n 949) [26]; Report International Commission of Inquiry CAR S/2014/373 (n 940) [35]; SG Report S/2014/562 (n 940) [16; 50]; SG Report S/2014/857 (n 950) [40].

965 SG Report S/2016/305 (n 950) [44].

966 SG Report S/2007/156 (n 941) [35].

967 SG Report S/2006/628 (n 937) [81].

968 SG Report S/2008/26 (n 937) [37; 59]; SG Report S/2010/85 (n 938) [24; 82].

969 SG Report S/2013/69 (n 948) [40].

MINUSCA, UNDP and UN-Women was required to support judicial authorities to address the persistent backlog of cases.[970]

vi. Precarious Security Conditions for Judicial Personnel

Another circumstance preceding Council resolutions that emphasise a lack in judicial capacity were precarious security conditions for judicial personnel. In Timor-Leste, the Secretary-General reported that there was virtually no courthouse security.[971] In the Central African Republic, Séléka soldiers attacked magistrates and judges and magistrates and their families were exposed to constant threats.[972] In Somalia, the security of judges and prosecutors constituted a challenge and was identified a top priority.[973] And in the CAR, the Secretary-General observed that programmes needed to help provide 'a secure environment to judicial authorities and courts'.[974]

d. Analysis

i. Relationship of Council Language to a Trend of Legalisation

When trying to assess the plausibility of a possible trend towards a legalisation of Council language that relates to rule of law institutions such as the judiciary, one needs to determine whether the circumstances triggering Council resolutions that invoke a need to strengthen judicial capacity could have also justified references to legal concepts such as, eg, the independence, impartiality, effectiveness, transparency or fairness of the judiciary.[975] Generally, it can be observed that the judicial systems of the countries in reaction to which the Council issued resolutions focusing on judicial capacity were primarily affected by the above-described capacity-related problems. This seems to be consistent with the fact that all UN missions tasked to strengthen judicial capacity – BINUCA aside – were peacekeeping missions and, thus, employed during a volatile security situation focused on capacity-building rather than during a peacebuilding phase. In Liberia, the Secretary-General reported exclusively of problems pertaining to judicial capacity. In Timor-Leste, several Secretary-General reports preceding Council resolutions invoking a need to strengthen judicial capacity also

970 UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2015) UN Doc S/2015/576 [52].

971 SG Report S/2006/628 (n 937) [81].

972 SG Report S/2013/470 (n 949) [31]; SG Report S/2014/142 (n 949) [26]; SG Report S/2016/565 (n 944) [24].

973 SG Report S/2014/140 (n 948) [41–43]; SG Report S/2014/740 (n 843) [47].

974 SG Report S/2014/142 (n 949) [81].

975 For a discussion of legal concepts that establish rule of law requirements for national judiciaries, see subsequently, part 3 ch IV E.

contained references to problems with regard to the effectiveness or independence of the judiciary but Council resolutions reflected this circumstance in that they also referred to a need to respect judicial independence and enhance judicial effectiveness.[976] The same was the case in the CAR, where a Secretary-General report observing that legislation did not guarantee the independence of the judiciary was followed by a Council resolution which not only required that the capacities of the national judicial system be built but also that MINUSCA help reinforce the independence of the judiciary.[977]

Sometimes, however, Secretary-General reports contained references to problems with regard to judicial independence or fair trial guarantees which were not reflected in related Council resolutions. Eg in the CAR, the Secretary-General emphasised that arrests of perpetrators of crimes needed to be complemented by fair trials but the related Council resolution did not invoke a need to guarantee fair trial rights in this context.[978] With regard to the situation in Somalia, the Secretary-General and the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia both identified a need for an independent justice system and judgements rendered by independent and impartial courts within a reasonable time in order to address problems in the prosecution of suspected pirates.[979] The explicit references to the independence, impartiality and effectiveness of judicial institutions, however, were not picked up in subsequent Council resolutions, which focused entirely on judicial capacity issues. In the DRC, the Secretary-General reported about interferences in the judicial process through political and military authorities, a historic lack of judicial independence, low salaries which compounded corruption and military courts whose jurisdiction was not limited to the trial of military offences and personnel.[980] Council resolutions issued in response to these reports, however, did only highlight a need to strengthen the capacity of the judicial system and did not invoke the rule of law principles of judicial independence and impartiality.[981]

976 See, eg, SG Report S/2009/72 (n 957) [Annex] and UNSC Res 1867 (26 February 2009) UN Doc S/RES/1867 [preamble, indent 9; 11]; SG Report S/2010/85 (n 938) [24; 73; 82] and UNSC Res 1912 (26 February 2010) UN Doc S/RES/1912 [preamble, indent 7; 11].

977 SG Report S/2016/565 (n 944) [24; 63] and UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [35 (a) (i)].

978 SG Report S/2015/227 (n 950) [68] and UNSC Res 2217 (28 April 2015) UN Doc S/RES/2217.

979 SG Report S/2009/590 (n 838) [92]; Report Special Adviser Piracy S/2011/30 (n 939) [10].

980 SG Report S/2007/156 (n 941) [33; 35; 53]; SG Report S/2008/433 (n 941) [45; 62].

981 UNSC Res 1756 (15 May 2007) UN Doc S/RES/1756 [2 (q)]; UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856 [4 (g)].

To sum up, these reports illustrate that certain circumstances described by the Secretary-General could have justified the use of legalised language in Council resolutions rather than references to the non-technical concept of 'judicial capacity'. In the prevailing number of cases, however, deficiencies affecting the judicial systems in reaction to which the Council issued resolutions invoking a need to enhance judicial capacity were indeed predominantly of a capacity-related nature. It can, thus, be concluded that Council references to the concept of judicial capacity usually did not derogate from a possible trend towards the legalisation of Council language but neither contributed to it.

ii. Contribution of Council Language to Norm Emergence

With regard to the criteria of norm emergence proposed here, ie precision of language, consistency in reaction (ie invocation of particular rule of law vocabulary in reaction to similar circumstances) and legitimacy of standards related to the rule of law, references to judicial capacity do not contribute significantly to such a process. As opposed to legalised language where the Council uses terms that expressly resonate with or invoke a rule of law guarantee whose content enjoys a relatively established meaning in regional and international (human rights) law, the Council invokes a concept whose meaning cannot be inferred from such sources. The language, ie references to judicial capacity, must be qualified as vague and does not satisfy the criterion of linguistic precision. With regard to the requirement of consistency of reaction, the preceding analysis has demonstrated that Council invocations of the concept of judicial capacity seemed to follow a set of identifiable circumstances, thus enabling a determination of the Council's understanding of the concept's meaning. To this extent, a consistency of Council invocations of the concept of judicial capacity can be affirmed which may stimulate a process of ideation among agents interacting with the Council as to the meaning of the concept of judicial capacity. The third requirement of norm emergence, the procedural and material legitimacy of the standards related to the rule of law, cannot be considered fulfilled by Council invocations of judicial capacity to the extent that the Council does not relate the concept to any identifiable standards whose legitimacy within the international society could be assessed. In summary it can be said, therefore, that two crucial criteria for the emergence of the rule of law as an international norm are not fulfilled with regard to Council invocations of the concept of judicial capacity.

2. Authority of the Judiciary

a. Council Resolutions Invoking the Concept of Judicial Authority

When describing the requirements for the national judiciary in Côte d'Ivoire, the Council reverted to yet another non-technical term. Based on chapter VII resolutions, the Council decided that UNOCI, the UN Operation in Côte d'Ivoire, would assist and later advise the government in re-establishing the *authority of the judiciary.*[982]

b. Judicial Authority as a Legal Concept

The concept of the 'authority of the judiciary' is not found in any international or regional human rights treaty. The Basic Principles on the Independence of the Judiciary, a UN soft law instrument, refer to it as an element of judicial independence, which requires that the judiciary 'shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'.[983] The exact same wording was adopted by the African Commission on Human and Peoples' Rights in its *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance*.[984] Used this way, the term seems to refer to the scope and nature of the jurisdiction of the judiciary and to its independence from the other branches of government in determining whether it is implied.[985]

Another soft law instrument making use of the term is the *Recommendation Rec(1994)12 of the Committee of Ministers of the European Council* which establishes in its Principle II that '[a]ll persons connected with a case, including state bodies or their representatives, should be subject to the authority of the

[982] UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528 [6 (q)]; UNSC Res 1609 (24 June 2005) UN Doc S/RES/1609 [2 (x)]; UNSC Res 1739 (10 January 2007) UN Doc S/RES/1739 [2 (m)]; UNSC Res 1880 (30 July 2009) UN Doc S/RES/1880 [27]; UNSC Res 1933 (30 June 2010) UN Doc S/RES/1933 [16 (j)]. In all of these resolutions, the Council clearly established the connection between the concept of judicial authority and the rule of law, mandating UNOCI to 'assist the Government of National Reconciliation (. . .) in re-establishing the authority of the judiciary and the rule of law throughout Côte d'Ivoire'.

[983] Basic Principles on the Independence of the Judiciary, Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders (26 August – 6 September 1985) UN Doc A/CONF.121/22Rev.1 (principle 3).

[984] AComHPR, *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa* (2003) [1.(c)].

[985] The preamble of the ECOSOC Resolution 2006/23, Bangalore Principles of Judicial Conduct (27 July 2006) UN Doc E/RES/2006/23 also uses the term. It does, however, refer to the importance of the 'moral authority' of the judiciary for the public confidence in the judicial system – an entirely different concept again.

judge' and that '[j]udges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court'.[986] The explanatory memorandum on the principles explains that 'to ensure that the judge enjoys the respect due to him as a judge and that the proceedings are conducted efficiently and smoothly, all persons connected with a case (eg parties, witnesses, experts) must be subject to the authority of the judge in accordance with domestic law' and adds that 'state bodies or their representatives must also submit to the authority of the judge'.[987] It further observes that judges 'should have available to them the necessary practical measures and appropriate powers to maintain order in their courts'. When adding that judges have 'a responsibility to prevent the occurrence of situations which call in question their independence', the commentary clearly establishes that the authority of the judiciary is a crucial corollary of its independence.[988] Contempt of court procedures and security guards at hearings to eject persons disturbing public order are given as examples of measures that promote the authority of judges.[989] The principle was reiterated in a recommendation of the European Committee of Ministers issued several years later.[990] Interpreted this way, it seems the term can be understood as referring to the powers transferred to the judiciary, ie the scope of its jurisdiction, as well as to its independence from the other branches of government and from the parties and to the effective implementation of its decisions. The references to the availability of 'necessary practical measures' and to the 'appropriate powers to maintain order' in courts seem to also imply the necessity of sufficient judicial capacity. The term, not being clearly defined in any binding or non-binding legal document, appears ambiguous enough, though, as to encompass a number of different qualities of the judiciary.

986 European Committee of Ministers, Recommendation No R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges (13 October 1994) [principle II – The authority of judges].

987 European Committee of Ministers, Explanatory Memorandum Recommendation Rec (1994)12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges [principle II (The authority of judges)] para 22.

988 ibid [principle II (The authority of judges)] para 23.

989 ibid [principle II (The authority of judges)] para 24.

990 European Committee of Ministers, Appendix to Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, para 6.

c. The UN Understanding of Judicial Authority

What is exactly understood by the concept of the 'authority of the judiciary' does not emerge clearly from UN sources. The *UNDPKO Handbook for Judicial Affairs Officers in United Nations Peacekeeping Operations* determines that the authority of justice institutions needs to be assessed when creating profiles of state institutions in order to map the justice system of a host country for UN justice assistance.[991] For the assessment of the legal framework and structure of the judiciary, the *UNODC Criminal Justice Assessment Toolkit* inquires whether 'the government established ad hoc courts or tribunals that bypass the normal courts and the authority of the judiciary'.[992] It further refers to the sources on which the authority of the judiciary is based and which define it, such as the Constitution, enabling statutes, court rules, judicial rulings or opinions and connects the term closely to the independence of the judiciary from other branches of government and its integrity.[993] The UN understanding of the 'authority' of the judiciary, thus, seems to refer primarily to the scope of its jurisdiction as well as to its independence from the executive and legislative branches of government.

d. Situations causing Council References to the Concept of Judicial Authority

When analysing the circumstances in reaction to which the Council called for the re-establishment of the authority of the judiciary in Côte d'Ivoire, it becomes evident that they are comparable to situations where the Council called for the strengthening of judicial capacity. The circumstances were similar to situations where the Council called for the re-establishment of judicial capacity insofar as the Secretary-General observed that judicial structures were not functioning in the territory controlled by the Forces nouvelles and not fully functional in other parts of the country.[994] Additionally,

991 UNDPKO, Handbook Judicial Affairs Officers (n 440) 106.

992 UNODC, The Independence, Impartiality and Integrity of the Judiciary (n 934) 6.

993 ibid 5.

994 UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Mission in Côte d'Ivoire submitted pursuant to Security Council resolution 1514 (2003) of 13 November 2003' (2004) UN Doc S/2004/3 [31]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Mission in Côte d'Ivoire submitted pursuant to Security Council resolution 1514 (2003) of 13 November 2003' (2004) UN Doc S/2004/3/Add.1 [7]; UNSC Report of the Secretary-General, 'Fourth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2005) UN Doc S/2005/186 [40; 42]; UNSC Report of the Secretary-General, 'Tenth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2006) UN Doc S/2006/821 [32]; UNSC Report of the Secretary-General, 'Eleventh progress report of the Secretary-General on the United

the judicial system did not manage to ensure accountability for human rights violations, judicial personnel was lacking and court security and judicial resources were inadequate.[995]

Additionally, the Secretary-General reported that the Government of National Reconciliation was to implement a programme that included important elements related to the strengthening of the independence of the judiciary and recommended the establishment of a judicial unit to support and advise judicial authorities 'on the re-establishment of an effective and impartial judicial system' in areas where the administration of justice had collapsed and to 'encourage efforts throughout the country to increase the transparency of the justice system and the impartial, efficient and independent administration of justice'.[996] He further observed that the judiciary lacked independence from political forces, suffered from corruption and acts of intimidation and displayed a lack of will to ensure accountability for human rights violations.[997] The parallel judicial system established by the Forces nouvelles was marked by a total absence of impartiality, abuse of power and the arbitrary dispense of justice.[998] Additionally, irregularities with regard to the appointment of judges by the incumbent President occurred.[999]

e. Analysis

i. Relationship of Council Language to a Trend of Legalisation

The circumstances described in Secretary-General reports preceding Council resolutions calling for the re-establishment of the *authority of the judiciary*

Nations Operation in Côte d'Ivoire' (2006) UN Doc S/2006/939 [26]; UNSC Report of the Secretary-General, 'Twenty-fourth report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2010) UN Doc S/2010/245 [26].

995 SG Report S/2004/3 (n 994) [79]; SG Report S/2004/3/Add.1 (n 994) [7]; SG Report S/2005/186 (n 994) [42]; UNSC Report of the Secretary-General, 'Fifth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2005) UN Doc S/2005/398 [46]; SG Report S/2006/821 (n 994) [32]; UNSC Report of the Secretary-General, 'Twentieth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2009) UN Doc S/2009/196 [10]; UNSC Report of the Secretary-General, 'Twenty-first progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2009) UN Doc S/2009/344 [10]; UNSC Report of the Secretary-General, 'Twenty-third progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2010) UN Doc S/2010/15 [22]; SG Report S/2010/245 (n 994) [26].

996 SG Report S/2004/3/Add.1 (n 994) [13f].

997 SG Report S/2005/186 (n 994) [41f]; SG Report S/2009/196 (n 995) [26].

998 SG Report S/2005/186 (n 994) [42]; SG Report S/2005/398 (n 995) [46].

999 SG Report S/2006/821 (n 994) [44].

clearly invoke deficiencies with regard to the capacity, transparency, effectiveness, independence and impartiality of the judiciary, as underlined by the explicit references to these judicial qualities in Secretary-General reports and the tasks proposed for the judicial unit. In reaction to these circumstances, the Council could, thus, have also determined a need to re-establish the independence, impartiality, effectiveness or transparency of the judiciary but it did not. In comparable situations, the Council had in other resolutions invoked a need to guarantee the independence, effectiveness, impartiality or transparency of the judiciary or to strengthen its capacity.[1000] References to such judicial qualities, however, are found in Council resolutions on Côte d'Ivoire only several years later when the Council called on the government to ensure that the work of the Ivorian judicial system be impartial, transparent and consistent with internationally agreed standards.[1001]

It is not entirely clear, thus, based on what criteria the Council makes use of one concept or another. If Secretary-General reports are used to assist an interpretation of how the Council uses the term, it can be inferred that it invokes the concept of judicial authority in reaction to situations in which the capacity, impartiality, independence, transparency and effectiveness of the judiciary are affected. This seems to correspond with the use of the term in the CoE Committee of Ministers' recommendation with regard to the independence, efficiency and role of judges. The fact that the Council decided to revert to the legally indeterminate concept of judicial authority, instead of invoking the legally more clearly defined concepts of judicial transparency or judicial effectiveness or the established rule of law guarantees of judicial independence and impartiality, derogates from a possible trend towards a legalisation of Council language.

ii. Contribution of Council Language to Norm Emergence

As can be derived from this concluding assessment, the criteria of norm emergence, ie precision of Council language, consistency of its reactions (ie invocations of particular rule of law guarantees in response to comparable situations) and legitimacy of the standards related to the rule of law, are not fulfilled by Council invocations of the concept of judicial authority for the same reasons that applied to Council invocations of the concept of judicial

[1000] With regard to the circumstances preceding Council resolutions invoking the capacity of the judiciary, see part 3 ch IV D. 1.; with regard to judicial independence, effectiveness, transparency and impartiality see part 3 ch IV E.

[1001] UNSC Res 2112 (30 July 2013) UN Doc S/RES/2112 [16]; UNSC Res 2162 (25 June 2014) UN Doc S/RES/2162 [13]; UNSC Res 2226 (25 June 2015) UN Doc S/RES/2226 [13]; UNSC Res 2284 (28 April 2016) UN Doc S/RES/2284 [9].

capacity. In contrast to Council references to judicial capacity, however, Council invocations of the concept of judicial authority cannot even be described as consistent, ie as being made in reaction to clearly discernable and comparable circumstances.

The use of non-technical language, ie references to judicial capacity and authority, to describe rule of law deficits of national judiciaries does, thus, not contribute to the emergence of the rule of law as an international norm that shapes state identities and interests.

E. Legalised Council Language

In several resolutions, the Council reverts to a type of language which is here described as "legalised" to the extent that it expressly invokes or resonates with established rule of law guarantees as contained in regional or international (human rights) law. Council language expressly invoking established rule of law guarantees includes references to the *independence of the judiciary*, while references to the *effectiveness, impartiality, fairness and transparency of the judicial system* only resonate with certain rule of law guarantees such as the right to an effective remedy, an impartial tribunal or particular fair trial rights.

To illustrate to what extent Council language expressly invokes or resonates with established rule of law elements as guaranteed in regional and international (human rights) law and to determine whether the Council invokes these guarantees in reaction to circumstances that are considered encroachments upon them by international or regional human rights bodies, the following chapter will present the scope of the implied rule of law guarantees in international and regional human rights law.

1. Judicial Independence

a. Council Resolutions Invoking the Concept of Judicial Independence

Several UN peace missions were mandated by the Council to assist or support host governments in guaranteeing the *independence of the judiciary.*[1002] In late

[1002] Most Council resolutions referring to the independence of the judiciary establish a clear connection between the guarantee and the rule of law. See, eg, UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493 [11] (in which the Council 'urges the Government of National unity and Transition to ensure that (…) the establishment of a State based on the rule of law and of an independent judiciary are among its highest priorities'). See also, eg, UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590 [4 (a) (viii)] (deciding that 'the mandate of UNMIS shall be (…) to assist the parties to the Comprehensive Peace Agreement in promoting the rule of law, including an independent judiciary'), UNSC Res 1923 (25 May 2010) UN Doc S/RES/1923 [8 (vii)] (deciding 'that

2004, the Council mandated the first UN peace mission to address rule of law problems pertaining to the independence of the judiciary. The UN Peacebuilding Support Office in Guinea Bissau (UNOGBIS) was tasked to support efforts towards the strengthening of state institutions and structures to enable them to uphold the independent functioning of the judicial branch of government.[1003] The second UN peace operation with a corresponding mandate was UNMIS in Sudan, which was to assist the parties to the Comprehensive- and Darfur Peace Agreements in promoting an independent judiciary.[1004]

Mandates of peace missions in Sierra Leone, Burundi, the Central African Republic and Chad, Libya and the Democratic Republic of the Congo followed. In Sierra Leone, the Council requested the Secretary-General to establish UNIOSIL, the UN Integrated Office in Sierra Leone, with the key task to assist the government in developing the independence of the justice system.[1005] In Burundi, the Council mandated BINUB to support the government in consolidating the rule of law, in particular by strengthening the independence of the judiciary.[1006] The human rights- and rule of law-mandate of the UN Mission in the Central African Republic and Chad (MINURCAT) was to assist the governments of Chad and the Central African Republic in promoting the rule of law, including through support for an independent judiciary.[1007] In Libya, UNSMIL was mandated to assist the Libyan government in reforming and building an independent judiciary.[1008] MONUSCO in the Democratic Republic of the Congo was authorised by the Council to provide good offices, advice and

MINURCAT shall have the following mandate (. . .) to assist the Government of Chad in the promotion of the rule of law, including through support for an independent judiciary') or UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [35 (a) (i)] (authorising MINUSCA to support national and international justice and the rule of law and therefore to 'help reinforce the independence of the judiciary').

1003 UNSC Res 1580 (22 December 2004) UN Doc S/RES/1580 [2 (h)]. Remarkably, it took twenty years for the principle of judicial independence to be included in a binding Council decision. The principle appeared in a Council resolution for the first time in 1994 in a resolution on Somalia, where the Council welcomed a declaration of the leaders of the Somali Political Organization, which committed the Somali parties to establish an independent judiciary. See, UNSC Res 923 (31 May 1994) UN Doc S/RES/923 [preamble, indent 6].

1004 UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590 [4 (a) (viii)]; UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706 [8 (k)].

1005 UNSC Res 1620 (31 August 2005) UN Doc S/RES/1620 [1 (a) (v)].

1006 UNSC Res 1719 (25 October 2006) UN Doc S/RES/1719 [2 (d)].

1007 UNSC Res 1778 (25 September 2007) UN Doc S/RES/1778 [2 (g)]; UNSC Res 1861 (14 January 2009) UN Doc S/RES/1861 [6 (h)]; UNSC Res 1923 (25 May 2010) UN Doc S/RES/1923 [8 (vii)].

1008 UNSC Res 2144 (14 March 2014) UN Doc S/RES/2144 [6 (b)].

support to the government for the development and implementation of a multi-year joint UN justice support programme in order to develop independent criminal justice institutions and processes and the judiciary.[1009] And in the Central African Republic, MINUSCA was mandated to help reinforce the independence of the judiciary.[1010]

To the present day, the Council has thus mandated four peacekeeping missions and four political- and peacebuilding offices, respectively, to support national governments in the development or strengthening of the independence of the judiciary.[1011] The Council did not only task peacebuilding or political missions to support the establishment of an independent judiciary but also UN missions that were deployed during the so-called peacekeeping phase. This seems remarkable considering that peacekeeping usually takes place during more fragile and volatile situations, ie closer to a crisis or conflict time-wise, than peacebuilding.[1012] One would expect that peacekeeping focused primarily on the re-restablishment of institutions, whereas the peacebuilding phase would address enhancing institutional qualities such as, eg, the independence of the judiciary.

It is notable too that the Council has not yet issued a binding decision against a UN member state to reform or establish an independent judiciary but only encouraged or urged national governments and authorities to do so, reverting to exhortatory language only. With regard to the situation in Sierra Leone, the Council emphasised that the development of an independent judiciary was essential to long-term peace and development and urged the government to intensify its efforts to develop an independent judiciary so that it could take over from UNAMSIL full responsibility for maintaining law and order and later encouraged donors and UNAMSIL to assist the government in this regard.[1013] In the Democratic Republic of the Congo, the Council urged the government of National unity and Transition to ensure that the establishment of

[1009] UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147 [5 (j)].

[1010] UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [35 (a) (i)].

[1011] UNMIS, MINURCAT, MONUSCO and MINUSCA are peacekeeping operations, while UNOGBIS, UNIOSIL, BINUB and UNSMIL are political or peacebuilding offices, respectively.

[1012] Brahimi Report A/55/305-S/2000/809 (n 772) [12f]. The Brahimi report defines peacekeeping as a concept that evolved from a primarily military model of observing ceasefires and force separations after inter-state wars, to incorporate a complex model of military and civilian elements that work together to build peace in the aftermath of civil wars. Peacebuilding is described as encompassing activities undertaken on the far side of conflict to reassemble the foundations of peace and provide tools for building on those foundations something that is more than just the absence of war.

[1013] UNSC Res 1436 (24 September 2002) UN Doc S/RES/1436 [7]; UNSC Res 1470 (28 March 2003) UN Doc S/RES/1470 [7]; UNSC Res 1508 (19 September 2003) UN Doc S/RES/1508 [4]; UNSC Res 1537 (30 March 2004) UN Doc S/RES/1537 [3];

an independent judiciary was among its highest priorities.[1014] In Guinea-Bissau, the Council urged political leaders to refrain from involving the judiciary in politics, invoking a particular aspect of the guarantee of an independent judiciary, namely 'the actual independence of the judiciary from political interference by the executive branch and legislature'.[1015] Also in Haiti, the Council encouraged the authorities to provide ongoing support to the Superior Council of the Judiciary to ensure the independence of judicial institutions.[1016] The Council, thus, kept a firm grip on the implementation of the guarantee in the respective countries to the extent that it commissioned its subsidiaries organs to translate it into concrete measures rather than entrusting this task to the concerned states.

In its least authoritative form, the Council expressed its interest in the establishment of an independent judiciary in the preamble of its resolutions. In Somalia, the Council welcomed the Declaration of the Leaders of the Somali Political Organizations, which, ia, committed Somali parties to establish an independent judiciary.[1017] In Liberia, the Council urged the transitional government to ensure that the establishment of an independent judiciary be among its highest priorities and used the exact same wording in a resolution addressed at the Haitian transitional government.[1018] In Haiti, it further recognised the steps taken by the Superior Council of the Judiciary to carry out its mandate and promote the strengthening of judicial independence.[1019] In Timor-Leste, the Council reaffirmed the need of respect for the independence of the judiciary and its responsibility and in the Democratic Republic of the

UNSC Res 1562 (17 September 2004) UN Doc S/RES/1562 [6]; UNSC Res 1610 (30 June 2005) UN Doc S/RES/1610 [6].

1014 UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493 [11].

1015 UNSC Res 1949 (23 November 2010) UN Doc S/RES/1949 [6]; UNSC Res 2030 (21 December 2011) UN Doc S/RES/2030 [5]; UNHRCee, General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial (23 August 2007) UN Doc CCPR/C/GC/32 [19].

1016 UNSC Res 2070 (12 October 2012) UN Doc S/RES/2070 [11]; UNSC Res 2119 (10 October 2013) UN Doc S/RES/2119 [14]; UNSC Res 2180 (14 October 2014) UN Doc S/RES/2180 [16]; UNSC Res 2243 (14 October 2015) UN Doc S/RES/2243 [20]; UNSC Res 2313 (13 October 2016) UN Doc S/RES/2313 [22].

1017 UNSC Res 923 (31 May 1994) UN Doc S/RES/923 [preamble, indent 6].

1018 On Liberia see UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509 [preamble, indent 7]. On Haiti see UNSC Res 1542 (30 April 2004) UN Doc S/RES/1542 [preamble, indent 4].

1019 UNSC Res 2119 (10 October 2013) UN Doc S/RES/2119 [preamble, indent 9]; UNSC Res 2180 (14 October 2014) UN Doc S/RES/2180 [preamble, indent 11]; UNSC Res 2243 (14 October 2015) UN Doc S/RES/2243 [preamble, indent 13].

Congo, it noted with concern reports of the instrumentalisation of judicial institutions for political purposes.[1020]

b. Judicial Independence as a Legal Concept

i. International Human Rights Law

The guarantee of judicial independence is a core element of a state based on the rule of law.[1021] According to the UN Special Rapporteur on the Independence of Judges and Lawyers, the independence of the justice system figures as the 'institutional guardian of the enforcement of the rule of law' and '[g]iven that the judicial system serves to check other public institutions, a judiciary that is independent and not corruptible is fundamental in upholding the rule of law'.[1022] International treaty law guarantees the independence of the judiciary in arts 10 UDHR and 14 (1) ICCPR or – with a focus on preventing judicial corruption – in art 11 of the UN Convention Against Corruption as well as in several other UN human rights treaties and humanitarian law instruments.[1023]

The guarantee is also firmly established in regional human rights treaties such as arts 6 (1) ECHR, 8 (1) ACHR and 26 ACHPR and in most modern constitutions. The UN Special Rapporteur even qualified the 'principle of the

[1020] On Timor-Leste, see UNSC Res 1745 (22 February 2007) UN Doc S/RES/1745 [preamble, indent 5]; UNSC Res 1802 (25 February 2008) UN Doc S/RES/1802 [preamble, indent 8]; UNSC Res 1867 (26 February 2009) UN Doc S/RES/1867 [preamble, indent 9]; UNSC Res 1912 (26 February 2010) UN Doc S/RES/1912 [preamble, indent 7]; UNSC Res 1969 (24 February 2011) UN Doc S/RES/1969 [preamble, indent 7]; UNSC Res 2037 (23 February 2012) UN Doc S/RES/2037 [preamble, indent 7]. On the DRC, see UNSC Res 2277 (30 March 2016) UN Doc S/RES/2277 [preamble, indent 16].

[1021] Stephan Gass, Regina Kiener and Thomas Stadelmann (eds), *Standards on Judicial Independence* (Editions Weblaw 2012) III. See also ECOSOC, Bangalore Principles of Judicial Conduct (n 985) [value 1].

[1022] UNGA, Report of the Special Rapporteur on the Independence of Judges and Lawyers (11 August 2014) UN Doc A/69/294 [28, 40]. See also UNHRC, Report of the Special Rapporteur on the Independence of Judges and Lawyers (9 April 2010) UN Doc A/HRC/14/26 [17] (where the Special Rapporteur held that the independence of the judiciary is 'a core component of (. . .) the rule of law').

[1023] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Art 11 of the UN Convention Against Corruption requires State Parties to 'take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary'. See, United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41. For an overview of binding treaty law guaranteeing judicial independence, see Gass, Kiener and Stadelmann (n 1021) 1-28.

independence of judges and lawyers' as an 'international custom and general principle of law recognized by the international community (. . .) in the sense of article 38 (1) (b) and (c) of the Statute of the International Court of Justice'.[1024] Several soft law sources further flesh out what is implied by the principle of judicial independence such as, eg, the *Basic Principles on the Independence of the Judiciary* or the *Bangalore Principles of Judicial Conduct*.[1025]

Regarding the content of the principle, art 14 (1) ICCPR contains the right to a hearing by an independent tribunal and constitutes an institutional guarantee, which primarily relates to the independence of the judiciary from the executive and, to a lesser degree, the legislative branch.[1026] In its General Comment on art 14 ICCPR, the UN Human Rights Committee qualified the independence of a tribunal as an 'absolute right that is not subject to any exception'.[1027] Access to an independent tribunal is guaranteed in the determination of criminal charges or of rights and obligations in a suit at law.[1028] The scope of protection of the guarantee involves a clear demarcation of the competences of the judiciary from the other branches of government, the immovability of judges, their safety and legal qualification, the conditions of their appointment, removal and dismissal, the human and material resources provided to the judiciary as well as its 'actual independence' from political interference by other governmental branches.[1029] The 'provisions of article 14 apply to all courts and tribunals

[1024] UNHRC, Report of the Special Rapporteur on the Independence of Judges and Lawyers (24 March 2009) UN Doc A/HRC/11/41 [14].

[1025] Basic Principles on the Independence of the Judiciary (n 983); ECOSOC, Bangalore Principles of Judicial Conduct (n 985).

[1026] Manfred Nowak, 'Article 14: Procedural Guarantees in Civil and Criminal Trials' in *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, N.P. Engel 2005) paras 23, 25.

[1027] UNHRCee, General Comment No 32 (n 1015) [19].

[1028] For a discussion of what is understood by 'criminal charge' or 'rights and obligations in a suit at law', see UNHRCee, General Comment No 32 (n 1015) [15 ff] or, eg, Nowak (n 1026) paras 16–22; Walter Kälin and Jörg Künzli, 'Protection of Persons Deprived of their Liberty and Fair Trial Guarantees' in *The Law of International Human Rights Protection* (OUP 2009) 440–443; Sangeeta Shah, 'Detention and Trial' in Daniel Moeckli and others (eds), *International Human Rights Law* (2nd edn, OUP 2014) 259, 271 f.

[1029] On the demarcation of competences between the judiciary and the other branches of government, see UNHRCee, Concluding Observations of the Human Rights Committee on Romania (28 July 1999) UN Doc CCPR/C/79/Add.111 [10] (interference by the executive, powers exercised by Ministry of Justice with regard to judicial matters, including appeal process and its inspection powers of the courts). On the immovability of judges, see UNHRCee, Concluding Observations of the Human Rights Committee on Algeria (18 August 1998) UN Doc CCPR/C/79/Add.95 [14] (decree regulating nomination, promotion and dismissal of judges compromising judicial independence and

immovability only after 10 years of work). On the safety of judges, see UNHRCee, Concluding Observations of the Human Rights Committee on Brazil (24 July 1996) UN Doc CCPR/C/79/Add.66 [11] (threats against members of the judiciary). On the legal qualification of judges, see UNHRCee, Concluding Observations of the Human Rights Committee on Georgia (15 November 2007) UN Doc CCPR/C/GEO/CO/3 [14] (inadequate education of judges and lack of general training in international human rights law); UNHRCee, Concluding Observations of the Human Rights Committee on the Republic of the Congo (25 April 2000) UN Doc CCPR/C/79/Add.118 [14] (the Committee observed that 'particular attention should be given to the training of judges'); UNHRCee, Concluding Observations of the Human Rights Committee on Sudan (19 November 1997) UN Doc CCPR/C/79/Add.85 [21] (judges not selected based on their legal qualification); UNHRCee, Comments of the Human Rights Committee on the United States of America (7 April 1995) UN Doc CCPR/C/79/Add.50 [23] (administration of justice by unqualified and untrained persons). On the requirements for judicial appointments, see UNHRCee, Preliminary Observations of the Human Rights Committee on Peru (25 July 1996) UN Doc CCPR/C/79/Add.67 [14] (seven-year tenure of judges with requirement of recertification for reappointment); UNHRCee, Concluding Observations of the Human Rights Committee on Turkmenistan (19 April 2012) UN Doc CCPR/C/TKM/CO/1 [13] (judges appointed by the President for renewable terms of five years); UNHRCee, Concluding Observations of the Human Rights Committee on Uzbekistan (25 April 2005) UN Doc CCPR/CO/83/UZB [16] (appointment of judges reviewed by executive every five years); UNHRCee, Concluding Observations of the Human Rights Committee on the Republic of Moldova (5 August 2002) UN Doc CCPR/CO/75/MDA [12] ('short initial appointments for judges, beyond which they must satisfy certain criteria in order to gain an extension of their term'); UNHRCee, Concluding Observations of the Human Rights Committee on Armenia (19 November 1998) UN Doc CCPR/C/79/Add.100 [8] (election of judges by popular vote for a fixed maximum term of six years); UNHRCee, Concluding Observations of the Human Rights Committee on Liechtenstein (12 August 2004) UN Doc CCPR/CO/81/LIE [12] (criteria of appointment of members to the selecting body, the casting vote of the Princely House and the limited nature of tenure). On the removal of judges, see UNHRCee, Concluding Observations of the Human Rights Committee on Zambia (3 April 1996) UN Doc CCPR/C/79Add.62 [16] (appointment and removal of Supreme Court judges by President, subject only to ratification by National Assembly without any safeguard or inquiry by an independent judicial tribunal); UNHRCee, Concluding Observations of the Human Rights Committee on Namibia (August 2004) UN Doc CCPR/CO/81/NAM [18] (absence of mechanism or procedure for removal of judges for misconduct); UNHRCee, Concluding Observations of the Human Rights Committee on Vietnam (5 August 2002) UN Doc CCPR/CO/75/VNM [10] (taking of disciplinary measures against judges because of errors in judicial decisions). On the dismissal of judges, see UNHRCee, *Busyo et al v Democratic Republic of the Congo* (Com No 933/00) UN Doc CCPR/C/79/D/933/2000 (31 July 2003) [5.2] (dismissal of judges through presidential degree; established procedures and safeguards for dismissal of judge not respected); UNHRCee, *Pastukhov v Belarus* (Com No 814/98) UN Doc CCPR/C/78/D/814/1998 (5 August 2003) [7.3] (dismissal of judge of constitutional court by presidential decree before expiry of term on the ground that a new constitution had entered into force; absence of effective judicial protections to contest dismissal); UNHRCee, *Bandaranayake v Sri*

within the scope of that article whether ordinary or specialized, civilian or military'.[1030] Article 14 (1) ICCPR not only requires states to abstain from unjustified interferences with the right but also to take positive measures in their statutory or constitutional law to guarantee the independence of the judiciary.[1031] Beyond its focus on the separation of powers, art 14 (1) ICCPR also seeks to guarantee the independence of the judiciary from powerful social actors, which may include the media, industry or political parties.[1032]

ii. Regional Human Rights Law

The scope of protection of art 6 (1) ECHR equals that of art 14 (1) ICCPR.[1033] Similarly to art 14 (1) ICCPR, art 6 (1) ECHR grants the right of access to an independent tribunal in the determination of civil rights and obligations or criminal charges.[1034] When assessing whether a judicial body can be considered independent from the executive and the parties to the respective case, the European Court of Human Rights takes into account the 'manner of appointment of its members', the 'duration of their term', 'the existence of guarantees against outside pressures' and 'whether the body presents an appearance of independence'. Additionally, the court requires that the tribunal

Lanka (Com No 1376/05) UN Doc CCPR/C/93/D/1376/2005 (24 July 2008) [7.3]. On the human and material resources provided to the judiciary, see UNHRCee, Concluding Observations of the Human Rights Committee on Vietnam (5 August 2002) UN Doc CCPR/CO/75/VNM [9] ('judicial system remains weak owing to the (…) lack of resources for the judiciary'); UNHRCee, Concluding Observations of the Human Rights Committee on Kenya (29 April 2005) UN Doc CCPR/CO/83/KEN [20] ('serious dysfunctions in the administration of justice, owing primarily to the lack of human and material resources'). On the actual independence of the judiciary from political interferences by the other branches of government, see UNHRCee, General Comment No 32 (n 1015) [19]; UNHRCee, *Oló Bahamonde v Equatorial Guinea* (Com No 468/91) UN Doc CCPR/C/49/D/468/1991 (20 October 1993) [9.4] ('a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal').

1030 UNHRCee, General Comment No 32 (n 1015) [22].

1031 ibid [19].

1032 Nowak (n 1026) para 26.

1033 For an overview of the case law, see Anne Peters and Tilmann Altwicker, *Europäische Menschenrechtskonvention* (2nd edn, C.H. Beck 2012) § 19 paras 23f; Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (6th edn, C. H. Beck 2016) § 24 paras 34–40.

1034 For a discussion of what is understood by the notions of 'civil rights and obligations' and 'criminal charge', see David Harris and others (eds), *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 373–398.

'must have jurisdiction to examine all questions of fact and law relevant to the dispute before it'.[1035]

Article 8 ACHR, the right to a fair trial, was also inspired by art 14 ICCPR.[1036] In the development of the right to an independent tribunal as established in art 8 (1) ACHR, the Inter-American Court of Human Rights was guided by the case law of the European Court of Human Rights and by UN soft law, in particular the *Basic Principles on the Independence of the Judiciary*.[1037] When assessing whether the guarantee of judicial independence has been interfered with, the Inter-American Court focuses on the independence of the judiciary from the other governmental branches and takes into account the conditions of selection, appointment, promotion, removal, security of tenure, transfer, dismissal, terms of office and remuneration of the members of the judiciary and inquires whether outside pressure has been exerted on them.[1038]

[1035] ECtHR, *Campbell and Fell v Great Britain* (App No 7819/77, 7878/77) 28 June 1984 [78]; ECtHR, *Bryan v United Kingdom* (App No 19178/91) 22 November 1995 [37]; ECtHR, *Findlay v United Kingdom* (App No 22107/93) 25 February 1997 [73]; ECtHR, *Olujić v. Croatia* (App No 22330/05) 5 February 2009 [38]. See also ECtHR, *Neumeister v Austria* (App No 1936/63) 27 June 1968 [24] (independence from the executive and the parties to the case); ECtHR, *Ringeisen v Austria* (App No 2614/65) 16 July 1971 [95] (independence from the executive and the parties to the case); ECtHR, *Sramek v Austria* (App No 8790/79) 22 October 1984 [38] (length of the term of office, possibility of removal and body appointing members of regional authority); ECtHR, *Lithgow ao v Great Britain* (App No 9006/80) 8 July 1986 [202] (appointment of members of an arbitration tribunal by the executive); ECtHR, *Beaumartin v France* (App No 15287/89) 24 November 1994 [38] (independence from instructions of the executive); ECtHR, *Lauko v Slovakia* (App No 26138/95) 2 September 1998 [64] (appointment by executive, lack of guarantees against outside pressures and appearance of independence); ECtHR, *Kadubec v Slovakia* (App No 27061/95) 2 September 1998 [57] (appointment by executive, lack of guarantees against outside pressures and appearance of independence); ECtHR, *Luka v Romania* (App No 34197/02) 21 July 2009 [44] (conditions of removal from office); ECtHR, *Henryk Urban and Ryszard Urban v Poland* (App No 23614/08) 20 November 2010 [53] (conditions of removal from office).

[1036] Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) paras 25.26 & 25.28.

[1037] Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.20 referring to IACtHR, *Constitutional Court v Peru* (n 737) [73–75]; Antkowiak and Gonza (n 737) 191 referring to IACtHR, *Constitutional Tribunal (Camba Campos et al) v Ecuador* (Judgment of 28 August 2013; Series C No 268) (Preliminary Objections, Merits, Reparations, and Costs) [188].

[1038] See Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.20 citing IACtHR, *Constitutional Court v Peru* (n 737) [75]; IACtHR, *Castillo Petruzzi v Peru* (Judgment of 30 May 1999; Series C No 52) (Merits, Reparations, and Costs) [130–132]; IACtHR, *Cantoral Benavides v Peru* (Judgment of 18 August 2000; Series C No 69) (Merits) [114f]; IACtHR, *Berenson Mejía v Peru* (Judgment of 25 November 2004; Series C No 119) (Merits, Reparations, and Costs) [193]; IACtHR, *Apitz Barbera et al v Venezuela* (Judgment of 5 August 2008; Series C No 182) (Preliminary Objection,

Article 26 ACHPR requires states parties to the African Charter to guarantee the independence of the courts. Whereas 'Article 7 focuses on the individual's right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right'.[1039] In its interpretation of the guarantee, the African Commission on Human and Peoples' Rights, a quasi-judicial body with exclusively advisory competences, is guided, ia, by the *Basic Principles on the Independence of the Judiciary*, art 30 of the International Bar Association's Minimum Standards of Judicial Independence, its own resolutions and international precedent on similar provisions in other human rights instruments.[1040] Accordingly, it interprets the right to independent courts to pertain to the office terms of judges, their appointment, security, removal and suspension and requires the absence of executive control as well as the guarantee of judicial independence in constitutional or statutory law.[1041] In its

Merits, Reparations and Costs); IACtHR, *Reverrón Trujillo v Venezuela* (Judgment of 30 June 2009; Series C No 197) (Preliminary Objections, Merits, Reparations, and Costs); IACtHR, *Usón Ramírez v Venezuela* (Judgment 20 November 2009; Series C No 207) (Preliminary Objections, Merits, Reparations, and Costs). See also Cecilia Medina, 'Right to Due Process' in *The American Convention on Human Rights* (Intersentia 2014) para 35 and Antkowiak and Gonza (n 737) 191 citing IACtHR, *Constitutional Tribunal (Camba Campos et al) v Ecuador* (n 1037); IACtHR, *Supreme Court of Justice (Quintana Coello et al) v Ecuador* (Judgment of 23 August 2013; Series C No 266) (Preliminary Objections, Merits, Reparations, and Costs).

1039 AComHPR, *Civil Liberties v Nigeria*, Com No 129/94 (1995) [15].

1040 Manby (n 737) 171, 206, 212.

1041 AComHPR, *Wetsh'okonda Koso ao v Congopara*, Com No 281/03 (2008) [79] ('the independence of a court refers to the independence of the court vis-à-vis the Executive. This implies the consideration of the mode of designation of its members, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence: as the saying goes "justice must not only be done: it must be seen to be done"'). See also AComHPR, *International Pen ao v Nigeria*, Com Nos 137/94, 139/94, 154/96, 161/97 (1998) (military control over special tribunal, ousting of possibility to appeal to ordinary courts); AComHPR, *Amnesty International ao v Sudan*, Com Nos 48/90, 50/91, 52/91, 89/93 (1999) [68f] (dismissal of judges which were opposed to establishment of special courts and military tribunals by executive); AComHPR, *Media Rights Agenda a.o. v Nigeria*, Com Nos 105/93, 128/94, 130/94, 152/96 (1999) [61f] (independence of courts requires that their judgments are implemented); AComHPR, *Media Rights Agenda v Nigeria* (n 737) [66] (trial and conviction of civilian by special military tribunal presided over by serving military officer); AComHPR, *Dawda Jawara v The Gambia*, Com Nos 147/95, 149/96 (2000) [74] (ousting of competence of ordinary courts and ignoring of court judgments by military government); AComHPR, *Lawyers of Human Rights v Swaziland*, Com No 251/02 (2005) [55–57] (dismissal of judges, jurisdiction of courts ousted, judicial powers exercised by executive); AComHPR, *Mgwanga Gunme a.o. v Cameroon*, Com No 266/03 (2009) [209–211] (excessive executive control over judiciary through appointments, promotions and transfer policy etc of judges; President and Minister of

Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance, the African Commission on Human and Peoples' Rights elaborates in detail on the jurisdiction of ordinary courts, the question of military and special tribunals, appointment- and removal procedures, security of tenure, adequate remuneration, disciplinary and administrative procedures against judicial officers and the freedom of expression and association of judicial officers as preconditions of an independent tribunal.[1042]

As can be inferred from this comparative analysis, regional and international human rights law has developed a comparable notion of the material scope of the guarantee of an independent tribunal which also depends on the reliance of human rights bodies such as the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights on the case law of the European Court of Human Rights, the general comments, concluding observations and jurisprudence of the UN Human Rights Committee as well as on pertinent international soft law sources. Besides its inclusion in the UDHR and the ICCPR, this process of cross-fertilisation among different human rights regimes may be said to have further contributed to the guarantee approaching universality.[1043]

c. The UN Understanding of Judicial Independence

A number of UN documents that focus on the re-establishment of rule of law structures in conflict-, post-conflict- or developing countries emphasise the relevance of the principle of judicial independence in this particular context.[1044] The Secretary-General prominently invoked the principle in his definition of the rule of law.[1045] He held that the rule of law 'refers to a principle of governance in which all persons, institutions and entities (. . .) are accountable to laws that are (. . .) independently adjudicated'.[1046] In the same report he also observed that 'at

Justice preside over Higher Judicial Council); AComHPR, *Kenneth Good v Republic of Botswana*, Com No 313/95 (2010) [180] (law prohibiting judicial review of presidential acts).

1042 AComHPR, *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa* (2003).

1043 Nollkaemper, 'Universality' (n 706) para 1 ('In its traditional meaning, the universality of international law refers to international law as a global system of law, which is of worldwide validity and is binding on all States.').

1044 UNDPKO, Handbook Multidimensional Peacekeeping Operations (n 899) 94; OHCHR, Rule-of-Law Tools for Post-conflict States: Monitoring Legal Systems (2006) 2; UNSG, Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance (2008) 6; UNDPKO, Handbook Judicial Affairs Officers (n 440) 172.

1045 SG Report S/2004/616 (n 439) [5].

1046 ibid [6].

the institutional core of systems based on the rule of law is a strong judiciary, which is independent and adequately empowered, financed, equipped and trained to uphold human rights in the administration of justice' and recommended that peace agreements and Security Council resolutions and mandates should 'require that all judicial processes, courts and prosecutions be (. . .) consistent with established international standards for the independence and impartiality of the judiciary'.[1047] These invocations of the principle of judicial independence, however, do not amount to a definition.

The same applies to other UN sources, which neither provide a definition of the principle. If they invoke the guarantee, they usually offer only superficial references to its content such as, eg, the *UNDPKO Handbook on United Nations Multidimensional Peacekeeping Operations*, which held that judicial independence requires that the judiciary be impartial and free from interference and that its decisions be respected.[1048] Some UN sources, however, describe what constitutes an encroachment upon the guarantee of judicial independence, invoking undue interferences by the executive branch or other powerful social actors, low or unpaid wages, corruption and bribery or unsatisfactory disciplinary procedures.[1049] Or they identify what is required to guarantee judicial independence such as, eg, freedom from coercion, pressure or influence from the executive or other actors, the strengthening of constitutional or legislative guarantees of judicial independence, support for judicial bodies to address separation of power issues, enhancing judicial control over administrative- and budgetary issues, improving conditions of service (eg salaries) or addressing matters related to appointment, tenure, discipline, bribes and the conduct of judicial trials.[1050]

Even though these observations do not amount to a definition, one can clearly see that UN documents take their inspiration from the legal concept of an independent tribunal in international human rights law, which is in line with the principle that UN rule of law assistance should be based on international

[1047] ibid [35; 64].

[1048] UNDPKO, Handbook Multidimensional Peacekeeping Operations (n 899) 94.

[1049] UNDPKO, Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law (2006) 4; OHCHR, Monitoring Legal Systems (n 1044) 24; UNDPKO/DFS, Policy on Justice Components in United Nations Peace Operations (2009) 7; UNDPKO/OHCHR, United Nations Rule of Law Indicators (n 935) 51; UNDPKO, Handbook Judicial Affairs Officers (n 440) 172.

[1050] UNDPKO, Handbook Multidimensional Peacekeeping Operations (n 899) 96; UNDPKO, Primer for Justice Components (n 1049) 32f; SG Guidance Note UN Rule of Law Assistance (n 1044) 5f; UNDPKO/DFS, Policy on Justice Components (n 1049) 7; UNDPKO/OHCHR, United Nations Rule of Law Indicators (n 935) 73; UNDPKO, Handbook Judicial Affairs Officers (n 440) 172.

norms and standards.[1051] UN documents do, thus, not suggest the existence of an autonomous UN understanding of the concept of judicial independence, which could then serve as an alternative point of reference for Council resolutions referring to the principle.

d. Situations causing Council References to the Concept of Judicial Independence

To determine whether the Council developed an understanding of what the guarantee of judicial independence implies and when it is affected, one has to have a closer look at the circumstances that motivated the Council to invoke the guarantee. Conflict- and post-conflict scenarios in response to which the Council issued the majority of its resolutions referring to the principle of judicial independence, are particularly prone to threats to the independence and impartiality of the judiciary. The executive, powerful social actors or persons involved in organised crime may try to influence judges and prosecutors, low or unpaid wages often contribute to corruption and bribery, the justice system may suffer from ethnic, religious or political bias and disciplinary or oversight mechanisms for judicial actors may be absent.[1052] The accumulation of Council resolutions requiring the establishment of an independent judiciary in conflict- and post-conflict societies suggests that the Council considers the guarantee as a crucial element of rule of law systems that foster peace and security. Secretary-General reports preceding Council resolutions that refer to the guarantee of judicial independence provide useful background information when trying to determine under what circumstances the Council considers the guarantee of judicial independence affected or in need of reform. Knowing under what circumstances the Council views the guarantee implied may provide an idea of the Council's understanding of the content of the rule of law principle of judicial independence.

In several reports, the Secretary-General considered the independence of the judiciary as affected or undermined such as in Timor-Leste, Haiti, Guinea-Bissau, Burundi, Libya or the Central African Republic.[1053] Often, the

[1051] SG Report S/2004/616 (n 439) [9f].

[1052] UNDPKO, Handbook Judicial Affairs Officers (n 440) 18.

[1053] On Timor-Leste, see SG Report S/2010/85 (n 938) [73]. On Haiti, see UNSC Report of the Secretary-General, 'Report of the Secretary-General on Haiti' (2004) UN Doc S/2004/300 [35] and UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2015) UN Doc S/2015/667 [27]. On Guinea-Bissau, see UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and the activities of the United Nations Integrated Peacebuilding Office in Guinea-Bissau' (2015) UN Doc S/

Secretary-General also advised the Security Council to mandate UN peace operations to assist national governments in the re-establishment of an independent judiciary. He did so in Sudan, Sierra Leone, Burundi and Chad.[1054] The Council usually followed the Secretary-General's recommendations in this respect.[1055] There were, however, also instances where the Council issued measures with regard to the guarantee of judicial independence, when the Secretary-General did not propose such action. In such cases, the Council was more proactive and invoked the guarantee of judicial independence where the Secretary-General did indeed report problems in that regard but did not invite the Council to issue measures addressing them. This can be observed with respect to Liberia, Sierra Leone, Haiti and Libya.[1056] In some cases, the Council

2015/37 [53]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and on the activities of the United Nations Integrated Peacebuilding Office in that country' (2011) UN Doc S/2011/655 [39]. On Burundi, see UNSC Report of the Secretary-General, 'Seventh report of the Secretary-General on the United Nations Operation in Burundi' (2006) UN Doc S/2006/429 [41]. On Libya, see UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Support Mission in Libya' (2013) UN Doc S/2013/516 [96]. On the CAR, see SG Report S/2016/565 (n 944) [63].

[1054] On Sudan, see UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Sudan' (2005) UN Doc S/2005/57 [56f]. On Sierra Leone, see UNSC Report of the Secretary-General, 'Twenty-fifth report of the Secretary-General on the United Nations Mission in Sierra Leone' (2005) UN Doc S/2005/273/Add.2 [6]. On Burundi, see UNSC Report of the Secretary-General, 'Seventh report of the Secretary-General on the United Nations Operation in Burundi' (2006) UN Doc S/2006/429/Add.1 [4]. On Chad, see UNSC Report of the Secretary-General, 'Report of the Secretary-General on Chad and the Central African Republic' (2007) UN Doc S/2007/488 [36].

[1055] On Sudan, see UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590 [4 (a) (viii)]. On Sierra Leone, see UNSC Res 1620 (31 August 2005) UN Doc S/RES/1620 [1 (a) (v)]. On Burundi, see UNSC Res 1719 (25 October 2006) UN Doc S/RES/1719 [2 (d)]. On Chad, the Central African Republic and the subregion see UNSC Res 1778 (25 September 2007) UN Doc S/RES/1778 [2 (g)].

[1056] On Liberia, compare UNSC Report of the Secretary-General, 'Report of the Secretary-General to the Security Council on Liberia' (2003) UN Doc S/2003/875 [50] with UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509 [preamble, indent 7] (in this case, however, the Council reacted in the weakest form possible, urging the government in the preamble of the resolution to ensure that the establishment of an independent judiciary be among its highest priorities). On Sierra Leone, compare UNSC Report of the Secretary-General, 'Fourteenth report of the Secretary-General on the United Nations Mission in Sierra Leone' (2002) UN Doc S/2002/679 [24], UNSC Report of the Secretary-General, 'Fifteenth Report of the Secretary-General on the United Nations Mission in Sierra Leone' (2002) UN Doc S/2002/987 [45] with UNSC Res 1436 (24 September 2002) UN Doc S/RES/1436 [7]. On Haiti, compare SG Report S/2004/300 (n 1053) [38] with UNSC Res 1542 (30 April 2004) UN Doc S/RES/1542 [preamble, indent 4] (in this resolution again, the Council only urged the government in

even addressed deficiencies with regard to the independence of the judiciary although preceding Secretary-General reports did not refer to problems in that regard at all. Such was the case in the Democratic Republic of the Congo, Sierra Leone and Guinea-Bissau.[1057]

A comparative look at the situations in response to which the Council invoked the guarantee of judicial independence reveals striking similarities with the circumstances that are considered encroachments upon the guarantee of an 'independent tribunal' according to art 14 (1) ICCPR by the UN Human Rights Committee and with the requirements advanced by the UN Special Rapporteur on the Independence of Judges and Lawyers. To the extent that regional human rights law corresponds widely with international human rights law in its interpretation of the respective guarantee, Council invocations of the principle also coincide largely with a regional understanding of its scope. The following section will depict the circumstances that preceded Council references to the principle of judicial independence and that are also considered encroachments on the guarantee of an independent tribunal by international and regional human rights bodies.

i. Actual Independence from Political Interference

The UN Human Rights Committee and the Special Rapporteur both consider the 'actual independence' from political interference by the other branches of government a crucial element of the guarantee of judicial independence.[1058]

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the preamble to ensure that the establishment of an independent judiciary be among its highest priorities). On Libya, compare SG Report S/2013/516 (n 1053) [46] with UNSC Res 2144 (14 March 2014) UN Doc S/RES/2144 [6 (b)].

1057 On the DRC, see UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493 [11]; UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147 [5 (j)]. On Sierra Leone, see UNSC Res 1537 (30 March 2004) UN Doc S/RES/1537 [3]; UNSC Res 1562 (17 September 2004) UN Doc S/RES/1562 [6]. On Guinea-Bissau, see UNSC Res 1580 (22 December 2004) UN Doc S/RES/1580 [2 (h)] and UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and on the activities of the United Nations Peacebuilding Support Office in that country' (2004) UN Doc S/2004/969 [26; 33] (even though the Secretary-General issued observations and recommendations with regard to the judiciary, he did not specifically refer to problems with regard to its independence).

1058 UNHRCee, General Comment No 32 (n 1015) [19]; UNHRCee, *Oló Bahamonde v Equatorial Guinea* (n 1029) [9.4] ('a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal'); UNHRCee, Concluding Observations Zambia (n 1029) [16] (appointment and removal of Supreme Court judges by President, subject only to ratification by National Assembly without any safeguard or inquiry by an independent

The Council invoked the guarantee of judicial independence repeatedly when the Secretary-General reported interferences of this kind. In Liberia, eg, the Secretary-General observed that the judiciary 'suffered from political interference'.[1059] Similarly, he reported about interferences of 'administrative and security authorities in judicial matters' in Chad.[1060] In the Central African Republic he observed a lack of guarantees that national magistrates could render justice without fear of political interference.[1061] In Sudan, the internal conflict had 'manipulated and politicised the judiciary' and in Guinea-Bissau, the politico-military elite had monopolised the state and effectively abolished the separation of powers during decades of instability.[1062] At times, preceding problems with regard to the actual independence of the judiciary also surfaced in the form of positive observations such as in Timor-Leste, where the Secretary-General considered it encouraging that all political leaders, including the Prime Minister, emphasised a need to respect judicial processes with regard to trials of the Deputy Prime Minister and the Minister of Foreign Affairs.[1063] Equally in Haiti, the Secretary-General observed approvingly that the Superior Council of the Judiciary had taken steps to consolidate its authority over the judiciary in an effort to significantly reduce political interference in judicial affairs.[1064]

ii. Threats to the Safety of Judges and Judicial Personnel

Threats to the safety of judges and judicial personnel are considered an interference with the guarantee of an independent tribunal according to art 14 (1) ICCPR by the UN Human Rights Committee and the Special Rapporteur on the Independence of Judges and Lawyers.[1065] Secretary-General reports preceding Council resolutions which invoke the guarantee of judicial independence regularly observed interferences of this type.

judicial tribunal); Report Special Rapporteur A/HRC/11/41 (n 1024) [18f]. See also Basic Principles on the Independence of the Judiciary (n 983) [principles 2 & 4].

1059 SG Report S/2003/875 (n 1056) [24].

1060 UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Mission in the Central African Republic and Chad' (2010) UN Doc S/2010/217 [23].

1061 SG Report S/2014/562 (n 940) [52].

1062 On Sudan, see UNSC 'Report of the International Commission of Inquiry on Darfur to the Secretary-General' (2005) UN Doc S/2005/60 [432]. On Guinea-Bissau, see SG Report S/2015/37 (n 1053) [49].

1063 SG Report S/2011/32 (n 947) [14].

1064 UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2013) UN Doc S/2013/493 [34].

1065 UNHRCee, Concluding Observations Brazil (n 1029) [11] (threats against members of the judiciary); Report Special Rapporteur A/HRC/11/41 (n 1024) [78f]. See also Basic Principles on the Independence of the Judiciary (n 983) [principle 2].

In Sudan, eg, judges that disagreed with the government were reported to suffer harassment.[1066] In Eastern Chad, the Secretary-General noted problematic security conditions for magistrates, while the judicial process in Guinea-Bissau regarding the political assassination of a former President and Chief of General Staff faced security constraints.[1067] In Libya, the safety of judicial personnel was seriously compromised by assassinations of and death threats against prosecutors and judges as well as by attacks on courthouses.[1068] In the Central African Republic, the Secretary-General observed that there were no guarantees in place that national magistrates could render justice in an impartial manner without fear of physical violence and reported threats to magistrates and their families.[1069]

iii. Judicial Corruption

Judicial corruption is incompatible with the guarantee of an independent tribunal according to art 14 (1) ICCPR as interpreted by the UN Human Rights Committee and the Special Rapporteur.[1070] Incidents of judicial corruption were reported repeatedly by the Secretary-General prior to the issuance of Council resolutions that invoked the guarantee of judicial independence. In Liberia, eg, the Secretary-General reported that the judiciary suffered from corrupt practices under the Taylor government.[1071] Equally in Haiti, he observed that the judicial

[1066] Report International Commission of Inquiry Darfur S/2005/60 (n 1062) [432].

[1067] On Eastern Chad, see SG Report S/2010/217 (n 1060) [23]. On Guinea-Bissau, see UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and on the activities of the United Nations Integrated Peacebuilding Office in that country' (2011) UN Doc S/2011/370 [33].

[1068] SG Report S/2013/516 (n 1053) [38]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Support Mission in Libya' (2014) UN Doc S/2014/131 [20; 40f]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Support Mission in Libya' (2014) UN Doc S/2014/653 [53].

[1069] SG Report S/2014/562 (n 940) [52]; SG Report S/2016/565 (n 944) [24]. In UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [34 (d) (vii)], the Council further reacted to this particular circumstance by mandating MINUSCA to provide security for magistrates.

[1070] UNHRCee, Concluding Observations on the Second Periodic Report of Kyrgyzstan (23 April 2014) UN Doc CCPR/C/KGZ/CO/2 [19]. See also the special report on judicial corruption, UNGA, Report of the Special Rapporteur on the Independence of Judges and Lawyers (13 August 2012) UN Doc A/67/305 and Report Special Rapporteur A/69/294 (n 1022) [40–42]. See also, UNHRC, Final Report of the Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights (5 January 2015) UN Doc A/HRC/28/73 [19].

[1071] SG Report S/2003/875 (n 1056) [24].

sector suffered from endemic corruption.[1072] In Timor-Leste, the Secretary-General determined that checks and balances provided by effective and transparent oversight- and accountability mechanisms were essential to combat corruption and improper practices among justice officials.[1073] Also in Guinea-Bissau, the Secretary-General observed that the judiciary was highly susceptible to corruption and bribery.[1074]

iv. Insufficiently Qualified Judicial Personnel

Secretary-General reports preceding Council resolutions that invoked the guarantee of judicial independence also observed problems with regard to the legal qualification and professional training of judicial personnel. Deficiencies in this regard are considered potential curtailments of the guarantee of an independent tribunal according to art 14 (1) ICCPR by the UN Human Rights Committee and the UN Special Rapporteur on the Independence of Judges and Lawyers.[1075] In Sierra Leone, the Secretary-General observed that judicial structures suffered from a lack of qualified personnel.[1076] In Burundi he held that critically needed reforms involved the development of a cadre of qualified judicial workers.[1077] In Timor-Leste, a need for continuous and specialised training was noted and the justice system was in need of sufficiently qualified officials as they, ia, lacked an understanding of the applicable laws.[1078] In

[1072] SG Report S/2004/300 (n 1053) [35]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2016) UN Doc S/2016/753 [62].

[1073] SG Report S/2010/85 (n 938) [83].

[1074] SG Report S/2015/37 (n 1053) [49].

[1075] UNHRCee, Concluding Observations Georgia (n 1029) [14] (absence of adequate education of judges and general training in international human rights law); UNHRCee, Concluding Observations Vietnam (n 1029) [9] ('judicial system remains weak owing to the scarcity of qualified, professionally trained lawyers'); UNHRCee, Concluding Observations Republic of the Congo (n 1029) [14] (the Committee observed that 'particular attention should be given to the training of judges'); UNHRCee, Concluding Observations Sudan (n 1029) [21] (judges not selected based on their legal qualification); UNHRCee, Comments on United States of America (n 1029) [23] (administration of justice by unqualified and untrained persons); Report Special Rapporteur A/HRC/11/41 (n 1024) [80–84]. See also, Basic Principles on the Independence of the Judiciary (n 983) [principles 10 & 13] (holding that '[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law' and that the '[p]romotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience').

[1076] UNSC Report of the Secretary-General, 'Twenty-first report of the Secretary-General on the United Nations Mission in Sierra Leone' (2004) UN Doc S/2004/228 [24].

[1077] SG Report S/2006/429 (n 1053) [41].

[1078] SG Report S/2010/85 (n 938) [24; 82].

Eastern Chad, persistent problems concerned the inadequacy or absence of training of judicial personnel, while it was estimated in the Central African Republic that 70 per cent of all criminal cases were heard by magistrates without adequate professional training, owing in part to a lack of a training curricula and skilled trainers at the National School of Administration and Judicial Studies.[1079]

v. Lack of Human and Material Resources

A lack of human and material resources, a serious restraint of the guarantee of an independent tribunal according to the UN Human Rights Committee and the Special Rapporteur, was identified repeatedly by Secretary-General reports prior to the issuance of Council resolutions proposing measures with regard to the independence of the judiciary.[1080] Sierra Leone's judicial system suffered from severe constraints with regard to judges, magistrates and justices of the peace, adequate logistics and infrastructure as well as from a lack of access to current legislation and jurisprudence in codified form.[1081] In Timor-Leste, the Secretary-General assessed that access to justice had been hampered, ia, by a lack of adequate infrastructure and human resources.[1082] In Eastern Chad, the Secretary-General determined that the financial and human resources allocated to the justice sector were inadequate and in Libya, a shortage of judges was observed to place an additional strain on judicial institutions that were already facing major challenges.[1083]

[1079] On Eastern Chad, see SG Report S/2010/217 (n 1060) [23f]. On the CAR, see SG Report S/2016/565 (n 944) [24].

[1080] UNHRCee, Concluding Observations Vietnam (n 1029) [9] ('judicial system remains weak owing to the (. . .) lack of resources for the judiciary'); UNHRCee, Concluding Observations Kenya (n 1029) [20] ('serious dysfunctions in the administration of justice, owing primarily to the lack of human and material resources'); Report Special Rapporteur A/HRC/11/41 (n 1024) [76f]. See also Basic Principles on the Independence of the Judiciary (n 983) [principle 7] (holding that 'it is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions').

[1081] UNSC Report of the Secretary-General, 'Seventeenth report of the Secretary-General on the United Nations Mission in Sierra Leone' (2003) UN Doc S/2003/321 [39]; SG Report S/2004/228 (n 1076) [24]; UNSC Report of the Secretary-General, 'Twenty-third report of the Secretary-General on the United Nations Mission in Sierra Leone' (2004) UN Doc S/2004/724 [31].

[1082] SG Report S/2010/85 (n 938) [24; 82].

[1083] On Eastern Chad, see SG Report S/2010/217 (n 1060) [23]. On Libya, see SG Report S/2014/131 (n 1068) [45].

vi. Guarantee of Judicial Independence in Statutory- and Constitutional Law

Both the UN Human Rights Committee and the UN Special Rapporteur expect states to take positive measures and to guarantee judicial independence in their statutory or constitutional law.[1084] Similarly to the Special Rapporteur in his country mission reports, the Secretary-General did not only report about lacking legal guarantees but also noted when Constitutions did guarantee the independence of the judiciary.[1085] With regard to Sudan, the Secretary-General observed that although the 1998 Sudanese Constitution guaranteed the independence of the judiciary, the internal conflict of the country had manipulated and politicised the judiciary.[1086] In Libya, the Secretary-General reported the amendment of the law on the status of the judiciary, which was meant to enhance the independence of the judiciary by allowing for the election of the Supreme Judicial Council by their peers.[1087] In Haiti, the Secretary-General observed that the slow progress in renewing the terms of judges highlighted a structural weakness of the system, rooted in the Constitution and in the law on the status of the judges, which could translate into biased appointments and inefficient career-management processes.[1088] Finally, in the Central African Republic, the Secretary-General criticised that relevant legislation did not guarantee the independence of the judiciary.[1089]

vii. Oversight- and Disciplinary Mechanisms for Judicial Personnel

Another concern with regard to the guarantee of judicial independence as interpreted by the UN Human Rights Committee and the UN Special Rapporteur are lacking or insufficient oversight- and disciplinary mechanisms for judicial personnel.[1090] With regard to Eastern Chad, the Secretary-General reported of MINURCAT's support activities for the Chadian government in

[1084] UNHRCee, General Comment No 32 (n 1015) [19]; Report Special Rapporteur A/HRC/11/41 (n 1024) [20–22]. See also Basic Principles on the Independence of the Judiciary (n 983) [principle 1] (holding that '[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country').

[1085] Report Special Rapporteur A/HRC/11/41 (n 1024) [21].

[1086] Report International Commission of Inquiry Darfur S/2005/60 (n 1062) [432].

[1087] SG Report S/2013/516 (n 1053) [46].

[1088] SG Report S/2015/667 (n 1053) [21].

[1089] SG Report S/2016/565 (n 944) [24].

[1090] UNHRCee, Concluding Observations Republic of the Congo (n 1029) [14] (judicial independence limited owing to the lack of independent mechanism for the discipline of judges); UNHRCee, Concluding Observations Namibia (n 1029) [18] ('The State party should establish an effective and independent mechanism and provide for a proper procedure for the impeachment and removal of judges found guilty of misconduct'); UNGA, Report of the Special Rapporteur on the Independence of Judges and Lawyers

addressing the ineffectiveness of disciplinary oversight mechanisms for the judiciary.[1091] In Timor-Leste, the Secretary-General observed that Superior Councils responsible for maintaining standards and professional discipline within the judiciary and codes of ethics for the judiciary needed to be further strengthened in order to exert effective disciplinary control over judges in accordance with international standards.[1092] In Haiti, after the irregular acquittal of two defendants, the Secretary-General held that it was of utmost importance that the Ministry of Justice and Public Security and the Superior Council of the Judiciary determined the circumstances that had led to these irregularities and commended that in several cases of irregularities involving magistrates, the Ministry and the Council had taken disciplinary measures against the magistrates concerned.[1093] A few months later, however, the vetting process of magistrates stagnated, the Superior Council of the Judiciary had not approved the rules for the evaluation of judges and the ad hoc joint vetting commission lacked the funding to complete its work on the certification of judges, resulting in an insufficient disciplinary oversight of judicial personnel.[1094]

viii. Inadequate Judicial Salaries

Inadequate judicial salaries or significant delays in the payment of judicial wages may negatively affect the independence of the judiciary as interpreted by the UN Human Rights Council and the UN Special Rapporteur.[1095] Secretary-General reports preceding Council resolutions referring to the independence of the judiciary also contained references to low judicial salaries. In Guinea-Bissau, the Secretary-General observed that the judiciary was highly susceptible to corruption and bribery owing to low wages and frequent delays in the payment of salaries.[1096] In Timor-Leste, problems with regard to judicial

(28 April 2014) UN Doc A/HRC/26/32 (on the connection between judicial independence and accountability).

1091 SG Report S/2010/217 (n 1060) [23f].

1092 SG Report S/2010/85 (n 938) [83; 90].

1093 SG Report S/2015/667 (n 1053) [27].

1094 UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2016) UN Doc S/2016/225 [Annex I, para 16]; SG Report S/2016/753 (n 1072) [27; Annex, para 11].

1095 UNHRCee, Concluding Observations of the Human Rights Committee on Georgia (19 April 2002) UN Doc CCPR/CO/74/GEO [12]; UNHRCee, Concluding Observations of the Human Rights Committee on Tajikistan (18 July 2005) UN Doc CCPR/CO/84/TJK [17] ('The State party should guarantee the full independence and impartiality of the judiciary by (…) remunerating judges with due regard for the responsibilities'); Report Special Rapporteur A/HRC/11/41 (n 1024) [73–75].

1096 SG Report S/2015/37 (n 1053) [49].

salaries were evidenced by positive measures taken against them. The Secretary-General reported the enactment of a new law, which increased the salaries of judges, prosecutors and public defenders.[1097]

ix. Appointment, Dismissal and Security of Tenure

The UN Human Rights Committee and the UN Special Rapporteur both consider adequate conditions of appointment and dismissal and security of tenure for judges as core components of the guarantee of an independent tribunal.[1098] Council resolutions referring to problems with regard to the independence of the judiciary were preceded by reports of the Secretary-General of irregularities with regard to the appointment or dismissal of judges. In Sudan, the Secretary-General observed that judges that disagreed with the

[1097] SG Report S/2010/85 (n 938) [74].

[1098] UNHRCee, Preliminary Observations Peru (n 1029) [14] (seven-year tenure of judges with requirement of recertification for reappointment); UNHRCee, Concluding Observations Turkmenistan (n 1029) [13] (judges appointed by the President for renewable terms of five years); UNHRCee, Concluding Observations Uzbekistan (n 1029) [16] (appointment of judges reviewed by executive every five years); UNHRCee, Concluding Observations Republic of Moldova (n 1029) [12] ('short initial appointments for judges, beyond which they must satisfy certain criteria in order to gain an extension of their term'); UNHRCee, Concluding Observations Armenia (n 1029) [8] (election of judges by popular vote for a fixed maximum term of six years); UNHRCee, Concluding Observations Liechtenstein (n 1029) [12] (criteria of appointment of members to the selecting body, the casting vote of the Princely House and the limited nature of tenure); UNHRCee, Concluding Observations Algeria (n 1029) [14] (immovability of judges only after 10 years); UNHRCee, Concluding Observations Armenia (n 1029) [8] (election of judges by popular vote for six years); UNHRCee, *Busyo et al v Democratic Republic of the Congo* (n 1029) [5.2] (established procedures and safeguards for dismissal of judge not respected); UNHRCee, *Pastukhov v Belarus* (n 1029) [7.3] (dismissal of judge of constitutional court by presidential decree before expiry of term on the ground that a new constitution had entered into force; absence of effective judicial protections to contest dismissal); UNHRCee, *Bandaranayake v Sri Lanka* (n 1029) [7.3] (dismissal of a senior judge); Report Special Rapporteur A/HRC/11/41 (n 1024) [23–34; 53–64]. See also Basic Principles on the Independence of the Judiciary (n 983) [principles 10, 11 & 12] (holding that '[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory' and that '[t]he term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law' and that '[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists').

government were dismissed and that a law was enacted which authorised the President to appoint all judges in violation of the Interim National Constitution and the Interim Constitution of Southern Sudan.[1099] In Haiti, the Secretary-General was concerned about appointments of judges, which did not follow legal requirements and observed that the slow progress in the renewal of judicial terms highlighted structural weaknesses of the system rooted in the Constitution and in the law on the status of judges, which could translate into biased appointments.[1100]

x. Military- and Special Courts

Trials of civilians in military- or special courts may cause problems with regard to the independent administration of justice and compromise the guarantee in art 14 (1) ICCPR as interpreted by the UN Human Rights Committee and the UN Special Rapporteur. Such trials have to be in full conformity with the requirements of art 14 ICCPR and should remain exceptional.[1101] The report of the International Commission of Inquiry on Darfur, preceding Council resolutions that referred to problems with regard to judicial independence, criticised, ia, the existence of extraordinary courts in Sudan which were under the control of the President and applied principally to the Darfur States and Kordofan rather than to the whole of Sudan.[1102] In Libya, preceding problems with regard to military courts became evident by the report of the Secretary-General that the General National Congress had adopted a law abolishing the jurisdiction of military courts over civilians.[1103]

[1099] Report International Commission of Inquiry Darfur S/2005/60 (n 1062) [432]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Sudan' (2006) UN Doc S/2006/160 [54].

[1100] SG Report S/2013/493 (n 1064) [34]; SG Report S/2015/667 (n 1053) [21].

[1101] UNHRCee, General Comment No 32 (n 1015) [22]; Report Special Rapporteur A/HRC/11/41 (n 1024) [35f]. For case law of the UNHRCee on trials of civilians in military courts see, eg, UNHRCee, *Fals Borda et al v Colombia* (Com No 46/79) UN Doc CCPR/C/16/D/46/1979 (27 July 1982) [13.3]; UNHRCee, *Kurbanov v Tajikistan* (Com No 1096/02) UN Doc CCPR/C/79/D/1096/2002 (6 November 2003) [7.6]; UNHRCee, *Musaev v Uzbekistan* (Com Nos 1914, 1915 and 1916/09) UN Doc CCPR/C/104/D/1914,1915&1916/2009 (21 March 2012) [2–4].

[1102] Report International Commission of Inquiry Darfur S/2005/60 (n 1062) [439–449].

[1103] SG Report S/2013/516 (n 1053) [45].

e. Analysis

i. Relationship of Council Language to a Trend of Legalisation

If one tries to assess the plausibility of a trend towards the legalisation of Council action with regard to the two elements proposed above – legalisation on a linguistic as well as on an interpretive level – one can observe such a process with regard to how the Council invokes the principle of judicial independence. On a linguistic level, the Council uses precise terms that expressly invoke a rule of law guarantee whose content enjoys a relatively established meaning in regional and international human rights law: the guarantee of an independent tribunal. On a level of application, the Council seems to refer to the principle in reaction to circumstances that are considered interferences with the guarantee of an independent tribunal by international and regional human rights bodies. With regard to the questions as to how (the language used) and when (in reaction to which circumstances) the Council refers to the principle of judicial independence, a process of legalisation of Council action – as understood here – may thus be confirmed.

ii. Contribution of Council Language to Norm Emergence

As outlined above, the concept of legalisation corresponds largely with the requirements proposed for the contribution of Council resolutions to the emergence of the rule of law as an international norm that shapes state identities and interests. If the Council uses language that clearly invokes a rule of law guarantee established in regional and international human rights law in reaction to circumstances that are considered encroachments upon this guarantee by regional and international human rights bodies responsible for the interpretation of such a guarantee, it also satisfies the requirements for the emergence of norms, ie sufficient linguistic precision, consistent invocation and legitimacy of the standards applied. It is suggested here that these elements determine the potential of Council resolutions to contribute to the diffusion of an understanding of the meaning of the rule of law and its sub-guarantees, ie in this case of the principle of judicial independence as an essential element of the rule of law. To the extent that the criteria of legalisation are widely satisfied with regard to Council invocations of the rule of law guarantee of an independent judiciary, the requirements of norm emergence are also considered fulfilled.

2. Judicial Effectiveness

a. Council Resolutions Invoking the Concept of Judicial Effectiveness

In response to several different country situations, the Council considered it necessary that the effectiveness of judicial institutions or the judiciary system be enhanced, strengthened or ensured.[1104] In a thematic resolution on the role of policing in peacekeeping and post-conflict peacebuilding, the Council reiterated that, ia, effective judicial institutions were necessary to lay the foundation for sustainable peace and national development.[1105] This thematic resolution is one of the rare occasions where the Council identifies in a generic way what purpose a judiciary that satisfies certain requirements serves. The identified purpose corresponds with the mandate of the Council – the maintenance of international peace – but is too imprecise to serve as a guideline for concrete reform measures. The Council rather reminds of the concrete context of its actions and calls attention to the fact that its institution-building recommendations and decisions are an integral part of its peace maintenance activities.

Most authoritatively, the Council invoked the effectiveness of the judiciary in resolutions concerning Timor-Leste in which it mandated UNMIT to enhance the effectiveness of the judiciary system.[1106] Similarly in the Central African Republic, the Council tasked MINUSCA to help enhance the effectiveness of the national judicial system.[1107]

[1104] Most Council resolutions did not clearly establish a connection between the concept of judicial effectiveness and the rule of law. Almost all resolutions invoking a need to enhance judicial effectiveness, however, also emphasised a need to strengthen the rule of law. In those cases, the connection may be inferred based on a comparative reading of Council resolutions and Secretary-General reports. UNSC Res 1867 (26 February 2009) UN Doc S/RES/1867 [11], eg, 'requests UNMIT to continue its efforts (…) to enhance the effectiveness of the judiciary' but does not invoke the rule of law in the same paragraph. The Secretary-General report preceding the said resolution, however, discussed the creation of an effective judicial system as one of the objectives under the heading of the rule of law. See, SG Report S/2009/72 (n 957) [Annex]. Eventually, in resolution 2301, the Council clearly established the connection between judicial effectiveness and the rule of law when it authorised 'MINUSCA to use its capacities to (…) support for national and international justice and the rule of law: To help (…) enhance the effectiveness of the national judicial (…) system'. See, UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [35 (a) (i)].

[1105] UNSC Res 2185 (20 November 2014) UN Doc S/RES/2185 [preamble, indent 9].

[1106] UNSC Res 1802 (25 February 2008) UN Doc S/RES/1802 [8]; UNSC Res 1867 (26 February 2009) UN Doc S/RES/1867 [11]; UNSC Res 1912 (26 February 2010) UN Doc S/RES/1912 [11]; UNSC Res 1969 (24 February 2011) UN Doc S/RES/1969 [13]; UNSC Res 2037 (23 February 2012) UN Doc S/RES/2037 [12].

[1107] UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [35 (a) (i)].

Non-bindingly but in the operative part of the concerned resolutions, the Council encouraged the Haitian authorities to continue to implement justice reform by taking the necessary steps, including through ongoing support to the Superior Council of the Judiciary, to ensure the effectiveness of judicial institutions.[1108]

Least authoritatively as only referred to in the preambular part of its resolutions, the Council noted difficulties in Timor-Leste with a negative impact on the effectiveness of the judicial system and called on all relevant parties to work towards progress in this area.[1109] In Haiti, the Council recognised that the government bore particular responsibility for the further strengthening and effective functioning of the justice system and in Liberia it urged the government to demonstrate substantive progress in the effective functioning of the justice sector.[1110]

b. Judicial Effectiveness as a Legal Concept

i. Expeditious Proceedings

(i) International Human Rights Law

If one tries to relate the notion of an effective judiciary to legal guarantees provided for in international and regional human rights law, the right to be tried without undue delay comes to mind. The guarantee is an element of the right to a fair hearing in paragraph 1 of art 14 ICCPR for civil trials and provided for in paragraph 3 (c) of the same article for criminal proceedings specifically.[1111] Regarding the right of pre-trial detainees to be tried 'within a reasonable time', art 14 (3) (c) ICCPR overlaps with art 9 (3) ICCPR.[1112] In contrast to art 9 (3) ICCPR, however, art 14 (3) (c) ICCPR concerns the time between arrest and

[1108] UNSC Res 2070 (12 October 2012) UN Doc S/RES/2070 [11]; UNSC Res 2119 (10 October 2013) UN Doc S/RES/2119 [14]; UNSC Res 2180 (14 October 2014) UN Doc S/RES/2180 [16]; UNSC Res 2243 (14 October 2015) UN Doc S/RES/2243 [20]; UNSC Res 2313 (13 October 2016) UN Doc S/RES/2313 [22].

[1109] UNSC Res 1410 (17 May 2002) UN Doc S/RES/1410 [preamble, indent 7].

[1110] On Haiti, see UNSC Res 1277 (30 November 1999) UN Doc S/RES/1277 [preamble, indent 5]. On Liberia, see UNSC Res 2190 (15 December 2014) UN Doc S/RES/2190 [preamble, indent 3]; UNSC Res 2239 (17 September 2015) UN Doc S/RES/2239 [preamble, indent 4].

[1111] UNHRCee, General Comment No 32 (n 1015) [27]. See also UNHRCee, *Muñoz Hermoza v Peru* (Com No) UN Doc CCPR/C/34/D/203/1986 (4 November 1988) [11.3] (breach of art 14(1) ICCPR).

[1112] Nowak (n 1026) para 52.

trial irrespective of detention.[1113] The right to expeditious proceedings applies to the time between the moment an individual is informed of a criminal charge against it or the initiation of civil proceedings and the issuance of a final decision by an (if existent) appeal court.[1114] Importantly, the guarantee imposes requirements on states regarding the efficient organisation of their judicial systems.[1115] On that note, the UN Human Rights Committee advised the Croatian government to reform its judicial system, ia by simplifying its judicial procedures and by training its judges and court staff in efficient case management techniques in order to address a heavy backlog of court cases.[1116] This manifestation of the guarantee relates closely to the context in which the Council issues resolutions invoking the effectiveness of the judiciary.

The concrete evaluation of whether a delay was undue or whether proceedings took place within a reasonable time depends on the circumstances of the particular case.[1117] To assess whether a delay in the proceedings was undue, several criteria are taken into account such as the complexity of the legal matter, the length of all stages of the proceedings, the effects of the delay on the individual, the existence of remedies to accelerate the proceedings and the outcome of appeal proceedings.[1118]

(ii) Regional Human Rights Law

Article 6 (1) ECHR provides for a similar right as art 14 ICCPR, ie a hearing and judgment within a reasonable time.[1119] It guarantees the effectiveness of judicial decisions, which relates to their effective and prompt execution.[1120] As

[1113] Sarah Joseph and Melissa Castan, 'Right to a Fair Trial – Article 14' in *The International Covenant on Civil and Political Rights* (3rd edn, OUP 2013) para 14.86.

[1114] Louise Doswald-Beck and Robert Kolb, *Judicial Process and Human Rights* (NP Engel Publisher 2004) 212; Shah (n 1028) 277.

[1115] Shah (n 1028) 277.

[1116] UNHRCee, Concluding Observations of the Human Rights Committee on Croatia (30 April 2001) UN Doc CCPR/CO/71/HRV [16]. See also UNHRCee, *Lumanog and Santos v Philippines* (Com No 1466/06) UN Doc CCPR/C/92/D/1466/2006 (21 April 2008) [8.5] ('State parties have an obligation to organize their system of administration of justice in such a manner as to ensure an effective and expeditious disposal of the cases.').

[1117] Nowak (n 1026) para 53.

[1118] Shah (n 1028) 277 citing UNHRCee, *Deisl v Austria* (Com No 1060/02) UN Doc CCPR/C/81/D/1060/2002 (23 August 2004) [11.6]. See also, eg, UNHRCee, *Wolf v Panama* (Com No 289/88) UN Doc CCPR/C/44/D/289/1988 (26 March 1992) [6.4].

[1119] Nowak (n 1026) para 52.

[1120] See, Venice Commission, 'Rule of Law Checklist' (11–12 March 2016) 27 (with references to the relevant case law of the ECtHR on the effectiveness of judicial decisions).

art 14 (1) ICCPR, art 6 (1) ECHR requires that a state organise its judicial system in a way that enables judicial proceedings to take place within a reasonable time.[1121] This involves, similarly to art 14 (1) ICCPR, the duty of the state to organise its judicial system in a manner to avoid, eg, a backlog in court cases of a dimension that affects the right in art 6 (1) ECHR.[1122] When assessing whether a state complies with its fair trial obligations under the ECHR, the Venice Commission inquires whether proceedings are started and judicial decisions made without undue delay as required by art 6 (1) ECHR, whether there is a remedy against an undue length of judicial proceedings as required by art 13 read in conjunction with art 6 (1) ECHR and whether the right to timely access court documents and files is ensured for litigants as required by art 6 (3) (c) ECHR in criminal matters.[1123] The period of time assessed under art 6 (1) ECHR starts with the initiation of civil proceedings or the moment when a person is charged in criminal proceedings.[1124] Similarly to the UN Human Rights Committee, the European Court of Human Rights considers 'the circumstances of the case' and has 'regard to the complexity of the case, the conduct of the parties and of the authorities, and the importance of what is at stake for the applicant in the litigation' when determining whether the delay of judicial proceedings has been unreasonable.[1125]

Also the ACHR in its art 8 (1) contains the right to a trial within a reasonable time. The relevant time encompasses the entire proceedings until a 'final and firm judgment is delivered and the jurisdiction thereby ceases'.[1126] Comparable

[1121] Grabenwarter and Pabel (n 1033) § 24 para 84 citing, ia, ECtHR, *Philis (No 2) v Greece* (App No 19773/92) 27 June 1997 [40]; ECtHR, *Podbielski v Poland* (App No 27916/95) 30 October 1998 [38]; ECtHR, *Rawa v Poland* (App No 38804/97) 14 January 2003 [53]; ECtHR, *Hennig v Austria* (App No 41444/98) 2 October 2003 [38]; ECtHR, *Sürmeli v Germany* (App No 75529/01) 8 June 2006 [129]; ECtHR, *Svinarenko u Slyadnev v Russia* (App Nos 32541/08 & 43441/08) 17 July 2014 [143f].

[1122] See, eg, ECtHR, *Zimmermann and Steiner v Switzerland* (App No 8737/79) 13 July 1983 [27–32]; ECtHR, *Muti v Italy* (App No 14146/88) 23 March 1994 [15] or ECtHR, *Süssmann v Germany* (App No 20024/92) 16 September 1996 [55].

[1123] Venice Commission, 'Rule of Law Checklist' (n 1120) 26.

[1124] Grabenwarter and Pabel (n 1033) § 24 para 81.

[1125] See, eg, ECtHR, *Klein v Germany* (App No 33379/96) 27 July 2000 [36]. See Grabenwarter and Pabel (n 1033) § 24 para 82 for a summary of the case law of the ECtHR on these criteria.

[1126] Antkowiak and Gonza (n 737) 183 citing IACtHR, *Tarazona Arrieta and others v Peru* (Judgment of 15 October 2014; Series C No 286) (Preliminary Objection, Merits, Reparations and Costs) [98] and IACtHR, *López Álvarez v Honduras* (Judgment of 1 February 2006; Series C No 141) (Merits, Reparations, and Costs) [129] (on the beginning of the relevant time with respect to criminal processes) and IACtHR, *Tibi v Ecuador* (Judgment of 7 September 2004; Series No 114) (Preliminary Objections,

to the UN Human Rights Committee and the European Court of Human Rights, the Inter-American Commission on Human Rights observed that 'a reasonable length of time for the proceedings as allowed by Article 8 should be measured according to a series of factors such as the complexity of the case, the behavior of the accused, and the diligence of the competent authorities in their conduct of the proceedings'.[1127] The Inter-American Court of Human Rights made clear that the concept of 'reasonable time' is closely inspired by the jurisprudence of the European Court of Human Rights and that art 8 (1) ACHR is 'equivalent in principle to Article 6' of the ECHR.[1128] In *Valle Jaramillo v Colombia*, the court further added a fourth determining factor, ie the 'adverse effect of the duration of the proceedings on the judicial situation of the person involved in it'.[1129] Article 7 (5) ACHR which requires that a detained person 'be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings' is inspired by the same principle as art 8 (1) ACHR. Article 7 (5) ACHR, however, sets a stricter standard with regard to what constitutes a 'reasonable time' as it applies to 'the deprivation of liberty for the accused' and thus justifies priority treatment.[1130]

Article 7 (1) (d) of the ACHPR also guarantees a trial within a reasonable time. The guarantee is reinforced by the African Commission on Human and Peoples' Rights' *Resolution on the Right to Recourse and Fair Trial* which guarantees that 'persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released' and that 'in the determination of charges against individuals, the individual shall be entitled in particular to be tried within a reasonable time'.[1131] What exactly constitutes a reasonable time is determined with regard to the concrete circumstances of the case but indefinite or extended detention without charge or trial clearly violates the guarantee.[1132] In determining what constitutes a reasonable time, the

Merits, Reparations, and Costs) [168] (with regard to the beginning of the relevant time of administrative procedures).

1127 IACHR, *Giménez v Argentina* (Case No 11.245, Report No 12/96) (1 March 1996) [111]. For references to the relevant case law of the IACtHR on the notion of 'complexity of the matter', see Antkowiak and Gonza (n 737) 184 f.

1128 IACtHR, *Genie Lacayo v Nicaragua* (Judgment of 29 January 1997) (n 737) [77].

1129 IACtHR, *Valle Jaramillo and others v Colombia* (Judgment of 27 November 2008; Series C No 192) (Merits, Reparations and Costs) [155].

1130 IACHR, *Giménez v Argentina* (n 1127) [110].

1131 AComHPR, *Resolution on the Right to Recourse and Fair Trial* (1992) [2(c) & (e)(ii)].

1132 Manby (n 737) 171, 204 citing AComHPR, *Constitutional Rights Project v Nigeria*, Com No 153/96 (1999) [20] (failure to bring charges within two years of detention on

Commission is guided by the case law of the European Court of Human Rights. It closely follows the European court with regard to the criteria that determine whether a delay was unreasonable and in the position that a backlog in court cases cannot justify an encroachment upon the provision but rather constitutes an encroachment itself.[1133]

ii. Right to an Effective Remedy

(i) International Human Rights Law

When approaching the terms of an effective judicial- or judiciary system or judicial institutions from a legal perspective, the right to an effective remedy as provided for in international and regional human rights law further comes to mind. Universally, art 8 UDHR provides the right of everyone to 'an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. The right is also enshrined in art 2 (3) ICCPR and grants right holders 'accessible and effective remedies' in national law to vindicate the rights granted to them in the Covenant.[1134] As such, the provision presupposes the violation of a Covenant right and is, thus, not a stand-alone right.[1135] The guarantee, of course, entails particular requirements for the judiciary. States parties need to establish, ia, 'appropriate judicial (…) mechanisms for addressing claims of rights violations under

suspicion of serious crime violated art 7 (1) (d) ACHPR); AComHPR, *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon*, Com No 39/90 (1997) [19] (two years' delay affected complainant's ability to work in his profession and violated art 7 (1) (d) ACHPR); AComHPR, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*, Com No 204/97 (2001) [40] (fifteen years without action being taken in case of suspension, discharge and removal of magistrates violated art 7 (1) (d) ACHPR). See also AComHPR, *Alhassan Abubakar v Ghana*, Com No 103/93 (1996) [12] (seven years' detention without trial violated art 7 (1) (d) ACHPR); AComHPR, *Zimbabwe Lawyers for Human Rights and another v Zimbabwe*, Com No 293/04 (2008) [134] (no violation of art 7 (1) (d) ACHPR as complainants had failed to file processes expeditiously and/or failed to file their heads of arguments as required by the court); AComHPR, *Huri-Laws v Nigeria*, Com No 225/98 (2000) (refusal and/or negligence on part of the respondent state to bring complainant promptly before a judge or other judicial officer for trial violated art 7 (1) ACHPR); AComHPR, *Odjouoriby v Benin*, Com No 199/97 (2004) (proceedings pending before appeal court were unduly prolonged and violated art 7 (1) (d) ACHPR).

1133 AComHPR, *Article 19 v Eritrea* (n 737) [97, 99].

1134 UNHRCee, General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (26 March 2004) UN Doc CCPR/C/21/Rev.1/Add. 13 [15].

1135 Joseph and Castan (n 1113) para 25.07 ff.

domestic law'.[1136] According to the UN Human Rights Committee, 'the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law'.[1137] For a remedy to be effective, allegations of human rights violations need to be investigated 'promptly, thoroughly and effectively through independent and impartial bodies'.[1138] The notion of effectiveness in this context is thus closely tied to other institutional guarantees of the Covenant such as, eg, the impartiality and independence of judicial bodies. Measures required to address violations of Covenant rights involve 'restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations', 'measures to prevent a recurrence of a violation' or 'provisional or interim measures to avoid continuing violations'.[1139] In its focus on the duty to provide and enforce remedies, the guarantee is, ia, directed at fighting impunity – a central concern of UN peace interventions in conflict- and post-conflict states.[1140]

The right to an effective remedy as enshrined in art 2 (3) ICCPR does not, however, apply to violations of human rights obligations flowing from other national, regional or international legal instruments that are not covered by the Covenant. Nonetheless, the use of the term 'effective' in conjunction with judicial institutions or systems by the Security Council may resonate with the concept of an effective remedy as applied – analogously – to the vindication of national human rights. That the notion of an effective judicial system – as used by the Council – additionally implies the effective implementation of international human rights law, seems likely taking into account that the normative foundations of UN initiatives in advancing the rule of law involve the UN Charter as well as international human rights-, humanitarian-, criminal- and refugee law.[1141] One may, thus, assume that the Council's understanding of effectiveness as applied to national judicial systems, includes the effective implementation of the rights enshrined in the UDHR and ICCPR.

[1136] UNHRCee, General Comment No 31 (n 1134) [15].
[1137] ibid.
[1138] ibid.
[1139] UNHRCee, General Comment No 31 (n 1134) [16f, 19].
[1140] ibid [18].
[1141] SG Report S/2004/616 (n 439) [9].

As regards international soft law, the right to an effective remedy was also included in the *Basic Principles and Guidelines on the Right to a Remedy* adopted as a General Assembly resolution and requiring states to 'ensure that their domestic law is consistent with their international legal obligations by making available adequate, effective, prompt and appropriate remedies, including reparation' which involves that they 'investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law'.[1142]

(ii) Regional Human Rights Law

Similarly to art 2 (3) ICCPR, art 13 ECHR grants the right to an effective national remedy if Convention rights and freedoms have allegedly been violated.[1143] This means that art 13 ECHR requires 'a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief'.[1144] For the remedy to be 'effective', it must be 'available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State'.[1145] It must either prevent the alleged violation or remedy the impugned state of affairs or provide adequate redress for any violation that has already occurred.[1146] The right to an effective remedy 'requires the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision'.[1147] What 'effectiveness' means concretely, depends on the violated Convention right and may require particularly 'close scrutiny' in cases of alleged violations of an important right such as, eg, the prohibition of torture in art 3 ECHR.[1148] Substantively, art 13 ECHR may overlap with the right to a

[1142] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (21 March 2006) UN Doc A/RES/60/147 [2(c); 3(b)].

[1143] ECtHR, *Rumpf v Germany* (App No 46344/06) 2 December 2010 [50].

[1144] ECtHR, *Kudla v Poland* (App No 30210/96) 26 October 2000 [157].

[1145] Peters and Altwicker (n 1033) § 22 para 7 citing ECtHR, *M.S.S. v Belgium and Greece* (App No 30696/09) 21 January 2011 [290].

[1146] Peters and Altwicker (n 1033) § 22 para 14 citing ECtHR, *Petkov ao v Bulgaria* (App Nos 77568/01, 178/02 and 505/02) 11 September 2009 [74].

[1147] ECtHR, *M.S.S. v Belgium and Greece* (n 1145) [291].

[1148] Peters and Altwicker (n 1033) § 22 para 12 citing ECtHR, *M.S.S. v Belgium and Greece* (n 1145) [293].

hearing within a reasonable time under art 6 (1) ECHR in cases where national law does not provide an effective remedy against excessively lengthy judicial proceedings.[1149]

For the Inter-American human rights system, art 25 ACHR establishes that everyone should have 'the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties'.[1150] The terms 'simple', 'prompt' and 'effective' are usually read together by the Inter-American Court of Human Rights, which requires that all three elements be fulfilled.[1151] The court has hardly interpreted the term 'simple', whereas the 'promptness' criterion of art 25 ACHR is not differentiated from the requirement of 'reasonable time' in art 8 (1) ACHR and assessed by the court against the same four criteria.[1152] Article 25 ACHR requires states to 'not only draft and enact an effective remedy, but to also ensure the due application of this remedy by its judicial authorities', including the implementation of the related judgment.[1153]

As opposed to art 13 ECHR, the remedy under the ACHR is autonomous, ie it does not require another substantive Convention right to be violated.[1154] Article 25 (1) ACHR is also broader than arts 2 (3) ICCPR and 13 ECHR insofar as it grants a remedy not only in cases of alleged breaches of Convention rights but in all cases where fundamental rights recognised by the constitution or laws of the state concerned have allegedly been violated.[1155] It also differs from the concepts of an effective remedy as contained in arts 2 (3) ICCPR and 13 ECHR to the extent that it requires the remedy to be judicial.[1156]

[1149] Peters and Altwicker (n 1033) § 22 para 7 citing ECtHR, *Makedonski v Bulgaria* (App No 36036/04) 20 April 2011 [59f].

[1150] Antkowiak and Gonza (n 737) 220 referring to IACtHR, *Argüelles et al v Argentina* (Judgment of 20 November 2014; Series C No 288) (Preliminary Objections, Merits, Reparations, and Costs) [145].

[1151] Antkowiak and Gonza (n 737) 218.

[1152] Laurence Burgogue-Larsen and Amaya Úbeda de Torres, 'The Right to an Effective Remedy' in *The Inter-American Court of Human Rights* (OUP 2011) paras 26.18 & 26.21; Cecilia Medina, 'Right to Judicial Protection' in *The American Convention on Human Rights* (Intersentia 2014) para 14; Antkowiak and Gonza (n 737) 219.

[1153] Antkowiak and Gonza (n 737) 221 citing IACtHR, *Liakat Ali Alibux v Suriname* (Judgment of 30 January 2014; Series C No 276) (Preliminary Objections, Merits, Reparations, and Costs) [33].

[1154] Burgogue-Larsen and de Torres, 'The Right to an Effective Remedy' (n 1152) para 26.10.

[1155] ibid para 26.11.

[1156] Medina, 'Right to Judicial Protection' (n 1152) para 10.

To be considered effective by the court, a remedy must be 'capable of producing the result for which it was designed'.[1157] The court further held that it was not sufficient that a remedy 'be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress'.[1158] A remedy is not effective in practice when the judiciary 'lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in an other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy'.[1159] The requirements of judicial independence and impartiality can thus be interpreted as elements of the right to an effective remedy.[1160] Importantly for the context in which the Security Council often operates, the court observed that a remedy might prove 'illusory because of the general conditions prevailing in the country'.[1161] Such conditions may relate to internal armed conflicts, systematic forced disappearances or extrajudicial executions – all circumstances that may be characteristic of the situation in a conflict- or post-conflict state in reaction to which the Council issues its recommendations or decisions regarding judicial reform.[1162]

The ACHPR does not contain a provision comparable to arts 2 (3) ICCPR, 13 ECHR and 25 ACHR.[1163] Article 1 ACHPR does hold in general terms that

[1157] Burgogue-Larsen and de Torres, 'The Right to an Effective Remedy' (n 1152) para 26.27 citing IACtHR, *Velásquez Rodríguez v Honduras* (Judgment of 29 July 1988; Series C No 4) (Merits) [66].

[1158] Medina, 'Right to Judicial Protection' (n 1152) para 16 citing IACtHR, Advisory Opinion OC-9/87 'Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights' (6 October 1987) [24].

[1159] ibid para 16 citing IACtHR, Advisory Opinion OC-9/87 (n 1158) [24].

[1160] Medina, 'Right to Judicial Protection' (n 1152) [17] citing IACtHR, *Ivcher-Bronstein v Peru* (Judgment of 6 February 2001; Series C No 74) (Merits, Reparations and Costs) [139] and IACtHR, *Durand and Ugarte v Peru* (Judgment of 16 August 2000; Series C No 68) (Merits) [125, 131]; Antkowiak and Gonza (n 737) 221 referring to IACtHR, *Usón Ramírez v Venezuela* (n 1038) [130].

[1161] IACtHR, Advisory Opinion OC-9/87 (n 1158) [24].

[1162] Burgogue-Larsen and de Torres, 'The Right to an Effective Remedy' (n 1152) para 26.31 citing IACtHR, *La Rochela Massacre v Colombia* (Judgment of 11 May 2007; Series C No 163 (Merits, Reparations and Costs); IACtHR, *Velásquez Rodríguez v Honduras* (n 1157) [99]; IACtHR, *Juan Humberto Sánchez v Honduras* (Judgment of 7 June 2003; Series C No 99) (Preliminary Objection, Merits, Reparations and Costs) [123 ff]; IACtHR, *Villagrán Morales et al (Street Children) v Guatemala* (Judgment of 19 November 1999; Series C No 63) (Merits) [123 ff]; IACtHR, *Goiburú v Paraguay* (Judgment of 22 September 2006; Series C No 153) (Merits, Reparations and Costs).

[1163] Godfrey Musila, 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *Afr. Hum. Rts. L.J.* 441, 447.

the member states of the Charter shall undertake to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in it. Article 7 (1) (a) ACHPR in particular stipulates that every individual shall have 'the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'. The right to be heard has been interpreted by the African Commission on Human and Peoples' Rights as to comprise the right to an effective remedy in its *Resolution on the Right to Recourse and Fair Trial* where it elaborated that art 7 ACHPR 'considers that every person whose rights or freedoms are violated is entitled to have an effective remedy'.[1164] In its case law, the Commission observed that 'the remedy must be available, effective and sufficient' and that it 'is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint'.[1165] These requirements should be understood as 'constitutive of a remedy that is "effective" in cases of human rights violations under the African Charter'.[1166] They were, however, identified by the Commission when determining whether the obligation of exhaustion of local remedies should be lifted and not in defining the contours of a right to an effective remedy. In its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, the African Commission determined that the right to an effective remedy includes access to justice, reparation for the harm suffered and access to the factual information concerning the violations and further held that 'every State has an obligation to ensure that any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body'.[1167] Here again, the effectiveness of a remedy also relates closely to other requirements such as, eg, the impartiality of a court.[1168]

As has been illustrated, regional and international human rights law does contain several guarantees pertaining to the effectiveness of the judiciary such as the right to be tried within a reasonable time and to the timely issuance of judgments or the right to an effective remedy. Although the guarantees provided for by the discussed human rights regimes differ in detail, eg that the

[1164] AComHPR, *Resolution on the Right to Recourse and Fair Trial* (1992) [1].

[1165] See Musila (n 1163) 446 citing AComHPR, *Jawara v Gambia* (n 1041) [31f]. See also AComHPR, *Ilesanmi v Nigeria*, Com No 268/03 (2005) [45].

[1166] Musila (n 1163) 446.

[1167] AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003) part c.

[1168] See, eg, AComHPR, *Malawi African Association et al v Mauritania*, Com Nos 54/91-61/91–96/93-98/93-164/97_196/97-210/98 (2000) [94].

ACHR requires a judicial remedy under art 25 as opposed to arts 2 (3) ICCPR and 13 ECHR, they all try to ensure the efficiency of judicial systems with the aim of vindicating human rights. In this regard, regional and international human rights law provides fertile ground to legitimate Council references to the effectiveness of the judiciary if the Council invokes the notion in reaction to circumstances that have been identified as interferences with the discussed rights.

c. The UN Understanding of Judicial Effectiveness

Enhancing judicial effectiveness is a central element of UN rule of law efforts in conflict- and post-conflict societies.[1169] If one analyses the use of the term 'effectiveness' in connection with national judiciaries or judicial systems in UN documents, the term effectiveness seems to relate primarily to the effective functioning of the judiciary which is identified as a prerequisite of sustainable peace and security. The *UNDPKO Handbook on United Nations Multidimensional Peacekeeping Operations*, eg, observed that 'the absence of a fair and effective judiciary and perceptions of a failure of the justice system in a post-conflict environment can impede peacebuilding efforts' and that '[i]n this regard, the satisfactory functioning of the judicial sector is essential to keeping and building a sustainable peace'.[1170] The *UNODC Criminal Justice Assessment Toolkit*, a set of tools for UN agencies or government officials engaged in criminal justice reform, also emphasises the necessity of a functioning court system and the efficient and effective management of courts for a functioning criminal justice system.[1171] OHCHR's *Rule-of-Law Tools for Post-conflict States* points to the necessity of improved infrastructure, telecommunications, capable personnel and material resources to ensure the effectiveness of the justice system.[1172] Several UN sources emphasise the need to ensure that cases go to trial within a reasonable time and connect the notion of effectiveness to problems with regard to undue delays of judicial proceedings.[1173] Although these UN sources do not define 'effectiveness' in connection with the judiciary, they clearly emphasise its connection with the successful functioning of judicial institutions. Only the OHCHR provides something that approximates a definition when observing that the 'right to a fair legal process, access to justice and fair treatment, the independence of the judiciary, and the proper

[1169] UNDPKO, Primer for Justice Components (n 1049) 1, 15 f.
[1170] UNDPKO, Handbook Multidimensional Peacekeeping Operations (n 899) 94.
[1171] UNODC, The Courts (n 934) 1.
[1172] OHCHR, Monitoring Legal Systems (n 1044) 6.
[1173] ibid 6; UNDPKO/OHCHR, United Nations Rule of Law Indicators (n 935) 7, 50.

administration of justice lie at the heart of a fair and effective justice system'.[1174] From this statement, however, it cannot be determined which elements relate primarily to the fairness and which to the effectiveness of the justice system. The simple explanation provided by the UN Rule of Law Indicators that effectiveness and efficiency relate to a judicial system which meets its responsibilities in an efficient and timely manner, seems more straightforward in this regard but is also exceedingly abstract.[1175]

Here again, however, the conveyed understanding of judicial effectiveness in pertinent UN documents seems to relate closely to the interpretation of guarantees in regional and international human rights law that pertain to the effectiveness of the judiciary or judicial systems. Recourse to UN sources does, thus, not suggest a UN understanding of judicial effectiveness that deviates substantially from its interpretation in international and regional human rights law, which could alternatively inform Council references to judicial effectiveness.

d. Situations causing Council References to the Concept of Judicial Effectiveness

With regard to countries where the Council considered it necessary to enhance the effectiveness of the judicial system, Secretary-General reports described conditions that equalled circumstances preceding Council resolutions that invoked a need to enhance the capacity of the judiciary.[1176] In the Central African Republic, eg, a lack of accountability was a serious concern as it remained difficult for national authorities to investigate and prosecute serious crimes due to inadequately trained judicial personnel and the fact that judicial institutions such as the Supreme Court of Justice and the Inspectorate General of Judicial Services lacked the necessary resources.[1177] In Timor-Leste, the Secretary-General repeatedly observed a lack in capacity of the judicial system and reported of capacity support measures.[1178] Concretely, the judicial system was characterised by a lack in infrastructure, resources and qualified personnel and a backlog of court cases.[1179] Progress in trials was slow owing to an

[1174] OHCHR, Monitoring Legal Systems (n 1044) 2.

[1175] UNDPKO/OHCHR, United Nations Rule of Law Indicators (n 935) 50.

[1176] On the circumstances characterising a lack in judicial capacity, see part 3 ch IV D. 1. c.

[1177] SG Report S/2016/565 (n 944) [24].

[1178] UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Transitional Administration in East Timor' (2002) UN Doc S/2002/432 [78]; SG Report S/2008/26 (n 937) [37; 59]; SG Report S/2009/72 (n 957) [51; 55]; SG Report S/2010/85 (n 938) [74; 82].

[1179] SG Report S/2002/432 (n 1178) [17f; 19]; SG Report S/2008/26 (n 937) [30; 36f]; SG Report S/2010/85 (n 938) [24; 82]; SG Report S/2012/43 (n 938) [42].

overburdened justice system, accountability for crimes was not guaranteed and several judicial- and quasi-judicial institutions prescribed in the Constitution needed to be established.[1180] In Liberia, the Secretary-General only observed that challenges remained in terms of the capacity of the criminal justice system to bring cases of serious crimes to trial in a timely manner.[1181] In Haiti, the courts were in need of capacity-building measures by the UN country team and MINUSTAH.[1182] Deficiencies in the judicial system affected the right to a fair trial within a reasonable time despite the implementation of an on-call duty system for judges, the infrastructure and material resources of the courts were insufficient, half of the seats of the Supreme Court remained vacant and judicial institutions did not manage to ensure accountability for human rights violations and the unlawful use of force by the national police.[1183]

The situations in reaction to which the Council identified a need to enhance the effectiveness of the judiciary also shared similarities with situations where the Council had invoked a need to re-establish or guarantee judicial independence. In the Central African Republic, eg, the Secretary-General observed that relevant legislation did not guarantee the independence of the judiciary and that magistrates and their families were subjected to threats.[1184] He also explicitly urged the government to call upon national authorities to implement the reforms necessary to establish an independent judiciary.[1185] In Timor-Leste, the Secretary-General noted that efforts to ensure that people have access to independent justice had been hampered and the Superior Councils responsible for maintaining standards and professional discipline in the judiciary and prosecution service needed to be strengthened to ensure disciplinary control of judges and prosecutors in line with international standards.[1186] The emphasis in both countries, however, was clearly on deficits in judicial capacity rather than in independence.

In Haiti, the Secretary-General reported that the Superior Council of the Judiciary had taken steps to consolidate its authority over the judiciary in an effort to significantly reduce political interference in judicial affairs and had taken an interest in vetting judges before they were appointed.[1187] Nonetheless,

[1180] SG Report S/2002/432 (n 1178) [35; 60; 78]; SG Report S/2010/85 (n 938) [73]; SG Report S/2011/32 (n 947) [33]; SG Report S/2012/43 (n 938) [33].
[1181] SG Report S/2015/620 (n 941) [47].
[1182] SG Report S/2016/225 (n 1094) [23]; SG Report S/2016/753 (n 1072) [25].
[1183] SG Report S/2016/225 (n 1094) [33; 38; 65]; SG Report S/2016/753 (n 1072) [25; 27; 31; Annex, para 11].
[1184] SG Report S/2016/565 (n 944) [24].
[1185] SG Report S/2016/565 (n 944) [63].
[1186] SG Report S/2010/85 (n 938) [24; 83].
[1187] SG Report S/2013/493 (n 1064) [34].

judges of the peace were appointed without following legal requirements and the slow progress in the renewal of terms of judges highlighted a structural weakness of the system, rooted in the Constitution and the law on the status of the judges, which could translate into biased appointments and inefficient career-management processes.[1188] A trial in which two defendants were swiftly tried and acquitted without following established procedures called into question the independence of the judiciary.[1189] Additionally, processes to vet magistrates and evaluate judges stagnated as the vetting commission lacked the necessary funding and the Superior Council of the Judiciary did not approve the evaluation rules.[1190]

The fact that the country situations based on which the Council invoked a need to enhance judicial effectiveness exhibit similar features as situations in which it invoked a need to address deficiencies in judicial capacity or independence, is also reflected in Council resolutions. In Timor-Leste, the Council also referred to problems with regard to judicial capacity and independence during this period, thus making it difficult to determine what exactly the Council understands by judicial effectiveness and whether it attributes a meaning to the term that can be distinguished from the concepts of judicial capacity and independence.[1191] Similarly in the Central African Republic, the Council did not only authorise MINUSCA to enhance the effectiveness of the national judicial system but also to build its capacities and reinforce the independence of the judiciary.[1192] The emphasis in the Secretary-General report on judicial capacity- and independence problems is thus directly mirrored in the Council resolution which makes it difficult to conclude what facts exactly caused the Council's reference to judicial effectiveness. In the same resolution, however, the Council also repeatedly noted a need to restore the judiciary which may back the conclusion that the Council invokes a need for enhanced effectiveness of the judiciary if it suffers from capacity problems, anchoring the notion more in the field of measures that focus on the functioning rather than quality of judicial institutions – a thin and at times ambiguous line, of course.[1193]

[1188] ibid [34]; SG Report S/2015/667 (n 1053) [21].
[1189] SG Report S/2015/667 (n 1053) [27].
[1190] SG Report S/2016/225 (n 1094) [Annex I, para 16]; SG Report S/2016/753 (n 1072) [27].
[1191] UNSC Res 1802 (25 February 2008) UN Doc S/RES/1802 [preamble, indent 8; 7]; UNSC Res 1867 (26 February 2009) UN Doc S/RES/1867 [preamble, indent 9; 9; 10]; UNSC Res 1912 (26 February 2010) UN Doc S/RES/1912 [preamble, indent 7; 10]; UNSC Res 1969 (24 February 2011) UN Doc S/RES/1969 [preamble, indent 7; 12]; UNSC Res 2037 (23 February 2012) UN Doc S/RES/2037 [preamble, indent 7; 11].
[1192] UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [35 (a) (i)].
[1193] UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [10; 13].

In Haiti, the emphasis during the discussed period of time seemed to be on problems with regard to the independence of the judiciary, even though Secretary-General reports also noted some deficits in judicial capacity. This circumstance was also reflected in Council resolutions to the extent that the Council did not only consider it necessary to ensure the effectiveness of judicial institutions but also their independence.[1194] Secretary-General reports seemed to suggest that problems with regard to judicial independence also had a bearing on the effectiveness of the judiciary when observing that problems with regard to the appointment of judges – a classical judicial independence issue – remained a serious challenge for the efficiency of the judiciary.[1195] Concerning Haiti, it is thus not possible to come to a similar conclusion as with regard to the Central African Republic to the extent that in the latter case the focus seemed to be on capacity problems, whereas in Haiti the focus seemed to be on independence problems and the reference to judicial effectiveness must be read in this light or understood as an additional stand-alone requirement of indeterminate meaning.

e. Analysis

i. Relationship of Council Language to a Trend of Legalisation

If one attempts to identify a trend towards the legalisation of Council language, the use of the term 'effectiveness' in connection with judicial institutions is certainly of more normative relevance than references to 'judicial capacity' to the extent that the notion of 'judicial effectiveness' may be construed with reference to rule of law guarantees as enshrined in international and regional human rights law. If interpreted with reference to rule of law guarantees that can be related to the concept of an effective judicial system, several of the circumstances that may be described as capacity deficits could also result in encroachments on the right to expeditious proceedings or the right to an effective remedy. A backlog in court cases and slow progress in trials as observed in Timor-Leste or challenges to bring cases of serious crimes to trial in a timely manner as in Liberia, may result in an interference with the right to an expeditious trial as well as with the right to an effective remedy. As can be deduced from the UN Human Rights Committee's interpretation of the right to

[1194] UNSC Res 2070 (12 October 2012) UN Doc S/RES/2070 [11]; UNSC Res 2119 (10 October 2013) UN Doc S/RES/2119 [preamble, indent 9; 14]; UNSC Res 2180 (14 October 2014) UN Doc S/RES/2180 [preamble, indent 11; 16]; UNSC Res 2243 (14 October 2015) UN Doc S/RES/2243 [preamble, indent 13; 20]; UNSC Res 2313 (13 October 2016) UN Doc S/RES/2313 [22].

[1195] SG Report S/2015/667 (n 1053) [21].

expeditious proceedings, the insufficient training of judicial personnel may also constitute an encroachment on the guarantee if it results in an undue delay of judicial proceedings.[1196] This seems relevant with regard to the situation in the Central African Republic, where a lack in adequately trained judicial personnel added to difficulties in the investigation and prosecution of serious crimes. Insufficient court infrastructure and resources – as prevailing in Timor-Leste – can always affect the ability of the judiciary to administer justice effectively and thus have a bearing on the right to expeditious proceedings as well as on the right to an effective remedy. With an eye to a possible trend towards the legalisation of Council language, it is thus desirable that the Council invokes the notion of judicial effectiveness rather than that of judicial capacity if trying to address the circumstances described.

The fact, however, that the Council varies its use of terms in reaction to comparable situations or – as in the present cases – even refers to several concepts at once, makes it almost impossible to discern which meaning exactly the Council ascribes to the different concepts. Based on the sources at hand, it is thus difficult to identify clearly what the Council may be referring to when invoking the concept of judicial effectiveness. Although one can have the impression that the focus of effectiveness problems is on weaknesses in judicial capacity – as supported by the case studies of Timor-Leste and the Central African Republic –, the situation in Haiti suggests that the concept is also invoked when the judiciary suffers primarily from independence problems. If the Council ascribes to the concept a meaning independent from the other terms used, it is not clearly discernable from its resolutions or the way the Council reacts to the input provided by the Secretary-General. To the extent that a legal notion of judicial effectiveness may encompass the requirement of an independent judiciary – as illustrated when discussing the right to an effective remedy – it might not be surprising to have the Council invoke both principles. Being no judicial body, the Council may display more nonchalance when referring to terms that may be understood and interpreted with reference to legal guarantees and rather opt for the use of multiple terms to ensure that it describes a situation comprehensively and allows sufficient room for various judicial reform measures.

With regard to a possible trend of legalisation of Council action, Council references to the effectiveness of the judicial system may be interpreted as to contribute to such a trend on a linguistic level. They do so to the extent that the notion of the effectiveness of the judicial system resonates with established rule of law guarantees such as the rights to expeditious proceedings and an effective

[1196] See UNHRCee, Concluding Observations Croatia (n 1116) [16].

remedy which enjoy a relatively established meaning in regional and international (human rights) law. The connection between the language used and the relatable rule of law guarantees, however, is not as precise as it is in cases where the Council invoked the independence of the judiciary. On a level of application, the references to the effectiveness of the judicial system cannot be considered as a contribution to a legalisation of Council action as a comparative reading of Secretary-General reports and Council resolutions does not allow for a clear determination of the Council's understanding of the concept of judicial effectiveness in contrast to concepts such as judicial capacity or independence. As a consequence, it is impossible to determine whether the Council invokes the notion of judicial effectiveness in reaction to circumstances that are considered encroachments upon the rights to an expeditious hearing and an effective remedy by regional and international human rights bodies and to assess whether a legalisation of Council action on a level of application can be observed.

ii. Contribution of Council Language to Norm Emergence

Regarding the requirements of norm emergence, ie the use of precise language, the consistent invocation of such language in reaction to similar circumstances and the legitimacy of the standards related to the rule of law, Council invocations of judicial effectiveness fulfil the first criterion. The Council uses language that can be related to rule of law guarantees whose content enjoys a relatively established meaning in regional and international (human rights) law, ie the rights to expeditious hearings and an effective remedy. The consistency of such invocations, however, cannot be confirmed as the Council often also invoked other concepts with regard to the judiciary in resolutions that identified a need to enhance judicial effectiveness. It is, thus, virtually impossible to clearly determine which of the concepts invoked by the Council are reactions to particular judicial deficits reported by the Secretary-General and accordingly to assess the consistency of such references. The requirement of legitimacy of the standards the Council relates to the rule of law may be considered fulfilled to the extent that the Council uses language that resonates with universal human rights. As the Council does not consistently use such language, however, it cannot be assessed whether it reacts to circumstances that are considered encroachments upon such human rights guarantees by the competent interpreting bodies. It, thus, cannot be considered to really implement such standards via resolutions invoking the concept of judicial effectiveness. In conclusion it must, thus, be said that Council references to the concept of judicial effectiveness do mostly not fulfil the criteria proposed here for the emergence of the rule of law as an international norm.

3. Impartiality, Fairness, Transparency and Compliance with Internationally Agreed Standards of Judicial Systems

a. Council Resolutions Invoking the Concept of an Impartial, Fair and Transparent Judicial System, consistent with Internationally Agreed Standards

Several Council resolutions required judicial institutions or systems to be impartial, fair, and transparent or consistent with internationally agreed standards. The Council used such language in reaction to the situations in Afghanistan, Côte d'Ivoire and Guinea-Bissau.

In Afghanistan, the Council requested UNAMA to support the establishment of a fair and transparent judicial system in order to strengthen the rule of law throughout the country.[1197] It later repeatedly invoked the requirement of a fair and transparent justice system in non-binding provisions, albeit then addressing Afghan state institutions.[1198] A small number of Council resolutions that explicitly invoked fair trial guarantees are not discussed in the present thesis as their number is too insignificant to allow for a fruitful comparative analysis and as only one resolution seems to relate fair trial guarantees to the rule of law and only vaguely at that.[1199]

In Guinea-Bissau, the Council mandated the UN Integrated Peacebuilding Office to provide strategic and technical advice and support to national

[1197] UNSC Res 1536 (26 March 2004) UN Doc S/RES/1536 [10]; UNSC Res 1589 (24 March 2005) UN Doc S/RES/1589 [9].

[1198] UNSC Res 2112 (30 July 2013) UN Doc S/RES/2112 [16]; UNSC Res 2162 (25 June 2014) UN Doc S/RES/2162 [13]; UNSC Res 2226 (25 June 2015) UN Doc S/RES/2226 [13]; UNSC Res 2284 (28 April 2016) UN Doc S/RES/2284 [9]; UNSC Res 2344 (17 March 2017) UN Doc S/RES/2344 [28].

[1199] The Council invoked fair trial guarantees without establishing a connection to the rule of law in UNSC Res 615 (17 June 1988) UN Doc S/RES/615 [preamble, indent 5]; UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757 [Attachment Statute of the Special Tribunal for Lebanon arts 16 (2), 17, 18 (2), 21 (2), 28 (2)]; UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966 [4]; UNSC Res 2000 (27 July 2011) UN Doc S/RES/2000 [11]; UNSC Res 2322 (12 December 2016) UN Doc S/RES/2322 [15]. UNSC Res 1888 (30 September 2009) UN Doc S/RES/1888 [8] invoked fair trial standards and the rule of law in the same paragraph but enumerated them separately rather then portraying them as connected. UNSC Res 2313 (13 October 2016) UN Doc S/RES/2313 [preamble, indent 32] is the only resolution which could be construed to imply that fair trial guarantees are considered an element of the rule of law by the Council to the extent that it noted 'with concern the slow progress towards consolidating the rule of law' and called 'on the Haitian Government to address the (…) denial of human rights including fair trial guarantees'. Addressing the denial of fair trial guarantees could, thus, be interpreted as a measure to consolidate the rule of law.

authorities and relevant stakeholders in developing civilian and military justice systems that are compliant with international standards.[1200]

Non-bindingly but in the operative part of its resolutions, the Council called on the government in Côte d'Ivoire to ensure that the work of the Ivorian judicial system be impartial, transparent and consistent with internationally agreed standards in order to strengthen the rule of law.[1201]

The terms used by the Council when describing the necessary qualities of the judicial systems in Afghanistan and Côte d'Ivoire resonate with the right to a fair and public hearing by an impartial tribunal as guaranteed in several international and regional human rights treaties, eg, in arts 10 UDHR, 14 (1) ICCPR, 6 (1) ECHR, 8 (1) ACHR and 7 (1) ACHPR.

b. Impartiality of Judicial System as a Legal Concept

i. International Human Rights Law

The call on the Ivorian government in Council resolutions on Côte d'Ivoire to ensure that the work of the judicial system be impartial, resonates with the right to an impartial tribunal whose content has been established in regional and international human rights law. In international treaty law, the right to an impartial tribunal is guaranteed in arts 10 UDHR and 14 (1) ICCPR. According to the UN Human Rights Committee, the requirement of impartiality has two aspects. First, judges should not be 'influenced by personal bias or prejudice', nor should they 'harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other'. Additionally, the tribunal must appear impartial to a

[1200] UNSC Res 2103 (22 May 2013) UN Doc S/RES/2103 [1 (e)]; UNSC Res 2157 (29 May 2014) UN Doc S/RES/2157 [1 (d)]; UNSC Res 2186 (25 November 2014) UN Doc S/RES/2186 [1 (d)]; UNSC Res 2203 (18 February 2015) UN Doc S/RES/2203 [2 (b)]; UNSC Res 2267 (26 February 2016) UN Doc S/RES/2267 [2 (b)]; UNSC Res 2343 (23 February 2017) UN Doc S/RES/2343 [2 (c)]. In the same breath, all resolutions invoked UNIOGBIS' mandate to implement rule of law strategies. The connection here is not unequivocal but sufficiently plausible to allow for the inference that the Council considers the rule of law connected with the compliance of justice systems with international standards.

[1201] UNSC Res 2112 (30 July 2013) UN Doc S/RES/2112 [16]; UNSC Res 2162 (25 June 2014) UN Doc S/RES/2162 [13]; UNSC Res 2226 (25 June 2015) UN Doc S/RES/2226 [13]; UNSC Res 2284 (28 April 2016) UN Doc S/RES/2284 [9]. The present study deliberately forgoes an analysis of the term of 'credibility' in this context as that term seems to fit best into the category of non-technical Council language but has been inserted into legalised language in this case, making a separate analysis difficult.

reasonable observer.[1202] The guarantee is circumscribed similarly in the *Basic Principles on the Independence of the Judiciary* and a central goal of the *Bangalore Principles of Judicial Conduct*.[1203]

ii. Regional Human Rights Law

The interpretation by the European Court of Human Rights of the right to an impartial tribunal in art 6 (1) ECHR advances a similar conception of impartiality as the one proposed by the UN Human Rights Committee. The general focus of the guarantee is on the 'confidence which the courts must inspire in the public in a democratic society'.[1204] Therefor, the court requires the absence of prejudice or bias and undertakes a two-pronged test of the subjective and objective impartiality of judges. The subjective approach tries to determine the personal conviction of a judge in a given case, whereas the objective approach focuses on whether the judge offered sufficient guarantees to exclude any legitimate doubt in this respect.[1205] When applying the subjective test, the court assumes the personal impartiality of a judge until it obtains evidence refuting this presumption. Evidence that has caused the court to rule out this presumption involved judges displaying hostility or ill will or arranging to have a case assigned to themselves for personal reasons.[1206] The court has developed a rich case law on the issue of judicial impartiality, focusing, ia, on the compatibility of different functions of judges in judicial proceedings.[1207]

[1202] UNHRCee, General Comment No 32 (n 1015) [21]. See also UNHRCee, *Karttunen v Finland* (Com No 387/89) UN Doc CCPR/C/46/D/387/1989 (23 October 1992) [7.2].

[1203] Basic Principles on the Independence of the Judiciary (n 983) [principle 2]; ECOSOC, Bangalore Principles of Judicial Conduct (n 985).

[1204] ECtHR, *Piersack v Belgium* (App No 8692/79) 1 October 1982 [30] (conflict between roles in prosecutor's office and in the court dealing with the same case).

[1205] ibid.

[1206] ECtHR, *Kyprianou v Cyprus* (App No 73797/01) 15 December 2005 [119].

[1207] ECtHR, *De Cubber v Belgium* (App No 9186/80) 26 October 1984 [26–30] (conflict between office in public prosecutor's department and as investigating judge); ECtHR, *Pfeifer v Austria* (App No 10802/84) 25 February 1992 [36] (conflict between role of investigative and trial judge); ECtHR, *Hauschildt v Denmark* (App No 10486/83) 24 May 1989 [48–52] (jugdes having participated in both the trial judgment and in prior decisions concerning pre-trial detention); ECtHR, *Demicoli v Malta* (App No 13057/87) 27 August 1991 [40–42] (conflict between quasi-judicial function and role of victims of two members of parliament); ECtHR, *Thorgeir Thorgeirson v Iceland* (App No 13778/88) 25 June 1992 [49–51] (prosecution represented by the trial judge in the absence of the prosecutor); ECtHR, *Padovani v Italy* (App No 13396/87) 26 February 1993 [28] (trial judge having already made decisions relating to the case before the trial); ECtHR, *Nortier v Netherlands* (App No 13924/88) 24 August 1993 [35–37] (overlap

The Inter-American Commission on Human Rights and the Inter-American Court both refer to the case law of the European Court of Human Rights when interpreting the scope of the right to an impartial tribunal guaranteed in art 8 (1) ACHR.[1208] For the Inter-American court, the principle of impartiality requires that the members of a court 'have no direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the controversy'.[1209] The court has followed the 'theory of appearances' as developed by the European Court of Human Rights and adopted the two-pronged test of subjective and objective impartiality which focuses on the personal conduct of judges and whether it displays prejudice, ill-will, hostility or bias and on objective facts which may compromise their impartiality.[1210] It developed the overall thrust of its case law with regard to the independence and impartiality of military courts, which figured prominently in Latin American political history and were often subordinate to the executive and

between investigative and judicial roles); ECtHR, *Holm v Sweden* (App No 14191/88) 25 November 1993 [30–33] (partiality of the jury); ECtHR, *Saraiva de Carvalho v Portugal* (App No 15651/89) 22 April 1994 [35–40] (preliminary assessment of available evidence by judge); ECtHR, *Procola v Luxembourg* (App No 14570/89) 28 September 1995 [45] (combination of advisory and judicial function of members of judicial committee); ECtHR, *Bulut v Austria* (App No 17358/90) 22 February 1996 [32–34] (trial judge had questioned witnesses during preliminary investigation); ECtHR, *Remli v France* (App No 16839/90) 23 April 1996 [46–48] (juror identified himself as racist in case about defendants of North African origin); ECtHR, *Tierce et al v San Marino* (App Nos 24954/94, 24971/94, 24972/94) 25 July 2000 [76–83] (judge acting in combination of functions on two courts, as investigating and trial judge at first instance and subsequently also preparing the file for the appeal hearing).

[1208] Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.21 ('very early on it [the IACtHR] based its analyses on the definition of impartiality given by the European Court, with particular reference to the famous "theory of appearances"'). For references to the case law of the ECtHR in the case law of the IACHR see, eg, IACHR, *Garcia v Peru* (n 737); IACHR, *Raquel Martín de Mejía v Peru* (n 737); IACHR, *Andrews v the United States of America* (n 737) [159 ff].

[1209] IACtHR, *Palamara Iribarne v Chile* (Judgment of 22 November 2005; Series C No 135) (Merits, Reparations, Costs) [146]. For a more recent judgment, see IACtHR, *Argüelles et al v Argentina* (n 1150) [168].

[1210] Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.21 citing IACtHR, *Herrera Ulloa v Costa Rica* (Judgment of 2 July 2004; Series C No 107) (Preliminary Objections, Merits, Reparations and Costs) [170] and IACtHR, *Apitz Barbera et al v Venezuela* (n 1038) [63–65]. See also Antkowiak and Gonza (n 737) 192 citing, eg, IACtHR, *Atala Riffo and Daughters v Chile* (Judgment of 24 February 2012; Series C No 239) (Merits, Reparations, and Costs) [234] and IACtHR, *Usón Ramírez v Venezuela* (n 1038).

thus 'inhibited, if not prevented (…) from making objective and impartial judgments'.[1211]

The African Commission on Human and Peoples' Rights has also developed a rich case law on the right to be tried by an impartial court or tribunal as provided for in art 7 (1) (d) ACHPR.[1212] The Commission interprets the guarantee with an eye to the jurisprudence of the UN Human Rights Committee.[1213] It also endorsed the analysis of the European Court of Human Rights with regard to the objective and subjective elements of the impartiality test.[1214] In its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, the Commission further fleshed out under what conditions a judicial officer would be considered partial and required to step down, referring, ia, to the incompatibility of certain judicial functions or judges' connections to the case or the parties concerned.[1215] Comparable to the situation in the Inter-American human rights system, particular emphasis of the Commission's case law has been on trials by military- or special tribunals which the Commission commonly considers as incompatible with art 7 (1) (d) ACHPR.[1216]

[1211] Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.17 citing IACtHR, *La Cantuta v Peru* (Judgment of 29 November 2006; Series C No 162) (Merits, Reparations and Costs) [141]. See also Medina, 'Right to Due Process' (n 1038) para 38 citing IACtHR, *Genie Lacayo v Nicaragua* (Judgment of 13 September 1997; Series C No 45) (Application for Judicial Review of the Judgment of Merits, Reparations and Costs) [86f] and IACtHR, *Castillo Petruzzi et al v Peru* (Judgment of 4 September 1998; Series C No 41) (Preliminary Objections) [130 ff].

[1212] See, eg, AComHPR, *Malawi African Association et al v Mauritania* (n 1168) [98] (conferral of criminal procedure to special tribunal made up of military judges compromises impartiality of courts); AComHPR, *Constitutional Rights Project v Nigeria (in respect of Wahib Akamu, G. Adega et al)*, Com No 60/91 (1995) [14] (special tribunal chiefly composed of members of the executive creates appearance, if not actual lack, of impartiality).

[1213] Manby (n 737) 171, 199 (additionally, the AComHPR's *Resolution on the Right to Recourse and Fair Trial* (1992) and the *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (2003) provide guidance for the interpretation of the ACHPR).

[1214] See, eg, AComHPR, *Wetsh'okonda Koso ao v Congopara* (n 1041) [80] ('Impartiality may be perceived in a subjective and objective manner. In a subjective manner, the impartiality of a judge is gauged by his internal inclinations. Since it is impossible to infer from this inclination objectively, it was simpler to conclude that subjective impartiality be assumed until proven otherwise.').

[1215] AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003) para 5.

[1216] Manby (n 737) 171, 205 (citing the respective case law). See also AComHPR, *Amnesty International ao v Sudan* (n 1041) [68] (special tribunals under control of executive);

As can be inferred from the preceding discussion, the right to an impartial tribunal is firmly established in international and regional human rights treaty law and was construed similarly by the various bodies responsible for their interpretation, suggesting a broad international consensus with regard to its content. The case law developed by the international, European, Inter-American and African human rights bodies would, thus, provide a broad basis for the Council to back up and legitimise its references to an impartial judicial system.

c. The UN Understanding of an Impartial Judicial System

Several UN sources identify ensuring the impartiality of the judiciary as an integral part of UN rule of law assistance.[1217] In his report on the rule of law and transitional justice in conflict- and post-conflict societies, the Secretary-General recommended that peace agreements and Security Council resolutions and mandates should 'require that all judicial processes, courts and prosecutions be (. . .) consistent with established international standards for the independence and impartiality of the judiciary'.[1218]

Only rarely, however, does one encounter attempts of a definition as to what judicial impartiality implies concretely. It has been related to 'the treatment of all rivals and disputants equally' and the question of 'whether the courts are perceived by the population to be treating people fairly and impartially regardless of their income, race, national or social origin, gender or religion'.[1219] Some UN sources provide clarity primarily by identifying what compromises judicial impartiality such as ethnic, religious, political, gender or other bias.[1220] Even though UN sources do not provide an in-depth analysis of the principle of judicial impartiality, they still exhibit an obvious – if vague – resemblance with the legal concept of an impartial tribunal. UN documents do, thus, not suggest the existence of a UN understanding of the principle of judicial impartiality, which could serve as an alternative reference point for Council resolutions invoking the impartiality of judicial systems.

AComHPR, *Media Rights Agenda v Nigeria* (n 737) [64] (trial of civilian by military tribunal).

1217 UNDPKO, Primer for Justice Components (n 1049) 26, 39; SG Guidance Note UN Rule of Law Assistance (n 1044) 6; UNDPKO/DFS, Policy on Justice Components (n 1049) 8.

1218 SG Report S/2004/616 (n 439) [64 (e)].

1219 UNDPKO/OHCHR, United Nations Rule of Law Indicators (n 935) 49; UNDPKO, Handbook Judicial Affairs Officers (n 440) 173.

1220 UNDPKO, Primer for Justice Components (n 1049) 4; UNDPKO, Handbook Judicial Affairs Officers (n 440) 17 f.

d. Transparent Judicial System as a Legal Concept

The phrases used in Afghanistan and Côte d'Ivoire that UNAMA and Afghan state institutions should aim to establish a transparent judicial system and that the Ivorian government should ensure that the work of the Ivorian judicial system be transparent, may be related to certain human rights guarantees geared towards ensuring the transparency of judicial proceedings. If interpreted with reference to regional and international human rights law, invocations of the transparency of judicial systems could be read to resonate with the right to a public hearing and judgment and the right to freedom of (judicial) information.[1221]

i. The Right to a Public Hearing and Judgment

(i) International Human Rights Law

The right to a public hearing and judgment is a crucial element of the guarantee of a fair trial and aims, ia, at ensuring the transparency of the administration of justice.[1222] International treaty law provides for the right in arts 10 UDHR and 14 (1) ICCPR. Article 14 (1) ICCPR requires courts to 'make information regarding the time and venue of the oral hearings available to the public' and to 'provide for adequate facilities for the attendance of interested members of the public'.[1223] The public can be excluded from trials for reasons of a procedural nature or for substantive reasons of 'morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice'.[1224] If none of these circumstances prevail, hearings 'must be open to the general public, including members of the media, and must not, for

[1221] UNODC, Resource Guide on Strengthening Judicial Integrity and Capacity (2011) 85.

[1222] UNHRCee, General Comment No 32 (n 1015) [28]; Kälin and Künzli (n 1028) 455f; Medina, 'Right to Due Process' (n 1038) para 77; Harris and others (n 1034) 433.

[1223] UNHRCee, General Comment No 32 (n 1015) [28]. See also UNHRCee, *Van Meurs v The Netherlands* (Com No 215/86) UN Doc CCPR/C/39/D/215/1986 (13 July 1990) [6.2]; UNHRCee, *Tourón v Uruguay* (Com No 32/78) UN Doc CCPR/C/12/D/32/1978 (31 March 1984) [8; 12] (no public hearing and judgement not delivered in public); UNHRCee, *Ngalula Mpandanjila et al v Zaire* (Com No 138/83) UN Doc CCPR/C/27/D/138/1983 (26 March 1986) [82] (trial was not held in public); UNHRCee, *Rodríguez Orejuela v Colombia* (Com No 848/99) UN Doc CCPR/C/75/D/848/1999 (23 July 2002) [7.3] (no public hearing).

[1224] UNHRCee, General Comment No 32 (n 1015) [29]. On procedural reasons for exclusion see, eg, UNHRCee, *RM v Finland* (Com No 201/88) UN Doc CCPR/C/35/D/301/1988 (23 March 1989) [6.4] (absence of oral hearings in the appellate proceedings raises no issue under art 14 ICCPR) and UNHRCee, *Kavanagh v Ireland* (Com No 819/98) UN

instance, be limited to a particular category of persons'.[1225] If the public is exceptionally excluded from a trial, the 'judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children'.[1226]

The UN Special Rapporteur on the Independence of Judges and Lawyers promotes an even broader concept of publicity which encompasses the 'creation of a judiciary website and the use of social media and television programmes to explain important judicial decisions'.[1227] More generally, the UN Convention against Corruption requires states to take measures to enhance the transparency of decision-making processes and to ensure that the public has effective access to information in order to confront corruption.[1228] The connection between judicial transparency and corruption was also underlined by the UN Special Rapporteur, who emphasised that 'transparency in the judiciary must be guaranteed so as to avoid corrupt practices that undermine judicial independence and public confidence in the justice system'.[1229]

(ii) Regional Human Rights Law

Article 6 (1) ECHR guarantees an oral and public hearing and requires that judgments be made public. The guarantee applies to criminal- and non-criminal cases and serves the public scrutiny and legitimacy of the administration of justice and the maintenance of confidence in the courts.[1230] According to the European Court of Human Rights, 'a trial complies with the requirement of publicity only if the general public is able to obtain information about its date and place and if this place is easily accessible to them'.[1231] The right also entitles the media.[1232]

Doc CCPR/C/71/D/819/1998 (4 April 2001) [10.4] (right to public hearing applies to the trial, it does not apply to pre-trial decisions made by prosecutors and public authorities).

[1225] UNHRCee, General Comment No 32 (n 1015) [29]. See also, eg, UNHRCee, *Khoroshenko v Russian Federation* (Com No 1304/04) UN Doc CCPR/C/101/D/1304/2004 (29 March 2011) [9.11] (relatives of accused excluded from trial).

[1226] UNHRCee, General Comment No 32 (n 1015) [29].

[1227] Report Special Rapporteur A/HRC/26/32 (n 1090) [73].

[1228] art 13 United Nations Convention Against Corruption (n 1023).

[1229] Report Special Rapporteur A/HRC/26/32 (n 1090) [39].

[1230] Harris and others (n 1034) 433. ECtHR, *Chaushev a.o. v Russia* (App Nos 37037/03, 39053/03 and 2469/04) 25 January 2017 [22]; ECtHR, *Stefanelli v San Marino* (App No 35396/97) 8 May 2000 [19].

[1231] ECtHR, *Hummatov v Azerbaijan* (App Nos 9852/03 and 13413/04) 29 February 2008 [144].

[1232] Peters and Altwicker (n 1033) § 19 para 46.

If a trial takes place outside a regular courtroom and at places where the general public has principally no access, the state needs to 'take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access'.[1233] As art 14 (1) ICCPR, art 6 (1) ECHR does not necessarily require publicity of the proceedings if the hearing at first instance had been public and the hearings at a second or third instance are proceedings for leave to appeal or involve only questions of law and not of facts.[1234] Substantive exceptions are enumerated in art 6 (1) ECHR and include morals, public order or national security in a democratic society, the interests of juveniles, the protection of the private life of the parties and the interests of justice. With regard to the publicity of judgments, the ECHR does not provide for exceptions in contrast to art 14 (1) ICCPR.[1235] The court has, however, granted states some leeway in implementing the right as long as it considered the purpose of art 6 (1) ECHR – ensuring scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial – to be served.[1236]

Article 8 (5) ACHR provides that 'criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice'. In interpreting the right, the Inter-American Court of Human Rights has been influenced by the jurisprudence of the European Court of Human Rights.[1237] The provision is directed against the 'secret administration of justice' and thus enables 'the scrutiny of the parties and of the public'.[1238] The requirement that proceedings be public is understood to apply to all, not only to criminal judicial proceedings.[1239] Article 8 (5) ACHR requires that states make it 'possible in fact and law for the public to have access to the trial'.[1240] Like the ICCPR and the

[1233] ECtHR, *Hummatov v Azerbaijan* (n 1231) [144].

[1234] Peters and Altwicker (n 1033) § 19 para 46 citing ECtHR, *Bulut v Austria* (n 1207) [41].

[1235] Nowak (n 1026) para 40.

[1236] ECtHR, *Campbell and Fell v the United Kingdom* (n 1035) [91] ('The Court has said in other cases that it does not feel bound to adopt a literal interpretation of the words "pronounced publicly": in each case the form of publication given to the "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object pursued by Article 6 para. 1 (art. 6–1) in this context, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial'); ECtHR, *Axen v Germany* (App No 8273/78) 8 December 1983 [31f].

[1237] Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.27.

[1238] Antkowiak and Gonza (n 737) referring to IACtHR, *J v Peru* (Judgment of 27 November 2013; Case No 275) (Preliminary Objections, Merits, Reparations, and Costs) [217] and IACtHR, *Palamara Iribarne v Chile* (n 1209) [168].

[1239] Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.27.

[1240] Medina, 'Right to Due Process' (n 1038) para 77.

ECHR, the ACHR in its art 8 (5) also allows for exceptions to the principle of publicity in the 'interest of justice'. The broad concept effectively leaves the determination of exceptions to the discretion of the judges.[1241] In contrast to arts 14 (1) ICCPR and 6 (1) ECHR, art 8 (5) ACHR does not provide for the right to the publication of judgments. The majority of the cases on art 8 (5) ACHR was issued in reaction to trials by anonymous tribunals.[1242]

The ACHPR and the African Commission's *Resolution on the Right to Recourse and Fair Trial* do not provide for the right to a public trial. The Commission, however, reverted to arts 60 and 61 ACHPR which empower it 'to draw inspiration from international law on human and peoples' rights' and relied on the UN Human Rights Committee's General Comment No. 13 on the right to a fair trial in order to interpret the right to the publicity of hearings into art 7 ACHPR, including the exceptions provided for by art 14 (1) ICCPR.[1243] The Commission continued this 'borrowing practice' and took further guidance from the case law developed by the ECtHR based on art 6 (1) ECHR.[1244] In its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance*, it held that everyone should be entitled to a public hearing in the determination of criminal charges or of rights and obligations. The requirement of publicity is interpreted to comprise information about the sittings of judicial bodies or the permanent venue for judicial proceedings and requires that adequate facilities be made available for the attendance of the public. The Principles and Guidelines further clarify that the right applies to civil and criminal legal proceedings and encompasses the 'public and the media' and enlists the legitimate exceptions to the right such as the interest of justice for the protection of children, witnesses or victims of sexual violence, public order and national security.[1245] The interpretation of the right by the African Commission is, thus, clearly inspired by the legal text of arts 14 (1) ICCPR and 6 (1) ECHR and the jurisprudence based on them. Neither the ACHPR, nor the resolutions of the Commission, however, say anything about the publication of judgments.

[1241] Medina, 'Right to Due Process' (n 1038) para 78.

[1242] Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.27 citing IACtHR, *Castillo Petruzzi v Peru* (Judgment of 30 May 1999) (n 1038) [172f]; IACtHR, *Cantoral Benavides v Peru* (n 1038) [141–149]; IACtHR, *Palamara Iribarne v Chile* (n 1209) [167f]; IACtHR, *Berenson Mejía v Peru* (n 1038) [198f].

[1243] AComHPR, *Media Rights Agenda v Nigeria* (n 737) [51f].

[1244] AComHPR, *Civil Liberties Organisation et al v Nigeria* (n 737) [35 ff].

[1245] AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003).

ii. The Right to Freedom of Information

Another right, which may be considered relevant for the notion of judicial transparency, is the right to judicial information.[1246] The right to freedom of information is guaranteed in arts 19 UDHR, 19 (2) ICCPR, 10 (1) ECHR, 13 (1) ACHR and 9 (1) ACHPR. All regimes contain the right to receive information. Unlike the other guarantees, arts 10 (1) ECHR and 9 (1) ACHPR do not explicitly mention the right to actively 'seek information', albeit are interpreted to cover this right too.[1247] All guarantees apply – at a minimum – to 'generally accessible information'.[1248] Article 19 (2) ICCPR applies to 'records held by a public body, regardless of the form in which the information is stored, its source and the date of production' and subsumes the judicial branch under its notion of a 'public body'.[1249] The right 'encompasses both the general right of the public to have access to information of public interest from a variety of sources and the right of the media to access information, in addition to the right of individuals to request and receive information of public interest and information concerning themselves that may affect their individual rights'.[1250]

The right to access information also applies to information held by the judiciary. The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression referred to information held by courts when observing that the UNGA Declaration on Human Rights Defenders provides for the right to access information as to how human rights

[1246] On the relationship between transparency and the right to access of information see, eg, Jonathan Klaaren, 'The Human Right to Information and Transparency' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 223–238. See also UNGA, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (4 September 2013) UN Doc A/68/362 [20] (observing that 'public authorities act as representatives of the public, fulfilling a public good; therefore, in principle, their decisions and actions should be transparent').

[1247] Nowak (n 1026) para 17; Manby (n 737) 171, 220; Klaaren (n 1246) 232; Grabenwarter and Pabel (n 1033) § 23 para 6.

[1248] Manfred Nowak, 'Article 19: Freedom of Opinion, Expression and Information' in *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, N.P. Engel 2005) para 18; Peters and Altwicker (n 1033) § 12 para 3; Grabenwarter and Pabel (n 1033) § 23 para 7; Laurence Burgogue-Larsen and Amaya Úbeda de Torres, 'The Right to the Freedom of Thought and Expression' in *The Inter-American Court of Human Rights* (OUP 2011) para 21.14.

[1249] UNHRCee, General Comment No 34: Article 19: Freedom of Opinion and Expression (12 September 2011) UN Doc CCPR/C/GC/34 [7; 18].

[1250] Report Special Rapporteur A/68/362 (n 1246) [19].

and freedoms are given effect in judicial systems.[1251] The *Társaság a Szabadságjogokért v Hungary* judgment of the European Court of Human Rights also concerned information held by a court, which denied an NGO access to a constitutional complaint of a Hungarian member of parliament. The court considered the denial by the Hungarian court incompatible with art 10 (1) ECHR in light of the fact that the issue was of public interest, the government had an 'information monopoly' in the case and the information sought was 'ready and available'.[1252] In most human rights regimes, however, the guarantee has been developed with a focus on information held by the executive- or legislative branch of government, while its dimension with regard to 'judicial records or information about the judiciary' has been given less attention.[1253] To the extent that the right has predominantly been interpreted with an eye to the executive- or legislative branch of government, it seems less relevant in the present context that concerns judicial transparency.

To sum up, regional and international human rights law offers clear standards with regard to the transparent administration of justice that could figure as a point of reference for the Council and legitimise its observations, recommendations or decisions regarding the improvement of judicial transparency in states addressed by its resolutions.

e. The UN Understanding of a Transparent Judicial System

The concept of transparency with regard to the judiciary in UN documents focusing on the re-establishment of the rule of law in conflict- and post-conflict

[1251] ibid [22]. In ECOSOC, Report of the Special Rapporteur: The Right to Freedom of Opinion and Expression (17 December 2004) UN Doc E/CN. 4/2005/64 [39] the Special Rapporteur stated that 'all information held by public bodies shall be publicly available unless it is subject to a legitimate exemption, and all bodies performing public functions, including governmental, legislative and *judicial bodies*, should be obliged to respond to requests for information' (emphasis added).

[1252] ECtHR, *Társaság a Szabadságjogokért v Hungary* (App No 37374/05) 14 July 2009 [36].

[1253] Open Society Justice Initiative, Report on Access to Judicial Information (2009) [if] (according to which information about the adjudicative work of the courts covers 'transcripts, documents filed with the court (pre- and post-trial), trial exhibits, recordings, settlements, opinions, and dockets', while administrative information encompasses 'court budgets; personnel and human resources; contracts between the court and third parties for construction, maintenance, office supplies, or the like; and organizational matters' and information about judges 'information about salaries, personal finances (such as debts and investments), vacancies, disciplinary matters, and selection of judges'). See also Burgogue-Larsen and Úbeda de Torres, 'The Right to the Freedom of Thought and Expression' (n 1248) para 21.17 (on whether the legislature and judiciary should also be considered passive subjects of the right).

states is usually invoked in conjunction with other concepts such as judicial professionalism, accountability or integrity.[1254] These documents do, thus, not allow for a clear delineation as to which observations and recommendations are related only to the concept of judicial transparency. Neither do UN documents provide a definition of judicial transparency. The *UNDPKO Handbook for Judicial Affairs Officers in United Nations Peacekeeping Operations* refers to the definition of the Oxford English Dictionary, according to which 'transparency' may refer to 'the condition of being open to public scrutiny'.[1255] Usually, however, UN documents only clarify what may be understood by the term 'transparency' based on the requirements they connect to it. Regularly, eg, judicial transparency is related to the need to address judicial corruption or enhance the judiciary's capacity to adjudicate criminal accountability for corruption, to the transparent selection and appointment of judges, to court administration and management and the discipline and removal of judges responsible for misconduct or human rights violations.[1256] Crucially, it is always connected to the concept of publicity. As such it requires that information about judicial conduct, decision-making processes, caseloads, collection of court fees, clearance rates and use of budgetary allocations by the courts be made available to the public and that judicial decisions be published.[1257] In this regard, UN sources clearly seem to draw their inspiration from legal guarantees on the transparent administration of justice but conceptualise it even more broadly, including elements which, eg, are guaranteed by the right to an independent tribunal. Council references to the transparency of the judicial system could, thus, theoretically be informed by the more encompassing and less principled conception of judicial transparency as advanced by UN sources.

f. Fair Judicial System as a Legal Concept

The phrase used in Council resolutions on Afghanistan that UNAMA and Afghan state institutions should aim to establish a fair judicial system, resonates – in legal terms – with the right to a fair trial, which is guaranteed in

[1254] UNDPKO, Primer for Justice Components (n 1049) 33; UNDPKO/DFS, Policy on Justice Components (n 1049) 7.

[1255] UNDPKO, Handbook Judicial Affairs Officers (n 440) 173.

[1256] UNDPKO, Primer for Justice Components (n 1049) 33f, 36; UNDPKO/DFS, Policy on Justice Components (n 1049) 7f; UNDPKO/OHCHR, United Nations Rule of Law Indicators (n 935) 8; UNDPKO, Handbook Judicial Affairs Officers (n 440) 177.

[1257] UNDPKO, Primer for Justice Components (n 1049) 33, 36; UNDPKO/DFS, Policy on Justice Components (n 1049) 7; UNDPKO/OHCHR, United Nations Rule of Law Indicators (n 935) 8; UNODC, Strengthening Judicial Integrity and Capacity (n 1221) 85.

most international and regional human rights treaties. Articles 10 UDHR, 14 (1) ICCPR, 6 ECHR, 8 ACHR and 7 ACHPR establish the right to a fair trial which is also found in most UN human rights conventions.[1258] Several fair trial guarantees are also applicable during armed conflict as they form part of international humanitarian law.[1259] Additionally, the denial of fair trial rights may amount to a war crime under the Rome Statute.[1260] The UN Human Rights Committee even subsumes the 'fundamental principles of fair trial, including the presumption of innocence' and all elements of the right to a fair trial that 'are explicitly guaranteed under international humanitarian law during armed conflict' under its notion of peremptory international law from which states cannot derogate under art 4 ICCPR.[1261] In addition to being guaranteed by international peremptory- and treaty law, there are several soft law instruments such as the *Basic Principles on the Independence of the Judiciary* or the *Basic Principles on the Role of Lawyers*, which provide for specific fair trial rights.[1262]

i. International Human Rights Law

The right to a fair trial as provided for in art 14 (1) ICCPR applies to the determination of criminal charges or rights and obligations in a suit at law. Its purpose is to serve 'as a procedural means to safeguard the rule of law' and to ensure 'the proper administration of justice'.[1263] The provision is an umbrella guarantee which encompasses a wide array of specific rights such as the principle of equality of arms between plaintiff and respondent or prosecutor and defendant, the independence and impartiality of judges, the publicity of

[1258] Shah (n 1028) 270 f.

[1259] Philip Alston and Ryan Goodman, 'Guaranteeing Fair Trials' in *International Human Rights* (OUP 2013) 466 referring to arts 3 (1) (d) of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949) and the Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949) and to art 5 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. (Geneva, 12 August 1949) and art 75 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I, 8 June 1977).

[1260] art 8 (2) (a) (vi) ICC Rome Statute.

[1261] UNHRCee, General Comment No 29: Article 4: Derogations during a State of Emergency (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11 [11; 16].

[1262] UNGA, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UNGA Res 40/32 (29 November 1985) UN Doc A/RES/40/32 [Annex] and UNGA, Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations, UNGA Res 45/100 (14 December 1990) UN Doc A/RES/45/100 [Annex].

[1263] UNHRCee, General Comment No 32 (n 1015) [2].

proceedings, respect for the principle of adversary proceedings, preclusion of ex officio reformatio in pejus, an expeditious procedure or a system of appeals.[1264] Article 14 (1) ICCPR requires 'the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive' during judicial proceedings.[1265] It thus precludes, eg, a hostile attitude towards a defendant in criminal proceedings or support of or racial bias against one of the parties in judicial proceedings.[1266] Importantly, art 14 (1) ICCPR does not guarantee a substantively fair result of judicial proceedings but only the observance of fair procedures.[1267] In criminal proceedings, art 14 ICCPR provides for additional fair trial rights such as the presumption of innocence, the right to be informed of the charge, the right to an adequate defence, the right to a trial without undue delay, the right to a trial in one's own presence, the right to defend oneself in person or through legal counsel of one's own choosing and to be informed of this right, the right to free legal assistance, rights regarding witness attendance and examination, the right to free assistance of an interpreter if needed, the freedom from self-incrimination, the right to an appeal and the principle of ne bis in idem.[1268] As can be derived from this, the

[1264] UNHRCee, *Karttunen v Finland* (n 1202) [7.2]; UNHRCee, *Espinoza de Polay Campos v Peru* (Com No 577/94) UN Doc CCPR/C/61/D/577/1994 (6 November 1997) [8.8]; UNHRCee, *Lloydell Richards v Jamaica* (Com No 535/93) UN Doc CCPR/C/59/D/535/1993 (31 March 1997) (Dissenting Opinion Nisuke Ando). See also Kälin and Künzli (n 1028) 453; Joseph and Castan (n 1113) para 14.67; Shah (n 1028) 276 f.

[1265] UNHRCee, General Comment No 32 (n 1015) [25].

[1266] ibid [25f].

[1267] ibid [26].

[1268] On the the presumption of innocence, see art 14 (2) ICCPR and UNHRCee, General Comment No 32 (n 1015) [30]; UNHRCee, General Comment No 29 (n 1261) [11]; UNHRCee, *Gridin v Russian Federation* (Com No 770/97) UN Doc CCPR/C/69/D/770/1997 (20 July 2000) [8.3]; UNHRCee, *Cagas, Butin and Astillero v Philippines* (Com No 788/97) UN Doc CCPR/C/73/D/788/1997 (23 October 2001) [7.3]. On the right to be informed of the charge, see art 14 (3) (a) ICCPR and UNHRCee, General Comment No 32 (n 1015) [31]. On the right to an adequate defence, see art 14 (3) (b) ICCPR and UNHRCee, General Comment No 32 (n 1015) [32]. This right involves, eg, the right of the defendant to communicate with his or her counsel, to be provided with all materials that the prosecution will use in court or any exculpatory materials, the right that the materials be presented in a manner comprehensible by the defendant or his and her counsel, the right to choose whether to defend oneself personally or by a counsel, the right to free legal aid if the interests of justice so require, the right to an interpreter and the right to the attendance and examination of witnesses. See also Shah (n 1028) 280 ff. On the right to a trial without undue delay, see art 14 (3) (c) ICCPR and UNHRCee, General Comment No 32 (n 1015) [35]; UNHRCee, *Hill and Hill v Spain* (Com No 526/93) UN Doc CCPR/C/59/D/526/1993 (2 April 1997) [12.4]; UNHRCee, *Sextus v Trinidad and Tobago* (Com No 818/98) UN Doc CCPR/C/72/D/818/1998 (16 July 2001) [7.2]. On the right to a trial in one's own presence, see art 14 (3) (d) ICCPR and

scope of application of the fair trial guarantees of the ICCPR is rather broad. Regional human rights law, however, provides equally comprehensive fair trial rights.

ii. Regional Human Rights Law

Article 6 (1) ECHR establishes the right to a fair trial in the determination of civil rights and obligations or of criminal charges. Paragraph (1) of art 6 ECHR constitutes the civil limb of the right to a fair trial, while paragraph (3) figures as its criminal limb.[1269] Whereas paragraph (3) applies to criminal proceedings

UNHRCee, General Comment No 32 (n 1015) [36]; UNHRCee, *Mbenge v Zaire* (Com No 16/77) UN Doc CCPR/C/18/D/16/1977 (25 March 1983) [14.1]; UNHRCee, Concluding Observations of the Human Rights Committee on Finland (8 April 1998) UN Doc CCPR/C/79/Add.91 [15]. On the right to defend oneself in person or through legal counsel of one's own choosing and to be informed of this right, see art 14 (3) (d) ICCPR and UNHRCee, General Comment No 32 (n 1015) [37]; UNHRCee, *Pinto v Trinidad and Tobago* (Com No 232/87) UN Doc CCPR/C/39/D/232/1987 (20 July 1990) [12.5]; UNHRCee, *Hill and Hill v Spain* (Com No 526/93) UN Doc CCPR/C/59/D/526/1993 (2 April 1997) [14.2]. On the right to free legal assistance, see art 14 (3) (d) ICCPR and UNHRCee, General Comment No 32 (n 1015) [38]; UNHRCee, *Borisenko v Hungary* (Com No 852/99) UN Doc CCPR/C/76/D/852/1999 (14 October 2002) [7.5]; UNHRCee, *OF v Norway* (Com No 158/83) UN Doc CCPR/C/23/D/158/1983 (26 October 1984) [3.4]. On rights regarding witness attendance and examination, see art 14 (3) (e) ICCPR and UNHRCee, General Comment No 32 (n 1015) [39]; UNHRCee, *Grant v Jamaica* (Com No 353/88) UN Doc CCPR/C/50/D/353/1988 (31 March 1994) [8.5]; UNHRCee, *Peart and Peart v Jamaica* (Com Nos 464/91 & 482/91) UN Doc CCPR/C/54/D/464/1991 & 482/1991 (24 July 1995) [11.4f]; UNHRCee, *Fuenzalida v Ecuador* (Com No 480/91) UN Doc CCPR/C/57/D/480/1991 (12 July 1996) [9.5]. On the right to free assistance of an interpreter if needed, see art 14 (3) (f) ICCPR and UNHRCee, General Comment No 32 (n 1015) [40]; UNHRCee, *Guesdon v France* (Com No 219/86) UN Doc CCPR/C/39/D/219/1986 (25 July 1990) [10.2]. On the freedom from self-incrimination, see art 14 (3) (g) ICCPR and UNHRCee, General Comment No 32 (n 1015) [41]; UNHRCee, *Sánchez López v Spain* (Com No 777/97) UN Doc CCPR/C/67/D/777/1997 (18 October 1999) [6.4]. For the right to an appeal, see art 14 (5) ICCPR and UNHRCee, General Comment No 32 (n 1015) [45–51]; UNHRCee, *Salgar de Montejo v Colombia* (Com No 64/79) UN Doc CCPR/C/15/D/64/1979 (24 March 1982) [10.4]; UNHRCee, *Reid v Jamaica* (Com No 355/89) UN Doc CCPR/C/51/D/355/1989 (8 July 1994) [14.3]; UNHRCee, *Perera v Australia* (Com No 536/93) UN Doc CCPR/C/53/D/536/1993 (28 March 1995) [6.4]; UNHRCee, *Gómez Vazquez v Spain* (Com No 701/96) UN Doc CCPR/C/69/D/701/1996 (20 July 2000) [11.1]. For the principle of ne bis in idem, see art 14 (7) ICCPR and UNHRCee, General Comment No 32 (n 1015) [54–57]; UNHRCee, *AP v Italy* (Com No 204/86) UN Doc CCPR/C/31/D/204/1986 (2 November 1987) [7.3].

[1269] See CoE, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Civil Limb)* (2013) and CoE, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)* (2014).

only, several analogous guarantees for civil proceedings are interpreted into paragraph (1).[1270] Likewise, the general guarantee of a 'fair hearing' in art 6 (1) ECHR often supplements the specific guarantees in arts 6 (2) and (3) ECHR.[1271]

The right to a fair hearing in art 6 (1) ECHR covers several specific rights, which aim to guarantee equal chances to the parties in judicial proceedings.[1272] These include the principle of equality of arms in criminal and civil cases, the right to be heard before a court, rules governing the legitimate use of entrapment, the right to freedom from self-incrimination in criminal cases, the right to have one's case properly examined, the right to a reasoned judicial decision, the principle of res judicata, rules related to the administration of evidence, the right to adversarial proceedings in civil- and criminal cases, the presumption of innocence in cases where art 6 (2) does not apply and the right to a hearing in one's own presence.[1273] Moreover, art 6 ECHR establishes

[1270] Peters and Altwicker (n 1033) § 20 para 1; Harris and others (n 1034) 409.

[1271] Harris and others (n 1034) 409.

[1272] See, eg, Harris and others (n 1034) 410–432; Grabenwarter and Pabel (n 1033) § 24 paras 67–77.

[1273] On the principle of equality of arms in criminal and civil cases, see, eg, ECtHR, *Niederöst Huber v Switzerland* (App No 18990/91) 18 February 1997 [19 ff]; ECtHR, *Mantovanelli v France* (App No 21497/93) 18 March 1997 [33–36]; ECtHR, *Kress v France* (App No 39594/98) 7 July 2001 [72f]; ECtHR, *Stankiewicz v Poland* (App No 46917/99) 6 April 2009 [68f]; ECtHR, *Massmann v Germany* (App No 11603/06) 4 May 2010. On the right to be heard before a court, see, eg, ECtHR, *Ressegatti v Switzerland* (App No 17671/02) 13 July 2006 [31f]; ECtHR, *Kari-Pekka Pietiläinen v Finland* (App No 13566/06) 18 November 2009 [33]. On rules governing the legitimate use of entrapment see, eg, ECtHR, *Khudobin v Russia* (App No 59696/00) 26 January 2007 [128]; ECtHR, *Ramanauskas v Lithuania* (App No 74420/01) 5 February 2008 [55]; ECtHR, *Bannikova v Russia* (App No 18757/06) 4 February 2011 [36–50]; ECtHR, *Veselov ao v Russia* (App Nos 23200/10, 24009/07, 556/10) 2 January 2013 [90]. On the right to freedom from self-incrimination in criminal cases see, eg, ECtHR, *Murray v the United Kingdom* (App No 18731/91) 8 February 1996 [45–50]; ECtHR, *Saunders v UK* (App No 19187/91) 17 December 1996 [68]; ECtHR, *Funke v France* (App No 10828/84) 25 February 1993 [44]; ECtHR, *Jalloh v Germany* (App No 54810/00) 11 July 2006 [111]. On the right to have one's case properly examined see, eg, ECtHR, *Dulaurans v France* (App No 34553/97) 21 March 2000 [33]. On the right to a reasoned judicial decision see, eg, ECtHR, *H v Belgium* (App No 8950/80) 30 November 1987 [53]; ECtHR, *Hirvisaari v Finland* (App No 49684/99) 25 December 2001 [30]; ECtHR, *Gorou v Greece (Nr. 2)* (App No 12686/03) 20 March 2009 [37]; ECtHR, *Ilyadi v Russia* (App No 6642/05) 5 May 2011 [39]; ECtHR, *Ajdarić v. Croatia* (App No 20883/09) 4 June 2012 [46–52]. On the the principle of res judicata see, eg, ECtHR, *Brumărescu v. Romania* (App No 28342/95) 28 October 1999 [61]; ECtHR, *Driza v Albania* (App No 33771/02) 13 November 2007 [64]. On rules related to the administration of evidence see, eg, ECtHR, *Mantovanelli v France* (App No 21497/93) 18 March 1997 [34]; ECtHR, *Elsholz v Germany* (App No 25735/94) 13 July 2000 [66]; ECtHR, *Blücher v the Czech Republic* (App No 58580/00) 11 April 2005 [65]; ECtHR, *Jalloh v Germany* (App

several additional fair trial rights that take effect in criminal cases. They include the presumption of innocence, the right to be informed of a charge, the right to prepare the defence, the right to defend oneself in person or through legal assistance of one's own choosing, the right to free legal aid if required, the right to the attendance and examination of witnesses and the right to free assistance of an interpreter if the accused does not understand or speak the language used in court.[1274] Article 4 of Protocol No 7 to the ECHR contains the principle of ne bis in idem.[1275]

No 54810/00) 11 July 2006 [97]; ECtHR, *Bykov v Russia* (App No 4378/02) 10 March 2009 [89]. On the right to adversarial proceedings in civil and criminal cases see, eg, ECtHR, *Werner v Austria* (App No 21835/93) 24 November 1997 [65f]; ECtHR, *Ruiz-Mateos v Spain* (App No 12952/87) 23 June 1993 [63]; ECtHR, *McMichael v the United Kingdom* (App No 16424/90) 24 February 1995 [80]; ECtHR, *Vermeulen v Belgium* (App No 19075/91) 20 February 1996 [33]. On the presumption of innocence in cases where art 6 (2) ECHR does not apply see, eg, ECtHR, *Phillips v the United Kingdom* (App No 41087/98) 5 July 2001 [39]. On the right to a hearing in one's own presence see, eg, ECtHR, *Colozza v Italy* (App No 9024/80) 12 February 1985 [27 ff].

1274 On the presumption of innocence, see art 6 (2) ECHR and, eg, ECtHR, *Barberà, Messegué and Jabardo v Spain* (App No 10590/83) 6 December 1988 [77]; ECtHR, *Telfner v Austria* (App No 33501/96) 20 June 2001 [15]; ECtHR, *Janosevic v Sweden* (App No 34619/97) 21 May 2003 [96 ff]. On the right to be informed of a charge, see art 6 (3) (a) ECHR and, eg, ECtHR, *Kamasinski v Austria* (App No 9783/82) 19 December 1989 [79]; ECtHR, *Pélissier and Sassi v France* (App No 25444/94) 25 March 1999 [52]; ECtHR, *Mattoccia v Italy* (App No 23969/94) 25 July 2000 [59]; ECtHR, *Penev v Bulgaria* (App No 20494/04) 7 April 2010 [33; 42]. On the right to prepare the defence, see art 6 (3) (b) ECHR and, eg, ECtHR, *Gregačević v Croatia* (App No 58331/09) 10 October 2012 [51]; ECtHR, *OAO Neftyanaya Kompaniya Yukos v Russia* (App No 14902/04) 8 March 2012 [538 ff]; ECtHR, *Huseyn ao v Azerbaijan* (App Nos 35485/05, 45553/05, 35680/05 and 36085/05) 26 October 2011 [175]. On the right to defend oneself in person or through legal assistance of one's own choosing, see art 6 (3) (c) ECHR and, eg, ECtHR, *Imbrioscia v Switzerland* (App No 13972/88) 24 November 1993 [38]; ECtHR, *Öcalan v Turkey* (App No 46221/99) 12 May 2005 [131–133]; ECtHR, *Galstyan v Armenia* (App No 26986/03) 15 February 2008 [91]; ECtHR, *Salduz v Turkey* (App No 36391/02) 27 November 2008 [51]. On the right to free legal aid if required, see art 6 (3) (c) ECHR. On the right to the attendance and examination of witnesses, see art 6 (3) (d) ECHR and, eg, ECtHR, *Hümmer v Germany* (App No 26171/07) 19 October 2012 [38]; ECtHR, *Lucà v Italy* (App No 33354/96) 27 May 2001 [39]; ECtHR, *Solakov v the former Yugoslav Republic of Macedonia* (App No 47023/99) 31 January 2002 [57]. On the right to free assistance of an interpreter if the accused does not understand or speak the language used in court, see art 6 (3) (e) ECHR and, eg, ECtHR, *Kamasinski v Austria* (App No 9783/82) 19 December 1989 [74]; ECtHR, *Lagerblom v Sweden* (App No 26891/95) 14 April 2003 [62].

1275 Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No 11 (Strasbourg, 22 November 1984).

Another regional human rights treaty guaranteeing fair trial rights is the ACHR. Article 8 (1) ACHR provides for the right to a hearing 'with due guarantees' in the substantiation of any accusation of a criminal nature or in the determination of rights and obligations of a civil, labour, fiscal or any other nature. The text thereby already establishes the provision's broad scope of application if compared to arts 14 (1) ICCPR and 6 (1) ECHR.[1276] The interpretation of the guarantee is often guided by the case law of the European Court of Human Rights and, to a lesser extent, the jurisprudence of the UN Human Rights Committee.[1277]

Article 8 ACHR is supplemented by art 25 ACHR.[1278] While art 8 ACHR contains fair trial rights, art 25 ACHR guarantees the right of recourse to a competent court or tribunal, ie judicial protection. The general fair trial rights of art 8 ACHR, which are not specific to criminal proceedings, include the right that cases are brought within a reasonable time and the principle of equality of arms.[1279] Criminal fair trial rights include the presumption of innocence, the right to a free translator or interpreter if required, the freedom from self-incrimination, the right to be informed of the charge, the right to an adequate defence, the right to defend oneself or to be assisted by a legal counsel of one's own choosing, the right to witness attendance and examination, the right to review, the principle of ne bis in idem and the publicity of criminal proceedings.[1280] The scope of protection provided for by

[1276] Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.08; Antkowiak and Gonza (n 737) 24.

[1277] Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) paras 25.03; 25.28.

[1278] ibid para 25.06.

[1279] On the right that cases are brought within a reasonable time, see Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.24 citing, eg, IACtHR, *Genie Lacayo v Nicaragua* (Judgment of 29 January 1997) (n 737) [77] and IACtHR, *Valle Jaramillo and others v Colombia* (n 1129) [155]. On the principle of equality of arms, see ibid (n 737) para 25.25 citing IACtHR, *Ivcher-Bronstein v Peru* (n 1160) [107–110].

[1280] On the presumption of innocence, see art 8 (2) ACHR and Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.35f citing IACtHR, *Berenson Mejía v Peru* (n 1038) [160]; IACtHR, *Servellón García et al v Honduras* (Judgment of 21 September 2006; Series C No 152) (Merits, Reparations and Costs) [96] and Antkowiak and Gonza (n 737) 194–196 citing IACtHR, *Argüelles et al v Argentina* (n 1150) [130] and IACtHR, *J v Peru* (n 1238) [228]. On the right to a free translator or interpreter if required, see art 8 (2) (a) ACHR and Antkowiak and Gonza (n 737) 196f (who note that the IACtHR 'has not directly assessed Article 8(2)(a)'). On the freedom from self-incrimination, see art 8 (2) (g) and (3) ACHR and Antkowiak and Gonza (n 737) 206–208. On the right to be informed of the charge, see arts 7 (4) & 8 (2) (b) ACHR. On the right to an adequate defence, see art 8 (2) (c) ACHR and Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.38 citing IACtHR, *Cantoral Benavides v Peru* (n 1038) [127] and Antkowiak and Gonza (n 737) 199f

the ACHR is, thus, similarly broad than that provided for by the ICCPR and the ECHR.

Also the ACHPR guarantees a broad catalogue of fair trial rights and the African Commission on Human and Peoples' Rights declared the right to a fair trial non-derogable.[1281] Article 7 (1) ACHPR guarantees the right to have one's cause heard which comprises the right to an appeal to a competent national

referring to IACtHR, *Barreto Leiva v Venezuela* (Judgment of 17 November 2009; Series C No 206) (Merits, Reparations, and Costs); IACtHR, *Palamara Iribarne v Chile* (n 1209) and IACtHR, *J v Peru* (n 1238) [206f]. On the right to defend oneself or to be assisted by a legal counsel of one's own choosing, see art 8 (2) (d) ACHR and Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.38 citing IACtHR, *Bulacio v Argentina* (Judgment of 18 September 2003; Series C No 100) (Merits, Reparations and Costs) [130] and Antkowiak and Gonza (n 737) 200–202 referring to IACtHR, *Argüelles et al v Argentina* (n 1150) [175]; IACtHR, *Barreto Leiva v Venezuela* (Judgment of 17 November 2009; Series C No 206) (Merits, Reparations, and Costs) [63]; IACtHR, *Chaparro Álvarez and Lapo Íñiguez v Ecuador* (Judgment of 21 November 2007; Series C No 170) (Preliminary Objections, Merits, Reparations and Costs) [158] and IACtHR, *J v Peru* (n 1238) [207]. On the right to witness attendance and examination, see art 8 (2) (f) ACHR and Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.38 citing IACtHR, *Castillo Petruzzi v Peru* (Judgment of 30 May 1999) (n 1038) [153] and Antkowiak and Gonza (n 737) 204–206 citing IACtHR, *Berenson Mejía v Peru* (n 1038) [184]; IACtHR, *Ricardo Canese v Paraguay* (Judgment of 31 August 2004; Series No 111) (Merits, Reparations and Costs) [164] and IACtHR, *Norín Catrimán et al v Chile* (Judgment of 29 May 2014; Series No 279) (Merits, Reparations, and Costs) [245–249]. On the right to review, see art 8 (2) (h) ACHR and Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.28f citing IACtHR, *Herrera Ulloa v Costa Rica* (n 1210) [157–168] and IACtHR, *Barreto Leiva v Venezuela* (Judgment of 17 November 2009; Series C No 206) (Merits, Reparations, and Costs) [82–91] and Antkowiak and Gonza (n 737) 208–210 referring to IACtHR, *Norín Catrimán et al v Chile* (Judgment of 29 May 2014; Series No 279) (Merits, Reparations, and Costs) [280] and IACtHR, *Mohamed v Argentina* (Judgment of 23 November 2012; Case No 255) (Preliminary Objections, Merits, Reparations, and Costs) [92]. On the principle of ne bis in idem, see art 8 (4) ACHR and Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.30 ff citing IACtHR, *Loayza Tamayo v Peru* (Judgment of 17 September 1997; Series C No 33) (Merits) [66–77] and IACtHR, *Almonacid Arellano v Chile* (Judgment of 26 September 2006; Series C No 154) (Preliminary Objections, Merits, Reparations and Costs) [154] and Antkowiak and Gonza (n 737) 211–213 referring to IACtHR, *J v Peru* (n 1238) [262]. On the publicity of criminal proceedings, see art 8 (5) ACHR and Burgogue-Larsen and de Torres, 'The Right to Due Process' (n 737) para 25.27 citing, eg, IACtHR, *Castillo Petruzzi v Peru* (Judgment of 30 May 1999) (n 1038) [133f]; IACtHR, *Cantoral Benavides v Peru* (n 1038) [141–149]; IACtHR, *Palamara Iribarne v Chile* (n 1209) [167f]; IACtHR, *Berenson Mejía v Peru* (n 1038) [147] and Antkowiak and Gonza (n 737) 213f referring to IACtHR, *J v Peru* (n 1238) [217].

[1281] AComHPR, *Article 19 v Eritrea* (n 737) [98f] (the war in Eritrea could, thus, not be used as a justification for an excessive delay in bringing detainees to trial).

organ against acts violating one's fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force, the right to be presumed innocent until proven guilty by a competent court or tribunal, the right to defence, including the right to be defended by a counsel of one's own choice and the right to be tried within a reasonable time by an impartial court or tribunal.[1282] Article 7 (2) ACHPR contains the prohibition of ex-post facto laws and individual criminal responsibility.[1283] In *Good v Botswana*, the Commission recalled that 'the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of Justice, as well as the obligation on the part of Courts and Tribunals to conform to international standards in order to guarantee a fair trial to all'.[1284] Several fair trial guarantees, which are not explicitly provided for in the Charter, were later added by the Commission through its resolutions. These include, ia, the right to a public hearing, the right to an interpreter, the freedom from self-incrimination, the principle of ne bis in idem, the right to compensation in cases of miscarriages of justice or the presumption of innocence.[1285] The scope of fair trial rights under the ACHPR can, thus, be considered to be equally broad than that provided for under the ICCPR, ECHR and ACHR.

As can be inferred from the preceding discussion on fair trial rights guaranteed by the ICCPR, ECHR, ACHR and ACHPR, the scope of protection of the different human rights instruments displays great convergence.

[1282] On the right to appeal, see Olufemi Amao, 'Civil and Political Rights in the African Charter' in Manisuli Ssenyonjo (ed), *The African Regional Human Rights System* (Nijhoff 2012) 29, 39 citing AComHPR, *Constitutional Rights Project v Nigeria (in respect of Wahib Akamu, G. Adega et al)* (n 1212) [13]; AComHPR, *Kenneth Good v Republic of Botswana* (n 1041) [161–173]; AComHPR, *Civil Liberties Organisation et al v Nigeria* (n 737) [32f]. On the presumption of innocence, see Amao 40 citing AComHPR, *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon* (n 1132) [18–21]; AComHPR, *Media Rights Agenda v Nigeria* (n 737) [47f]. On the right to defence, see Amao 40 citing AComHPR, *Achuthan and Amnesty International v Malawi*, Com Nos 64/92, 68/92, 78/92 (1995) [10]; AComHPR, *Amnesty International ao v Sudan* (n 1041) [64]; AComHPR, *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi*, Com No 231/99 (2000) [27]. On the right to be tried within a reasonable time, see, eg, AComHPR, *Constitutional Rights Project v Nigeria (in respect of Wahib Akamu, G. Adega et al)* (n 1212) [14]; AComHPR, *Alhassan Abubakar v Ghana* (n 1132) [12]; AComHPR, *Amnesty International ao v Sudan* (n 1041) [68].

[1283] On the prohibition of ex-post facto laws, see, eg, AComHPR, *Media Rights Agenda a.o. v Nigeria* (n 1041) [59].

[1284] AComHPR, *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* (n 1282) [26].

[1285] Amao (n 1282) 41 citing AComHPR, *Resolution on the Right to Recourse and Fair Trial* (1992) and AComHPR, *Resolution on the Respect and the Strengthening on the Independence of the Judiciary* (1996).

Additionally, those fundamental principles of a fair trial which are also guaranteed under international humanitarian law are considered peremptory international law by the UN Human Rights Committee, thus further enhancing the normative potential of fair trial rights to provide a legitimising basis for Council resolutions invoking the need to establish fair judicial systems if the Council ties them to circumstances that are considered encroachments on fair trial rights in regional and international (human rights) law.

g. The UN Understanding of a Fair Judicial System

The concept of fairness figures prominently in UN sources that focus on the re-establishment of rule of law systems in conflict- and post-conflict societies. They invoke the fair administration of justice, the fairness of judicial process and proceedings, a fair judiciary and fair courts, fair prosecutions, court systems and justice systems, fair procedures for the settlement of civil entitlements and disputes under the law and fair trial standards or emphasise a need to investigate, adjudicate and resolve cases fairly.[1286] Guaranteeing fair trial standards or fair court systems has also been identified as an element of UN rule of law assistance in conflict- and post-conflict societies.[1287] None of these sources, however, provide a definition of the concept of fairness and only rarely identify measures required to guarantee it.[1288] It is, thus, unlikely that a Council notion of fairness with regard to the judiciary and judicial systems would draw on a potentially existing alternative UN understanding.

h. The Concept of Internationally Agreed Standards

In reaction to the situations in Guinea-Bissau and Côte d'Ivoire, the Council invoked a need to ensure that the judicial- and justice systems of the concerned

[1286] SG Report S/2004/616 (n 439) [2; 64 (b) (e) (i)]; OHCHR, Monitoring Legal Systems (n 1044) 2, 5f; UNDPKO, Primer for Justice Components (n 1049) 25f, 40; OHCHR, Mapping the Justice Sector (n 931) 8; SG Guidance Note UN Rule of Law Assistance (n 1044) 5; UNDPKO/DFS, Policy on Justice Components (n 1049) 8.

[1287] SG Report S/2004/616 (n 439) [2; 64 (b) (e)]; UNDPKO, Primer for Justice Components (n 1049) 25f, 40; OHCHR, Mapping the Justice Sector (n 931) 8; SG Guidance Note UN Rule of Law Assistance (n 1044) 5; UNDPKO/DFS, Policy on Justice Components (n 1049) 8.

[1288] OHCHR identified a number of issues that should be monitored when trying to assist governments in making justice systems overall fairer and more effective and enumerated 'budgetary and financial allocations, administrative oversight and accountability or disciplinary mechanisms, judicial appointment processes, human resources policies and staff allocation and training, law dissemination to justice officials and general publication, methods for ensuring appropriate interaction between the institutions and actors involved in justice'. See OHCHR, Monitoring Legal Systems (n 1044) 6.

countries be consistent with international standards. What the reference to international standards refers to in the context of UN rule of law assistance can be construed with reference to UN sources. Several UN sources establish that UN rule of law assistance should be based on international norms and standards.[1289] The Secretary-General identified the UN Charter, international human rights-, humanitarian-, criminal- and refugee law as the normative foundation of the UN's work in advancing the rule of law and added that '[t]his includes the wealth of United Nations human rights and criminal justice standards' which 'represent universally applicable standards adopted under the auspices of the United Nations'.[1290]

Particularly relevant for the present context, the UN Special Rapporteur on the Independence of Judges and Lawyers has provided a list of international standards applicable to the judiciary. Among them are, ia, the ICCPR, which – as illustrated – contains a catalogue of guarantees pertaining to the judicial branch of government such as the right to a fair and public hearing by a competent, independent and impartial tribunal established by law or the *Basic Principles on the Independence of the Judiciary.*[1291] The *UNDPKO Handbook for Judicial Affairs Officers* further adds the *Bangalore Principles of Judicial Conduct* and the *Guidelines on the Role of Prosecutors* to the list of international standards pertaining to the judiciary.[1292] Another list of international standards and principles with regard to the integrity and independence of the judicial profession is found in the *UNDPKO Primer for Justice Components in Multidimensional Peace Operations*.[1293] The reference to 'international standards' does, thus, refer to a wide array of legal-, non-legal-, legally binding- and non-binding sources, which establish requirements for the judicial branch, allowing for broad inferences with regard to the exact requirements the Council might have in mind when using the phrase.

[1289] UNDPKO, Handbook Multidimensional Peacekeeping Operations (n 899) 94f, 96; SG Report S/2004/616 (n 439) [9]; UNDPKO, Primer for Justice Components (n 1049) 20f, 27, 29, 34; OHCHR, Monitoring Legal Systems (n 1044) 2, 5, 8f; SG Guidance Note UN Rule of Law Assistance (n 1044) 1f; UNDPKO/DFS, Policy on Justice Components (n 1049) 3; UNDPKO, Handbook Judicial Affairs Officers (n 440) 26.

[1290] SG Report S/2004/616 (n 439) [9].

[1291] ‹http://www.ohchr.org/EN/Issues/Judiciary/Pages/Standards.aspx› accessed 14 July 2017. With regard to the ICCPR as part of the notion of 'international standards', see also SG Report S/2004/616 (n 439) [n 7].

[1292] UNDPKO, Handbook Judicial Affairs Officers (n 440) 177.

[1293] UNDPKO, Primer for Justice Components (n 1049) [Annex B].

i. Situations causing Council References to the Concept of an Impartial, Fair and Transparent Judicial System, consistent with Internationally Agreed Standards

The situations described in Secretary-General reports preceding the above-mentioned Council resolutions on Côte d'Ivoire, Afghanistan and Guinea-Bissau paint a diverse picture of the deficiencies that affected the judiciary in the three countries.

In Afghanistan the justice sector lacked the required number of skilled staff and building the capacities of justice-sector staff was urgently required.[1294] Permanent justice institutions, including the Supreme Court, experienced enormous deficits in human- and financial resources as well as in infrastructure. A functioning judicial system was absent and the justice system generally lacked sufficiently qualified judges and systematic case auditing- and tracking.[1295] The judiciary was further seriously compromised by institutionalised corruption, political interferences, inadequate salaries for justice officials, an insecurity of judges in terms of career progression and tenure, insufficient security conditions for judges and justice personnel, a lack of transparent and merit-based processes for appointments and career advancement and an absence of effective and fair disciplinary- and ethical oversight mechanisms.[1296] The Secretary-General also observed that the failure

[1294] UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security: Emergency international assistance for peace, normalcy and reconstruction of war-stricken Afghanistan' (2004) UN Doc A/59/581–S/2004/925 [26].

[1295] SG Report A/59/581–S/2004/925 (n 1294) [27]; UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security: Emergency international assistance for peace, normalcy and reconstruction of war-stricken Afghanistan' (2006) UN Doc A/60/712–S/2006/145 [18; 24; 26]; UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for peace and security' (2006) UN Doc A/61/326–S/2006/727 [51; 54]; UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2007) UN Doc A/62/345–S/2007/555 [37; 45]; UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2008) UN Doc A/62/722–S/2008/159 [37]; UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2008) UN Doc A/63/372–S/2008/617 [31]; UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2011) UN Doc A/66/604–S/2011/772 [38].

[1296] SG Report A/60/712–S/2006/145 (n 1295) [24]; SG Report A/61/326–S/2006/727 (n 1295) [10; 54f]; UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2007) UN Doc A/61/799–S/2007/152 [47]; SG Report A/62/345–S/2007/555 (n 1295) [10; 37; 45]; SG

to ensure a secure environment for courts and judicial personnel undermined the overall capacity of the legal system to act impartially and independently and that the judiciary failed to operate in an independent manner.[1297]

In Guinea-Bissau, the Secretary-General observed that the capacity of the country to promote human rights and ensure minimum access to basic social services, including in national institutions such as the judiciary, remained weak.[1298] Access to justice was undermined by the insufficient and degraded state infrastructure, an inadequate legislative framework and the lacking confidence of the population in judicial officials.[1299] Justice institutions were particularly weak, generating a widespread culture of impunity and the judiciary had limited means to carry out its core functions, especially the investigation and prosecution of criminal acts committed by people in positions of power.[1300] Judicial authorities were unable to take action with regard to violence against women and children owing to a lack of material and human resources and access to justice was jeopardised by absent judges and prosecutors in many parts of the country.[1301] Reflecting these deficits, the National Programme for Justice Reform (2015–2019) included as one of its main axes the strengthening of human and material capacities.[1302]

Report A/62/722–S/2008/159 (n 1295) [24]; SG Report A/63/372–S/2008/617 (n 1295) [31]; UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2010) UN Doc A/64/705–S/2010/127 [page 17]; SG Report A/66/604–S/2011/772 (n 1295) [38]; UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2013) UN Doc A/67/889–S/2013/350 [19; 27]; UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2013) UN Doc A/68/609-S/2013/535 [35]; UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2015) UN Doc A/69/929-S/2015/422 [33].

1297 SG Report A/61/326–S/2006/727 (n 1295) [55]; UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2009) UN Doc A/63/751–S/2009/135 [60].

1298 UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau, including efforts towards the restoration of constitutional order, and on the activities of the United Nations Integrated Peacebuilding Office in that country' (2013) UN Doc S/2013/262 [45].

1299 SG Report S/2013/262 (n 1298) [45].

1300 SG Report S/2015/37 (n 1053) [53].

1301 UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and the activities of the United Nations Integrated Peacebuilding Office in Guinea-Bissau' (2015) UN Doc S/2015/626 [20].

1302 SG Report S/2015/626 (n 1301) [47].

The Secretary-General further reported that the actual independence of the judiciary from interferences was not guaranteed in Guinea-Bissau as the politico-military elite had monopolised the state and effectively abolished the separation of powers and the justice system was considered biased and as serving the interests of the powerful only.[1303] Political patronage often took precedence over fair competition and recruitment based on merit and owing to low wages and frequent delays in the payment of salaries, the judiciary had become highly susceptible to corruption and bribery.[1304] A culture of impunity had been fostered due to interferences in the justice system by the military- and political elite, threats made against judicial actors, a tendency towards victor's justice and little progress in the investigation of and establishment of accountability for serious human rights violations.[1305] To address these judicial deficits, the Judicial Training Centre conducted trainings for judicial officials on international principles related to the independence and impartiality of judicial actors and the National Programme for Justice Reform (2015–2019) comprised as one of its main axes the independence and transparency of the justice sector.[1306]

Regarding the situation in Côte d'Ivoire, the Secretary-General reported that the justice sector had insufficient financial resources and the military justice system only limited capacity.[1307] The judicial system suffered from a backlog of cases and lacking court infrastructure and equipment.[1308] The Secretary-General further observed that the justice sector lacked institutional independence and that the resolve and capacity of the judiciary to impartially and equitably address major crimes remained uneven.[1309] The judiciary suffered from corruption and lacked the ability to ensure accountability for human rights violations and crimes irrespective of the status or political

[1303] SG Report S/2015/37 (n 1053) [49; 53].

[1304] ibid [49].

[1305] SG Report S/2013/262 (n 1298) [46]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and the activities of the United Nations Integrated Peacebuilding Office in Guinea-Bissau' (2014) UN Doc S/2014/333 [16]; SG Report S/2015/37 (n 1053) [53]; SG Report S/2015/626 (n 1301) [19].

[1306] SG Report S/2015/626 (n 1301) [47].

[1307] UNSC Report of the Secretary-General, 'Special report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2013) UN Doc S/2013/197 [48]; UNSC Report of the Secretary-General, 'Thirty-third report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2013) UN Doc S/2013/761 [32].

[1308] UNSC Report of the Secretary-General, 'Thirty-second report of the Secretary-General on the United Nations Operation in Côte d'Ivoire ' (2013) UN Doc S/2013/377 [10; 32]; SG Report S/2013/761 (n 1307) [74].

[1309] SG Report S/2013/197 (n 1307) [48]; SG Report S/2013/377 (n 1308) [10].

affiliation of suspected perpetrators.[1310] Moreover, the Secretary-General considered it imperative that the government remained committed to ensuring equitable and independent justice without discrimination and in conformity with its obligations under international law and relevant human rights standards, thereby clearly indicating problems with regard to the independence of the judiciary.[1311]

j. Analysis

i. Relationship of Council Language to a Trend of Legalisation

The judiciary in Afghanistan, Guinea-Bissau and Côte d'Ivoire was affected by circumstances which the Council in other resolutions had often addressed with references to a lack in judicial capacity such as, eg, a backlog of court cases, insufficiently qualified judicial staff, absent court infrastructure and equipment and an inability to ensure accountability for crimes and human rights violations. Instead of referring to a need to strengthen or build judicial capacity in the countries concerned and using non-technical language, however, the Council referred to a need to address the fairness, transparency, impartiality and compliance with internationally agreed standards of the affected judicial systems. It, thus, made use of legalised language to describe the deficits affecting the national judiciary in the three countries concerned. This can be explained, ia, with the circumstance that the factors amounting to an insufficient judicial capacity certainly affect the ability of the judiciary to administer justice fairly, transparently, impartially and consistent with internationally agreed standards. Nonetheless, the Council could have invoked non-technical concepts such as the capacity of the judicial system to address these deficits. It did, however, choose to make use of terms and concepts that resonate with rule of law guarantees whose content enjoys a relatively

[1310] SG Report S/2013/377 (n 1308) [9; 47]; SG Report S/2013/761 (n 1307) [32]; UNSC Report of the Secretary-General, 'Thirty-fourth report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2014) UN Doc S/2014/342 [28f; 83]; UNSC Report of the Secretary-General, 'Thirty-fifth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2014) UN Doc S/2014/892 [36; 41]; UNSC Report of the Secretary-General, 'Thirty-sixth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2015) UN Doc S/2015/320 [16; 44; 50]; UNSC Report of the Secretary-General, 'Thirty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2015) UN Doc S/2015/940 [25f]; UNSC Report of the Secretary-General, 'Special report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2016) UN Doc S/2016/297 [24; 27].

[1311] SG Report S/2014/342 (n 1310) [83].

established meaning in regional and international human rights law. This choice of language may be interpreted as to support the view that the Council displays a certain penchant for the invocation of legal concepts when addressing institutional weaknesses in national judicial systems.

What the Council understands concretely by the separate terms, however, is not entirely clear. The *UNDPKO Handbook for Judicial Affairs Officers in UN Peacekeeping* noted a lack of standard UN definitions of terms such as 'integrity, professionalism, accountability, impartiality and transparency', which are frequently used with regard to justice actors. It further held that these terms are 'often used to describe challenges to the rule of law (eg lack of accountability) or the focus of certain programmes (eg developing increased professionalism among judges)' and that 'while these concepts are separate, they are also interdependent and overlapping'.[1312] This assessment seems to apply also to the way in which the Council invokes such terms. It is impossible to discern the concrete understanding the Council may be having of the discrete concepts if it refers to them at the same time to describe the requirements a judiciary or judicial system should satisfy. The act of identifying which term used in a resolution is a response to particular judicial deficits described in Secretary-General reports and thereby construing a tentative understanding of the Council's concept of the term, thus, becomes entirely hypothetical.

For example, all three country situations clearly display problems with regard to the independence of the judiciary, yet the Council did not invoke the term. With regard to Côte d'Ivoire and Afghanistan, deficits in judicial independence could of course also be subsumed under the requirement of a fair, impartial or transparent judicial system. The legal notion of a fair tribunal, eg, encompasses its independence and impartiality in most above-discussed human rights treaties. Similarly, the concept of international standards as used by the Council in reaction to the situations in Guinea-Bissau and Côte d'Ivoire, may be read to involve human rights as guaranteed in, eg, the ICCPR and thus encompass the right to an independent tribunal.

Certain circumstances described in Secretary-General reports can also be read as to relate to the particular terms used in Council resolutions. That the judiciary in Côte d'Ivoire lacked the ability to address crimes impartially and to ensure accountability irrespective of the status or political affiliation of alleged perpetrators, eg, can be considered as the basis for the Council's call on the Ivorian government to ensure that the work of the judicial system be 'impartial' and 'fair'. In Afghanistan, reports of judicial corruption, a lack of transparent and merit-based appointment processes and career advancement and the

[1312] UNDPKO, Handbook Judicial Affairs Officers (n 440) 173.

absence of effective and fair disciplinary- and ethical oversight mechanisms may have been the basis for Council references to a need to establish a 'fair' as well as a 'transparent' judicial system. Since the Council used several concepts to address the judicial deficits in Côte d'Ivoire and Afghanistan, however, it is impossible to conclusively establish that the invocation of particular terms relates to specific circumstances described in Secretary-General reports, even though this seems very likely.

With regard to Guinea-Bissau and Côte d'Ivoire, the concept of 'international standards' may encompass almost all human rights guarantees pertaining to the judicial system and as such be construed as a reaction to Secretary-General reports of problems with regard to the independence of the judiciary or its impartiality. Making use of vague and broad notions such as 'international standards', however, does not contribute to the emergence of a discernable Council understanding of particular legal concepts that may be subsumed under the generic phrase such as, eg, the independence, impartiality or fairness of the judiciary. References to 'international standards' can thus not be considered to contribute significantly to a legalisation of Council language and action as they allow for a great divergence of views as to their concrete meaning among Council diplomats negotiating the text of a resolution as well as among implementing actors.

A comparative analysis further shows that often situations on the ground do not vary significantly with regard to the prevailing judicial deficits but the Council uses different concepts to identify and address them. Why the Council chooses to invoke the concept of judicial 'independence' or the concepts of judicial 'fairness', 'transparency', 'impartiality' or 'compliance with internationally agreed standards' is, thus, difficult to discern.

With regard to the two levels of legalisation of Council action, it can thus be concluded that on a linguistic level Council resolutions on Afghanistan and Côte d'Ivoire contribute to a trend of legalisation of Council language. They do so, as they use terms that resonate with rule of law guarantees whose content enjoys a relatively established meaning in regional and international human rights law. With regard to the linguistic precision of these references, however, their contribution to the legalisation of Council language must be qualified lesser than that of Council references to the independence of the judiciary. References to a fair, transparent and impartial judicial system may be related to rule of law guarantees such as fair trial rights, the right to a public hearing and judgment or the right to an impartial tribunal. The linguistic connection between the arguably implied rule of law guarantees and the language used by the Council, however, is less precise than the connection between Council references to the independence of the judiciary and the rule of law guarantee of an independent tribunal.

With regard to the second element of legalisation, the level of application, Council references to the fairness, transparency and impartiality of the judicial system do not contribute to a trend of legalisation of Council action. It is not possible to identify – based on a comparative reading of Secretary-General reports and Council resolutions – which concepts are invoked in response to which judicial deficits. Whether the Council considers the fairness, transparency and impartiality of the judicial system affected in a manner that resonates with the interpretation of related rule of law guarantees by international or regional human rights bodies can thus not be clearly determined.

References to judicial- or justice systems compliant with international standards as in Guinea Bissau and Côte d'Ivoire contribute to an only limited extent – if at all – to a legalisation of Council language as they invoke a broad and vague concept and do not allow for a clear interpretation as to what the Council subsumes under the notion of international standards.

In summary it can be said, thus, that Council references to the fairness, transparency and impartiality of the judicial system contribute to a legalisation of Council action primarily on a linguistic level. On a level of application such references may indeed sometimes be related to circumstances reported by the Secretary-General that are considered encroachments on rule of law guarantees such as the right to an impartial tribunal or fair trial rights as interpreted by competent regional and international human rights bodies. Since the Council invokes several concepts to address these circumstances at the same time, however, it cannot be conclusively established that specific concepts are used in reaction to particular circumstances in a way that resembles the interpretation of the affected rule of law guarantees by regional and international human rights bodies. References to the compliance of judicial systems with international standards must generally be considered an only modest contribution to a legalisation of Council action due to their vague character.

ii. Contribution of Council Language to Norm Emergence

The preceding analysis also determines the potential of Council references to the fairness, transparency, impartiality and compliance with international standards of judicial systems to affect the emergence of the rule of law as an international norm. Of the norm emergence criteria proposed here, ie precision of language, consistency of its use and legitimacy of standards related to the rule of law, such references satisfy primarily the first criterion and the third to a limited extent. References to fair, transparent and impartial judicial systems resonate with rule of law guarantees whose content enjoys a relatively established meaning in regional and international (human rights) law and can

thus be described as relatively precise. The same, however, cannot be said with regard to Council references to judicial systems compliant with internationally agreed standards as they may be related to a wide array of possible sources to concretise their meaning.

Regarding the consistency of Council reactions, the preceding analysis has demonstrated that it is difficult to assess the fulfilment of this criterion as the Council invoked several different concepts at the same time in reaction to Secretary-General reports of judicial deficits. The act of connecting the concepts invoked to particular circumstances preceding the issuance of Council resolutions, thus, remains largely hypothetical. Accordingly, it is almost impossible to assess whether the Council invoked these concepts consistently in reaction to clearly discernable and comparable circumstances. The consistency of Council invocations of the concepts of fair, transparent and impartial judicial systems can, thus, not really be confirmed even though it must be conceded that several circumstances affecting the judiciaries in Afghanistan and Côte d'Ivoire can be related to rule of law guarantees such as fair trial rights, the right to a public hearing and judgment or the right to an impartial tribunal. The same must be said with regard to the concept of a judicial system compliant with international standards to the extent that its vague character does not allow for conclusive inferences of which guarantees the Council connects to it, thus making it impossible to determine whether it is invoked consistently in reaction to comparable circumstances.

The third criterion of norm emergence, the procedural and material legitimacy of the invoked rule of law standards, may be considered fulfilled to the extent that Council invocations of a fair, transparent and impartial judicial system seem to invoke rule of law guarantees that enjoy at least relative universality as they can be related to rights established in regional and international human rights law. The invocation of judicial systems compliant with international standards most certainly fulfils this criterion too as it must be understood to refer to standards that enjoy near to universal approval in the international society. To the extent that it cannot be assessed whether the Council indeed promotes such rule of law guarantees by invoking them in reaction to circumstances that are considered encroachments upon them, however, it cannot be concluded that the Council contributes to their implementation.

It must, thus, be concluded that the criteria for the emergence of the rule of law as an international norm are only partially fulfilled with regard to Council invocations of the fairness, transparency, impartiality and compliance with internationally agreed standards of judicial systems.

F. Operational Council Language

At various occasions, the Council reverted to a type of language that can be labelled as operational to the extent that it describes the measures that need to be undertaken to address judicial deficits rather than on the identification of particular judicial characteristics and virtues (non-technical language) or qualities that expressly invoke or resonate with established rule of law guarantees (legalised language). From the text of most resolutions it can be discerned that the Council connects operational language pertaining to the judiciary with the rule of law.[1313]

1. Council Resolutions using Operational Language

The Council used operational language to address judicial deficits in several cases when framing binding mandates of UN peace operations.

In Somalia, the Council revised the mandate of the UN Operation in Somalia II (UNOSOM II) to include assistance in the *reorganisation of the judicial system*.[1314] Almost twenty years later, UNSOM was mandated to help build the capacity of the Federal Government of Somalia to *strengthen* Somalia's *justice institutions*.[1315]

In Liberia, the Council established UNMIL to support security reform and to this end assist the transitional government in developing a strategy to *consolidate judicial institutions*.[1316]

[1313] See, eg, UNSC Res 1719 (25 October 2006) UN Doc S/RES/1719 [2 (d)] (requesting BINUB to consolidate the rule of law, in particular by strengthening the justice system); UNSC Res 1840 (14 October 2008) UN Doc S/RES/1840 [17] and UNSC Res 1892 (13 October 2009) UN Doc S/RES/1892 [15] (counting the implementation of the justice reform plan as part of MINUSTAH's mandate to reform rule of law institutions). Many resolutions use operational language in the same paragraphs, which invoke the rule of law. See, eg, UNSC Res 1577 (1 December 2004) UN Doc S/RES/1577 [preamble, indent 9]; UNSC Res 1658 (14 February 2006) UN Doc S/RES/1658 [preamble, indent 14]; UNSC Res 1750 (30 March 2007) UN Doc S/RES/1750 [preamble, indent 8]; UNSC Res 1943 (13 October 2010) UN Doc S/RES/1943 [preamble, indent 22]; UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996 [3 (c) (i) (iv); 18]; UNSC Res 2103 (22 May 2013) UN Doc S/RES/2103 [preamble, indent 4]; UNSC Res 2119 (10 October 2013) UN Doc S/RES/2119 [preamble, indent 7].

[1314] UNSC Res 897 (4 February 1994) UN Doc S/RES/897 [2 (d)] (emphasis added).

[1315] UNSC Res 2102 (2 May 2013) UN Doc S/RES/2102 [2 (d) (iv)]; UNSC Res 2158 (29 May 2014) UN Doc S/RES/2158 [1 (d) (iv)] (emphasis added).

[1316] UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509 [3 (q)] (emphasis added).

In Timor-Leste, the Council decided that the mandate of the UN Mission of Support in East Timor (UNMISET) should involve *support for the justice system* of Timor-Leste and for justice in the area of serious crimes.[1317]

The UN Operation in Burundi (ONUB) was tasked to provide advice and assistance to the transitional government to complete the *reform of the judiciary* and to assist the government and authorities in *extending* state authority and utilities throughout the territory, including *judicial institutions*.[1318] The Security Council later mandated BINUB to support the government in consolidating the rule of law, particularly by *strengthening the justice system*.[1319]

In Haiti, the Council mandated MINUSTAH to provide assistance and advice to Haitian authorities in *monitoring, restructuring, reforming* and *strengthening the justice sector*.[1320] It further requested MINUSTAH to continue to provide the necessary support with regard to the *reform of rule of law institutions*, encouraging Haitian authorities to take full advantage of this support, notably in implementing the *justice reform plan* and asked the Secretary-General to include in his reports a comprehensive *assessment of judiciary sector reform*.[1321]

MONUSCO in the Democratic Republic of the Congo was tasked to support the efforts of the Congolese authorities to *strengthen* and *reform judicial institutions*, to work with the government for the implementation of any appropriate recommendations for *justice sector reform* and to develop and implement, in consultation with the Congolese authorities and in accordance with the Congolese strategy for justice reform, a multi-year joint UN justice support programme in order to *develop, ia, the criminal justice chain, independent criminal justice institutions and processes and the judiciary.*[1322]

In South Sudan, the Council authorised UNMISS to support the government in *justice sector development* and in *developing a military justice system complementary to the civil justice system* and requested the SRSG and UNMISS to work and report back to the Council on a plan for UN system support to specific peacebuilding tasks, especially *justice sector support*.[1323]

[1317] UNSC Res 1543 (14 May 2004) UN Doc S/RES/1543 [3 (i)] (emphasis added).

[1318] UNSC Res 1545 (21 May 2004) UN Doc S/RES/1545 [5; 6; 7] (emphasis added).

[1319] UNSC Res 1719 (25 October 2006) UN Doc S/RES/1719 [2 (d)] (emphasis added).

[1320] UNSC Res 1702 (15 August 2006) UN Doc S/RES/1702 [14] (emphasis added).

[1321] UNSC Res 1840 (14 October 2008) UN Doc S/RES/1840 [17]; UNSC Res 1892 (13 October 2009) UN Doc S/RES/1892 [15; 26] (emphasis added).

[1322] UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925 [12 (l) (o)]; UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098 [15 (g)]; UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147 [5 (j)]; UNSC Res 2348 (31 March 2017) UN Doc S/RES/2348 [35] (emphasis added).

[1323] UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996 [3 (c) (i) (iv); 18] (emphasis added).

In Côte d'Ivoire, the Council decided that UNOCI should support the government's *development and implementation of a national justice sector strategy* as well as the *development and implementation of a multi-year joint UN justice support programme* in order to *develop, ia, the judiciary.*[1324]

Less authoritative with regard to its legal effects and political relevance but nonetheless informative when analysing whether the Council develops a rule of law understanding and contributes to its diffusion among UN member states and the wider international society, the Council reverted to operational language regarding the situation of the judiciary in various operative, albeit non-binding paragraphs.

In Somalia, the Council stressed the importance it attached to the *establishment of an operational judiciary system* at the regional and district level.[1325] Many years later, it requested the Secretary-General to develop recommendations on the mandate of a UN Peacekeeping Operation, which should assist in supporting the effective *re-establishment, training and retention of, ia, the judiciary.*[1326] A couple of years later, the Council reiterated the importance of the Somali authorities to assume responsibility for the *establishment of rule of law- and justice services* and urged the international community to continue efforts to support the *development* of the Somali *justice institutions*.[1327]

In Timor-Leste, it emphasised the need for measures to *address shortcomings in the administration of justice*, encouraged UNMIT's sustained efforts to *strengthen the justice system* and underlined an ongoing need to *strengthen national capacity in judicial line functions* and the importance of a coordinated approach to *justice sector reform* as well as a need for sustained support by the international community in *capacity-building and strengthening of institutions* in this sector.[1328]

In Haiti, the Council supported the recommendations of the Secretary-General regarding an *assessment of the Haitian judiciary*, including a more active role by MINUSTAH.[1329]

[1324] UNSC Res 2000 (27 July 2011) UN Doc S/RES/2000 [7 (f)] (emphasis added).

[1325] UNSC Res 886 (18 November 1993) UN Doc S/RES/886 [8] (emphasis added).

[1326] UNSC Res 1863 (16 January 2009) UN Doc S/RES/1863 [6 (e)] (emphasis added).

[1327] UNSC Res 2067 (18 September 2012) UN Doc S/RES/2067 [11; 12] (emphasis added).

[1328] UNSC Res 1338 (31 January 2001) UN Doc S/RES/1338 [8]; UNSC Res 1745 (22 February 2007) UN Doc S/RES/1745 [9]; UNSC Res 1867 (26 February 2009) UN Doc S/RES/1867 [9]; UNSC Res 1912 (26 February 2010) UN Doc S/RES/1912 [10]; UNSC Res 1969 (24 February 2011) UN Doc S/RES/1969 [12]; UNSC Res 2037 (23 February 2012) UN Doc S/RES/2037 [11] (emphasis added).

[1329] UNSC Res 1608 (22 June 2005) UN Doc S/RES/1608 [2 (d)] (emphasis added).

In Sierra Leone, the Council called on the government, UNIOSIL and all other stakeholders to increase their efforts to *strengthen the judiciary.*[1330]

In the Democratic Republic of the Congo, the Council urged the international community to consider providing increased technical or other assistance to *reinforce the Congolese justice institutions* and MONUSCO to continue supporting efforts of the Congolese authorities to *strengthen their justice system*.[1331] It further urged the government to *operationalize* and *implement* a national and comprehensive *vision and strategy for the justice sector*, to remain fully committed to protecting the civilian population through the *deployment of, ia, the judiciary*, to undertake the necessary *judicial reform* to ensure that the DRC effectively addressed impunity and to reinforce state authority and governance in the eastern DRC to allow for *justice sector reform*.[1332]

In Côte d'Ivoire, the Council called on the government to take the necessary steps to *re-establish and reinforce the judiciary.*[1333]

In Guinea-Bissau, it called on the authorities to actively *reform and strengthen the judicial system*.[1334]

In the Central African Republic, the Council called on the authorities to *strengthen their justice institutions*, including, ia, by *restoring the administration of the judiciary* and *criminal justice system* throughout the country.[1335] It further called on the transitional authorities to continue their efforts to redeploy state administration in the provinces, including through the effective *restoration of the administration of the judiciary* and the *criminal justice system* and on member states, international and regional organisations to urgently provide support for the *restoration of the judiciary* and the *criminal justice system*.[1336]

[1330] UNSC Res 1734 (22 December 2006) UN Doc S/RES/1734 [7]; UNSC Res 1793 (31 December 2007) UN Doc S/RES/1793 [7]; UNSC Res 1829 (4 August 2008) UN Doc S/RES/1829 [7]; UNSC Res 1886 (15 September 2009) UN Doc S/RES/1886 [6] (emphasis added).

[1331] UNSC Res 1952 (29 November 2010) UN Doc S/RES/1952 [15; 16] (emphasis added).

[1332] UNSC Res 2053 (27 June 2012) UN Doc S/RES/2053 [8]; UNSC Res 2211 (26 March 2015) UN Doc S/RES/2211 [16; 29]; UNSC Res 2277 (30 March 2016) UN Doc S/RES/2277 [2]; UNSC Res 2293 (23 June 2016) UN Doc S/RES/2293 [19]; UNSC Res 2348 (31 March 2017) UN Doc S/RES/2348 [21] (emphasis added).

[1333] UNSC Res 2000 (27 July 2011) UN Doc S/RES/2000 [10] (emphasis added).

[1334] UNSC Res 2203 (18 February 2015) UN Doc S/RES/2203 [10]; UNSC Res 2267 (26 February 2016) UN Doc S/RES/2267 [14] (emphasis added).

[1335] UNSC Res 2217 (28 April 2015) UN Doc S/RES/2217 [11]; UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [10] (emphasis added).

[1336] UNSC Res 2217 (28 April 2015) UN Doc S/RES/2217 [12; 13]; UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [13] (emphasis added).

In Liberia, the Council urged the effective, transparent and efficient management by the Government of Liberia of assistance, including from bilateral and multilateral partners, to *support the reform of the justice sector*.[1337]

In its least authoritative form, the Council used operational language in the preamble of its resolutions.

In Somalia, the Council affirmed the importance of a *re-established judicial system* for the restoration of public order.[1338] Much later and in reaction to piracy and armed robbery off the coast of Somalia, the Council emphasised the importance of international *support* to Somalia's *justice institutions* and welcomed capacity-building efforts in the region to *strengthen the Somali criminal justice system*.[1339]

In Sierra Leone, the Council noted the negative impact of the security situation on the administration of justice and the pressing need for international cooperation to assist in *strengthening the judicial system* of the country.[1340]

In Timor-Leste, the Council noted that further assistance was required to ensure the sustained *development and strengthening of the justice sector*.[1341]

In Burundi, the Council encouraged the international donor community to respond to requests from the government to *strengthen its national judicial institutions*.[1342]

In Afghanistan, the Council recognised an urgent need to *accelerate justice sector reform* and stressed the importance of further progress by the government in *strengthening judicial institutions*.[1343]

[1337] UNSC Res 2333 (23 December 2016) UN Doc S/RES/2333 [7] (emphasis added).

[1338] UNSC Res 897 (4 February 1994) UN Doc S/RES/897 [preamble, indent 10] (emphasis added).

[1339] UNSC Res 2102 (2 May 2013) UN Doc S/RES/2102 [preamble, indent 6]; UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125 [preamble, indent 17]; UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [preamble, indent 15]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [preamble, indent 16]; UNSC Res 2316 (9 November 2016) UN Doc S/RES/2316 [preamble, indent 15] (emphasis added).

[1340] UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315 [preamble, indent 11] (emphasis added).

[1341] UNSC Res 1543 (14 May 2004) UN Doc S/RES/1543 [preamble, indent 8] (emphasis added).

[1342] UNSC Res 1577 (1 December 2004) UN Doc S/RES/1577 [preamble, indent 9]; UNSC Res 1602 (31 May 2005) UN Doc S/RES/1602 [preamble, indent 12] (emphasis added).

[1343] UNSC Res 1589 (24 March 2005) UN Doc S/RES/1589 [preamble, indent 4]; UNSC Res 1943 (13 October 2010) UN Doc S/RES/1943 [preamble, indent 22]; UNSC Res 2011 (12 October 2011) UN Doc S/RES/2011 [preamble, indent 28]; UNSC Res 2069 (9 October 2012) UN Doc S/RES/2069 [preamble, indent 27]; UNSC Res 2120 (10 October 2013) UN Doc S/RES/2120 [preamble, indent 28] (emphasis added).

In Haiti, the Council encouraged MINUSTAH to further explore possibilities for greater support to *reform, modernise and strengthen the judiciary*, including through the provision of targeted technical assistance to rule of law institutions.[1344] It further urged the Haitian government to *reform the judiciary*, underlined the need to *strengthen the judicial system* and noted with concern the slow progress towards consolidating the rule of law and in this context called on the government to *address the deficiencies in the justice system*.[1345]

In Liberia, the Council identified the *reform of the judiciary* as a significant challenge in the consolidation of Liberia's post-conflict transition.[1346] Several years later, it urged the government to demonstrate substantive progress in the *reform, restructuring and effective functioning of the justice sector* to provide for the protection of all Liberians.[1347]

With regard to the Democratic Republic of the Congo, the Council urged the government to remain fully committed to the implementation of the PSC Framework and to protecting the civilian population through the *deployment of an accountable Congolese civil administration, in particular the judiciary.*[1348] It further urged the government to follow through by *undertaking the necessary judicial reform* to ensure that the DRC effectively addressed impunity and to

[1344] UNSC Res 1658 (14 February 2006) UN Doc S/RES/1658 [preamble, indent 14] (emphasis added).

[1345] UNSC Res 1702 (15 August 2006) UN Doc S/RES/1702 [preamble, indent 9]; UNSC Res 1743 (15 February 2007) UN Doc S/RES/1743 [preamble, indent 9]; UNSC Res 1780 (15 October 2007) UN Doc S/RES/1780 [preamble, indent 15]; UNSC Res 1840 (14 October 2008) UN Doc S/RES/1840 [preamble, indents 17 & 18]; UNSC Res 1892 (13 October 2009) UN Doc S/RES/1892 [preamble, indent 14]; UNSC Res 1944 (14 October 2010) UN Doc S/RES/1944 [preamble, indent 17]; UNSC Res 2012 (14 October 2011) UN Doc S/RES/2012 [preamble, indent 23]; UNSC Res 2070 (12 October 2012) UN Doc S/RES/2070 [preamble, indent 10]; UNSC Res 2119 (10 October 2013) UN Doc S/RES/2119 [preamble, indent 7]; UNSC Res 2180 (14 October 2014) UN Doc S/RES/2180 [preamble, indent 7]; UNSC Res 2243 (14 October 2015) UN Doc S/RES/2243 [preamble, indent 9]; UNSC Res 2313 (13 October 2016) UN Doc S/RES/2313 [preamble, indents 15 & 32] (in the same paragraph, the Council noted 'the slow progress towards consolidating the rule of law and calling on Haitian authorities to continue to pursue efforts aimed at strengthening rule of law institutions and ending impunity') (emphasis added).

[1346] UNSC Res 1750 (30 March 2007) UN Doc S/RES/1750 [preamble, indent 8]; UNSC Res 1777 (20 September 2007) UN Doc S/RES/1777 [preamble, indent 9]; UNSC Res 1836 (29 September 2008) UN Doc S/RES/1836 [preamble, indent 11] (emphasis added).

[1347] UNSC Res 2190 (15 December 2014) UN Doc S/RES/2190 [preamble, indent 3]; UNSC Res 2239 (17 September 2015) UN Doc S/RES/2239 [preamble, indent 4] (emphasis added).

[1348] UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098 [preamble, indent 24]; UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147 [preamble, indent 28] (emphasis added).

take immediate steps to uphold its commitment to the *development of a roadmap for the justice sector*.[1349]

In Guinea-Bissau, the Council stressed that the consolidation of peace and stability could only result from, ia, *reforms in the justice sector* and reiterated the importance of continued support towards the *implementation of justice sector reforms*.[1350] It also recognised the concrete steps taken by the government towards peace, security and stability and stressed the need that such steps be continuously taken by, ia, the tackling of corruption through the *reinforcement of the judicial system*.[1351]

In the Central African Republic, the Council called on international partners to urgently provide financial contributions to support the *restoration of the judicial chain* and on the elected authorities to *restore the administration of the judiciary* in order to fight impunity.[1352]

2. Situations causing Council Uses of Operational Language

The question that arises is, under what circumstances the Council reverts to operational language as opposed to legalised or non-technical language. Having identified a set of circumstances that seem to constitute the basis for the use of legalised or non-technical language in Council resolutions, one can have a comparative look at the situations triggering the use of operational language to identify weaknesses in the judiciary or to initiate measures to address such deficits to determine whether the Council used such language for discernible reasons.

In Somalia, eg, the main problem affecting the judicial system seemed to relate to its mere existence or functioning as the Secretary-General reported for more than twenty years that the Somali judicial system was generally fragile and judicial institutions largely absent.[1353] This resonates with Council resolutions

[1349] UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147 [preamble, indents 27 & 29] (emphasis added).

[1350] UNSC Res 2103 (22 May 2013) UN Doc S/RES/2103 [preamble, indents 4 & 12]; UNSC Res 2157 (29 May 2014) UN Doc S/RES/2157 [preamble, indents 5 & 12]; UNSC Res 2186 (25 November 2014) UN Doc S/RES/2186 [preamble, indents 5 & 15]; UNSC Res 2203 (18 February 2015) UN Doc S/RES/2203 [preamble, indents 7 & 16]; UNSC Res 2267 (26 February 2016) UN Doc S/RES/2267 [preamble, indents 7 & 18]; UNSC Res 2343 (23 February 2017) UN Doc S/RES/2343 [preamble, indent 9] (emphasis added).

[1351] UNSC Res 2203 (18 February 2015) UN Doc S/RES/2203 [preamble, indent 4]; UNSC Res 2267 (26 February 2016) UN Doc S/RES/2267 [preamble, indent 3] (emphasis added).

[1352] UNSC Res 2217 (28 April 2015) UN Doc S/RES/2217 [preamble, indent 39]; UNSC Res 2262 (27 January 2016) UN Doc S/RES/2262 [preamble, indent 6] (emphasis added).

[1353] UNSC Report of the Secretary-General, 'Further report of the Secretary-General submitted in pursuance of paragraph 19 of resolution 814 (1993) and paragraph A 5 of

on Somalia to the extent that they focused on the 're-establishment' and 're-organisation' of the judiciary or judicial system or on the strengthening of the Somali criminal justice system and with resolutions that explicitly emphasised the limited capacity of the Somali court- and judicial system.[1354] This assessment is also underlined by Secretary-General reports of capacity-building measures for the Somali justice system such as court reconstruction- and rehabilitation measures and training for Somali judges and prosecutors, pointing to problems with regard to court infrastructure and the qualification of judicial personnel in the country to address piracy-related crimes.[1355] These references indicate that the problems in Somalia did not pertain to the quality of an already established judiciary but rather to the very creation of a functioning judicial system.

With regard to the issue of piracy and armed robbery at sea off the coast of Somalia, Somalia's neighbouring states, which were likewise affected by these crimes, also seemed to lack judicial capacity. Accordingly, the Secretary-General reported about international efforts to support the building of judicial capacity and to enhance the capacity of judiciaries and prosecutorial services of states in the region.[1356] This focus on a lack in regional judicial capacity to judicially address piracy and armed robbery at sea was also reflected in Council resolutions which contained manifold references to a need to enhance the judicial capacity of the states in the region.[1357]

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resolution 865 (1993)' (1993) UN Doc S/26738 [82]; UNSC Report of the Secretary-General, 'Further report of the Secretary-General submitted in pursuance of paragraph 4 of resolution 886 (1993)' (1994) UN Doc S/1994/12 [18]; SG Report S/2014/740 (n 843) [61].

1354 UNSC Res 886 (18 November 1993) UN Doc S/RES/886 [8]; UNSC Res 897 (4 February 1994) UN Doc S/RES/897 [preamble, indent 10; 2 (d)]; UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [preamble, indent 15]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [preamble, indent 16]. For preceding resolutions, see UNSC Res 1918 (27 April 2010) UN Doc S/RES/1918 [preamble, indent 5; 6]; UNSC Res 1976 (11 April 2011) UN Doc S/RES/1976 [preamble, indents 11 & 12]; UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [4]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [4]; UNSC Res 2316 (9 November 2016) UN Doc S/RES/2316 [4].

1355 SG Report S/2012/643 (n 955) [46; 51; 60]; SG Report S/2013/69 (n 948) [40]; SG Letter S/2013/239 (n 962) [14]; SG Report S/2013/623 (n 843) [44]; SG Report S/2015/776 (n 843) [16].

1356 SG Report S/2013/623 (n 843) [22; 28; 44]; SG Report S/2014/740 (n 843) [23]; SG Report S/2016/843 (n 955) [34].

1357 UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 [15]; UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897 [14]; UNSC Res 1918 (27 April 2010) UN Doc S/RES/1918 [preamble, indents 5 & 6]; UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950 [19]; UNSC Res 1976 (11 April 2011) UN Doc S/RES/1976

Council resolutions responding to similar situations in other countries – as discussed above – had invoked the concept of judicial capacity or the concept of judicial effectiveness to address comparable weaknesses of the judiciary. This demonstrates that the Council adopts different approaches when choosing its language to address judicial deficits.

In Liberia, the Secretary-General noted that the judicial system lacked the capacity to process cases and reported of measures aimed at strengthening the capacity of the judiciary.[1358] Most courts were not functioning, much of the infrastructure had been destroyed and the judiciary was severely degraded.[1359] The judiciary lacked the necessary infrastructure and essential material resources such as logistic support, basic office supplies and funding.[1360] Unqualified judicial personnel often applied legal rules and procedures in an inconsistent manner and failed to observe minimum human rights standards.[1361] The criminal justice system was facing challenges in bringing cases to trial in a timely manner and cases were poorly managed.[1362] Several years later, the strengthening of the capacity of the judiciary was still a key national human

[preamble, indents 11 & 12]; UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020 [23]; UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077 [27]; UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125 [preamble, indent 28; 24]; UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184 [preamble, indent 26; 25]; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 [preamble, indent 29; 27]; UNSC Res 2316 (9 November 2016) UN Doc S/RES/2316 [preamble, indent 29; 27].

1358 UNSC Report of the Secretary-General, 'Fourteenth progress report of the Secretary-General on the United Nations Mission in Liberia' (2007) UN Doc S/2007/151 [33].

1359 SG Report S/2003/875 (n 1056) [24]; UNSC Report of the Secretary-General, 'Second Progress Report of the Secretary-General on the United Nations Mission in Liberia' (2004) UN Doc S/2004/229 [30]; SG Report S/2007/151 (n 1358) [33; 40]; UNSC Report of the Secretary-General, 'Fifteenth progress report of the Secretary-General on the United Nations Mission in Liberia' (2007) UN Doc S/2007/479 [37]; UNSC Report of the Secretary-General, 'Seventeenth progress report of the Secretary-General on the United Nations Mission in Liberia' (2008) UN Doc S/2008/553 [40].

1360 SG Report S/2007/151 (n 1358) [33]; SG Report S/2007/479 (n 1359) [40]; UNSC Report of the Secretary-General, 'Sixteenth progress report of the Secretary-General on the United Nations Mission in Liberia' (2008) UN Doc S/2008/183 [44]; SG Report S/2008/553 (n 1359) [35f]; UNSC Report of the Secretary-General, 'Eighteenth progress report of the Secretary-General on the United Nations Mission in Liberia' (2009) UN Doc S/2009/86 [31].

1361 SG Report S/2007/151 (n 1358) [33; 40]; SG Report S/2007/479 (n 1359) [37; 40]; SG Report S/2008/183 (n 1360) [41; 44]; SG Report S/2008/553 (n 1359) [35f; 40]; SG Report S/2009/86 (n 1360) [31]; SG Report S/2015/620 (n 941) [47]; UNHRC, National Report submitted in accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 (18 February 2015) UN Doc A/HRC/WG.6/22/LBR/1 [45].

1362 SG Report S/2007/151 (n 1358) [40]; SG Report S/2008/183 (n 1360) [44]; SG Report S/2008/553 (n 1359) [36]; SG Report S/2009/86 (n 1360) [31]; UNHRC, National Report

rights priority and a field that required international assistance.[1363] Systemic weaknesses in the criminal justice system, including limited internal oversight, weak administrative procedures and an outdated legal framework continued to cause significant delays in the delivery of justice and accountability for human rights violations and abuses, particularly for sexual and gender-based violence, was not guaranteed.[1364]

References to problems with regard to low salaries for judicial personnel, corruption within the judiciary, political interference with its work, a need to review the rules of court and the judicial canons and an insufficient legislative framework for the justice system further pointed to deficits with regard to the independence of the judiciary and the Secretary-General considered a greater political commitment by all Liberian institutions and civil society to an efficient, transparent, accountable and independent judiciary vital for the government to address victims' rights and build the trust of the people.[1365]

Several of the deficits that affected the Liberian judiciary could be qualified as pertaining to the independence, effectiveness or capacity of the judiciary and the Council did invoke these concepts in resolutions on other country situations featuring comparable problems. With regard to Liberia, however, the Council seemed to react to the reported problems affecting the independence of the judiciary in just one resolution and only in its preambular part, where it urged the transitional government to ensure that the establishment of an independent judiciary be among its highest priorities.[1366] In two resolutions issued more than ten years later, the Council addressed deficits regarding the effectiveness and capacity of the judiciary when urging the Liberian government to intensify its efforts to improve the capacity and capability of the justice sector, including

submitted in accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 (n 1361) [40].

[1363] UNHRC, National Report submitted in accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 (n 1361) [66f]; UNSC Report of the Secretary-General, 'Thirty-second progress report of the Secretary-General on the United Nations Mission in Liberia' (2016) UN Doc S/2016/706 [67]; UNSC Report of the Secretary-General, 'Special report of the Secretary-General on the United Nations Mission in Liberia' (2016) UN Doc S/2016/968 [17].

[1364] UNSC Report of the Secretary-General, 'Thirty-first progress report of the Secretary-General on the United Nations Mission in Liberia' (2016) UN Doc S/2016/169 [42]; SG Report S/2016/706 (n 1363) [28; 73]; SG Report S/2016/968 (n 1363) [17; 26].

[1365] SG Report S/2003/875 (n 1056) [24]; SG Report S/2007/151 (n 1358) [33]; SG Report S/2007/479 (n 1359) [37]; SG Report S/2008/183 (n 1360) [41]; SG Report S/2008/553 (n 1359) [35; 40]; SG Report S/2009/86 (n 1360) [31]; SG Report S/2016/169 (n 1364) [64]; SG Report S/2016/706 (n 1363) [49; 67]; SG Report S/2016/968 (n 1363) [17; 26; 40; 89].

[1366] UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509 [preamble, indent 7].

the courts.[1367] In the majority of its resolutions, however, the Council neither specified what the 'reform of the judiciary' implied concretely, nor did it explicitly identify the concrete problems affecting the judiciary that needed to be addressed by judicial reform such as its effectiveness, independence or capacity.

With regard to Timor-Leste, the Secretary-General noted the limited capacity of the judicial system. Courts outside Dili were inoperative most of the time and the judiciary was particularly weak with detrimental effects on the entire rule of law system.[1368] Additionally, the Secretary-General reported of capacity-strengthening measures undertaken, ia, by UNDP and UNMIT.[1369] The concrete problems affecting the judiciary related to delayed decision-making in courts and a backlog of cases, inadequate security conditions for courthouses, a lack of accountability for crimes, insufficient infrastructure and human resources, an absence of qualified judicial personnel, insufficient disciplinary oversight mechanisms for the judiciary and concerns over growing corruption.[1370] If compared with the language used in other Council resolutions and rule of law guarantees pertaining to the judiciary, these judicial deficits could be qualified as affecting the independence, effectiveness or capacity of the judicial system. Accordingly, Council resolutions reacting to the problems described in Timor-Leste did not only revert to operational language when addressing the described judicial deficits. They also used legalised language when referring to a need to respect the independence of the judiciary or to enhance the effectiveness of the judiciary system and non-technical language when highlighting a need to build the capacity of the justice sector.[1371] A closer

[1367] UNSC Res 2190 (15 December 2014) UN Doc S/RES/2190 [4]; UNSC Res 2239 (17 September 2015) UN Doc S/RES/2239 [4].

[1368] UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Mission of Support in East Timor' (2004) UN Doc S/2004/333 [25]; SG Report S/2006/628 (n 937) [81]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 9 August 2006 to 26 January 2007)' (2007) UN Doc S/2007/50 [27; 58]; SG Report S/2008/26 (n 937) [59]; SG Report S/2009/72 (n 957) [51; 55]; SG Report S/2010/85 (n 938) [82].

[1369] SG Report S/2008/26 (n 937) [37; 59]; SG Report S/2010/85 (n 938) [74]; SG Report S/2012/43 (n 938) [42].

[1370] SG Report S/2006/628 (n 937) [81; 85]; SG Report S/2007/50 (n 1368) [27]; SG Report S/2008/26 (n 937) [30; 37]; SG Report S/2010/85 (n 938) [24; 73; 82f]; SG Report S/2011/32 (n 947) [16; 33]; SG Report S/2012/43 (n 938) [33; 42].

[1371] On the independence of the judiciary, see UNSC Res 1745 (22 February 2007) UN Doc S/RES/1745 [preamble, indent 5]; UNSC Res 1802 (25 February 2008) UN Doc S/RES/1802 [preamble, indent 8]; UNSC Res 1867 (26 February 2009) UN Doc S/RES/1867 [preamble, indent 9]; UNSC Res 1912 (26 February 2010) UN Doc S/RES/1912

look at resolutions on Timor-Leste, comparing whether the Council issued its assessments and recommendations in preambular-, non-binding- or binding paragraphs, suggests that the focus in Timor-Leste was more on judicial capacity- and effectiveness problems than on issues pertaining to judicial independence. The use of operational language, thus, derogates less from a possible trend in legalisation of Council language and action as it would have, had the judiciary primarily been affected by problems pertaining to its independence, impartiality or fairness.

In Burundi, the Secretary-General noted the incapacity of the judicial system to act in a timely and impartial manner and observed that the national judicial capacity needed to be enhanced in order to be capable of addressing the many egregious crimes that were continuously committed.[1372] He further reported that the judicial system remained fragile and unable to carry out its function in a credible and independent manner. Reforms to ensure the judiciary's independence and a cadre of qualified judicial workers were critically needed and significant work remained to be done to ensure an independent and balanced judicial sector.[1373] Secretary-General reports further noted the absence of the necessary infrastructure such as transport- and communication systems, insufficient qualified judicial personnel, a backlog of court cases, a need for adequate funding and a lack of accountability for sexual violence.[1374]

The situation described by the Secretary-General with regard to Burundi may be interpreted as to affect the independence, effectiveness and capacity of

[preamble, indent 7]; UNSC Res 1969 (24 February 2011) UN Doc S/RES/1969 [preamble, indent 7]; UNSC Res 2037 (23 February 2012) UN Doc S/RES/2037 [preamble, indent 7]. On the effectiveness of the judiciary system, see UNSC Res 1410 (17 May 2002) UN Doc S/RES/1410 [preamble, indent 7]; UNSC Res 1802 (25 February 2008) UN Doc S/RES/1802 [8]; UNSC Res 1867 (26 February 2009) UN Doc S/RES/1867 [11]; UNSC Res 1912 (26 February 2010) UN Doc S/RES/1912 [11]; UNSC Res 1969 (24 February 2011) UN Doc S/RES/1969 [13]; UNSC Res 2037 (23 February 2012) UN Doc S/RES/2037 [12]. On the capacity of the justice sector, see UNSC Res 1704 (25 August 2006) UN Doc S/RES/1704 [4 (f)]; UNSC Res 1802 (25 February 2008) UN Doc S/RES/1802 [7]; UNSC Res 1867 (26 February 2009) UN Doc S/RES/1867 [9; 10]; UNSC Res 1912 (26 February 2010) UN Doc S/RES/1912 [10]; UNSC Res 1969 (24 February 2011) UN Doc S/RES/1969 [12]; UNSC Res 2037 (23 February 2012) UN Doc S/RES/2037 [11].

[1372] UNSC Report of the Secretary-General, 'Report of the Secretary-General on Burundi' (2004) UN Doc S/2004/210 [28]; UNSC Report of the Secretary-General, 'Second report of the Secretary-General on the United Nations Operation in Burundi' (2004) UN Doc S/2004/902 [63].

[1373] SG Report S/2004/210 (n 1372) [79]; SG Report S/2006/429 (n 1053) [41].

[1374] SG Report S/2004/210 (n 1372) [37f]; SG Report S/2004/902 (n 1372) [43]; SG Report S/2006/429 (n 1053) [41].

the judiciary. The majority of Council resolutions on Burundi, however, does not reveal what the 'reform of the judiciary' or the 'strengthening of judicial institutions' should imply. A focus on capacity problems may be read into some resolutions that encourage the international community to respond to requests from the Burundian government to strengthen its national judicial institutions and rule of law capacity, but the texts are not conclusive.[1375] The only resolution which clearly identifies the deficiencies affecting the judiciary, requests BINUB to focus on the consolidation of the rule of law, in particular by strengthening the justice system, including the independence and capacity of the judiciary.[1376] Here, as it rarely does, the Council explicitly identifies two focus areas of the activities it mandates to strengthen the justice system, namely the strengthening of the independence and capacity of the judiciary. Such specifications by the Council when using operational language are normatively desirable from the perspective of a legalisation of Council language if judicial deficits can be described as derogations from rule of law guarantees pertaining to the judiciary.

In Haiti, the Secretary-General observed that the judicial sector lacked institutional capacity and resources and that international assistance was required to enhance the professional capacity of the judiciary.[1377] Problems related to a lack in human and material resources, inadequate case management, an absence of adequate judicial institutions as judicial buildings had been damaged or burned down, threats to the safety of judges and judicial personnel, judges that ceased to report to work due to safety concerns, a general lack in judicial personnel and a lack of accountability as suspects of the Haitian police were released without investigation or trial.[1378] Even though similar reports on

[1375] UNSC Res 1577 (1 December 2004) UN Doc S/RES/1577 [preamble, indent 9]; UNSC Res 1602 (31 May 2005) UN Doc S/RES/1602 [preamble, indent 12].

[1376] UNSC Res 1719 (25 October 2006) UN Doc S/RES/1719 [2 (d)].

[1377] SG Report S/2004/300 (n 1053) [35]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2006) UN Doc S/2006/60 [41]. See also, UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2010) UN Doc S/2010/446 [32]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2013) UN Doc S/2013/139 [67] and UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2014) UN Doc S/2014/617 [33]; SG Report S/2016/225 (n 1094) [23]; SG Report S/2016/753 (n 1072) [25].

[1378] SG Report S/2004/300 (n 1053) [35f]; SG Report S/2006/60 (n 1377) [36]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2006) UN Doc S/2006/592 [22]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization

other country situations were addressed by Council resolutions invoking a need to enhance the capacity of the judiciary, the Council did not establish in any of its resolutions on Haiti that justice reform or the monitoring, restructuring, reforming, modernising and strengthening of the justice sector and the judiciary were directed at the restoration of its capacity.

The Secretary-General also repeatedly reported that the independence of the Haitian judiciary had been compromised, ia when observing a generally excessive dependence of the legal system on the executive branch, which undermined its credibility.[1379] The Ministry of Justice controlled judicial appointments and job tenure, exercised administrative supervision, determined the distribution of human resources and material support and took all budgetary decisions.[1380] Additionally, problems were reported with regard to judicial corruption.[1381] Neither statutory- nor constitutional law guaranteed the independence of the judiciary as it failed to establish the status of judges, the body that appoints them or the mode of management and discipline of the judicial corps.[1382] Concerns also prevailed regarding the appointment and dismissal of judges as the interim President ordered the retirement of Supreme Court judges and immediately nominated their replacements.[1383] Judges of the peace were appointed without following legal requirements and slow progress in the renewal of the terms of judges remained a serious challenge for the efficiency of the judiciary.[1384] It was further explicitly observed that the

Mission in Haiti' (2009) UN Doc S/2009/439 [40]; SG Report S/2010/446 (n 1377) [32]; SG Report S/2016/225 (n 1094) [33; 38]; SG Report S/2016/753 (n 1072) [25; 27; 31; Annex, para 11].

[1379] SG Report S/2004/300 (n 1053) [35]; SG Report S/2006/60 (n 1377) [37; 43]; SG Report S/2006/592 (n 1378) [23]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2006) UN Doc S/2006/1003 [30]; SG Report S/2013/493 (n 1064) [39; 62]; SG Report S/2015/667 (n 1053) [27].

[1380] SG Report S/2006/60 (n 1377) [37].

[1381] ibid; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2007) UN Doc S/2007/503 [2; 47]; SG Report S/2010/446 (n 1377) [69]; SG Report S/2016/753 (n 1072) [62].

[1382] SG Report S/2006/60 (n 1377) [37]; SG Report S/2006/592 (n 1378) [23]. Later reports, however, reported progress in this regard with bills being passed on the status of magistrates, the Superior Council, which oversees their functions, and the school of magistrates. See, SG Report S/2007/503 (n 1381) [5; 41]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2008) UN Doc S/2008/202 [34]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2008) UN Doc S/2008/586 [25].

[1383] SG Report S/2006/60 (n 1377) [37].

[1384] SG Report S/2013/493 (n 1064) [34]; SG Report S/2015/667 (n 1053) [21].

judiciary lacked actual independence from political interference and that the vetting of magistrates and the evaluation of judges stagnated due to the lacking funding of the vetting commission and the pending approval of the evaluation rules by the Superior Council of the Judiciary.[1385]

That the described judicial deficits compromise the independence of the judiciary was sometimes reflected in Council resolutions issued during the reporting period. The Council, eg, urged the government to ensure that an independent judiciary be among its highest priorities, albeit only in the preamble of the concerned resolution and during a time – in 2004 – preceding the period during which reports of circumstances affecting the independence of the Haitian judiciary accumulated.[1386] For the ensuing years, then, the Council did not refer to the guarantee of an independent judiciary even though the Secretary-General often reported about deficiencies in this regard. Only starting in October 2013, deficits with regard to the independence of the judiciary were no longer only reflected in Secretary-General reports but also in Council resolutions as it recognised the steps taken by the Superior Council of the Judiciary to carry out its mandate and promote the strengthening of judicial independence and encouraged the Haitian authorities to implement the justice reform with the aim of ensuring the independence and effectiveness of judicial institutions.[1387] Here again – as in reaction to the situation in Burundi –, one encounters one of the rare occasions where the Council explicitly identifies the goal of justice reform with regard to judicial institutions, ie to ensure their independence and effectiveness. In reaction to most Secretary-General reports emphasising problems with regard to the independence of the judiciary, however, the Council only used operational language that focused on a need to

[1385] A decree establishing the Conseil superieur du povoir judiciaire was widely criticised for leaving the door open for continued government interference. See, SG Report S/2006/592 (n 1378) [23]. Several years later, the Secretary-General reported that the Superior Council of the Judiciary had taken steps to consolidate its authority over the judiciary in an effort to reduce political interference with judicial affairs. See, SG Report S/2013/493 (n 1064) [34]. Subsequent reports, however, criticised that the slow progress in the renewal of the terms of judges remained a serious challenge for the efficiency of the judiciary and highlighted the structural weakness of the system, rooted in the Constitution and in the law on the status of the judges, which could translate into biased appointments and inefficient career-management processes. See, SG Report S/2015/667 (n 1053) [21]. See also, SG Report S/2016/753 (n 1072) [27; Annex, para 11].

[1386] UNSC Res 1542 (30 April 2004) UN Doc S/RES/1542 [preamble, indent 4].

[1387] UNSC Res 2070 (12 October 2012) UN Doc S/RES/2070 [11]; UNSC Res 2119 (10 October 2013) UN Doc S/RES/2119 [preamble, indent 9; 14]; UNSC Res 2180 (14 October 2014) UN Doc S/RES/2180 [preamble, indent 11; 16]; UNSC Res 2243 (14 October 2015) UN Doc S/RES/2243 [preamble, indent 13; 20]; UNSC Res 2313 (13 October 2016) UN Doc S/RES/2313 [22].

reform, strengthen or restructure the judiciary without identifying the concrete judicial qualities that should be advanced by such activities.[1388] As stated before, with a view to a possible trend towards the legalisation of Council action and language, it would be normatively desirable that the Council identified the institutional guarantees that operational measures should advance.

In the Democratic Republic of the Congo, the Secretary-General observed explicitly that the country required significant international support to build the capacity of the justice system and recommended that MONUC would support the government in this regard.[1389] He further reported that provincial authorities lacked effective capacity and that institutions were under-resourced and under-funded and judicial services weak.[1390] The country suffered from a lack of adequate judicial institutions as those foreseen in the constitution such as the Court of Cassation and the Constitutional Court needed yet to be established and as civilian justice mechanisms were in a dilapidated state.[1391] The civilian justice system was marked by a lack of material resources to the extent that it operated on less than 1% of the national budget and was missing a proper administrative system for finance, personnel, case-tracking, budget, procurement and asset management.[1392] Moreover, the judicial system was compromised by an absence of judicial personnel with substantially fewer judges and prosecutors in place than needed and inadequate security arrangements for magistrates.[1393] Additionally, accountability for crimes

[1388] UNSC Res 1658 (14 February 2006) UN Doc S/RES/1658 [preamble, indent 14]; UNSC Res 1702 (15 August 2006) UN Doc S/RES/1702 [preamble, indent 9; 14]; UNSC Res 1743 (15 February 2007) UN Doc S/RES/1743 [preamble, indents 9 & 11]; UNSC Res 1780 (15 October 2007) UN Doc S/RES/1780 [preamble, indent 15]; UNSC Res 1840 (14 October 2008) UN Doc S/RES/1840 [preamble, indents 17 & 18; 17]; UNSC Res 1892 (13 October 2009) UN Doc S/RES/1892 [preamble, indent 14; 15; 26]; UNSC Res 1944 (14 October 2010) UN Doc S/RES/1944 [preamble, indent 17; 9]; UNSC Res 2012 (14 October 2011) UN Doc S/RES/2012 [preamble, indent 23; 8].

[1389] SG Report S/2007/156 (n 941) [37; 53]; SG Report S/2008/433 (n 941) [45]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (2016) UN Doc S/2016/833 [49].

[1390] UNSC Report of the Secretary-General, 'Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes region' (2013) UN Doc S/2013/119 [19].

[1391] UNSC Report of the Secretary-General, 'Thirty-first report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (2010) UN Doc S/2010/164 [49]; SG Report S/2013/119 (n 1390) [5].

[1392] SG Report S/2010/164 (n 1391) [49]; SG Report S/2013/119 (n 1390) [22].

[1393] SG Report S/2010/164 (n 1391) [49]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (2012) UN Doc S/2012/355 [39]; SG Report S/

constituted a problem as justice authorities required UN assistance to investigate and prosecute war crimes, crimes against humanity, sexual and gender-based as well as other serious crimes allegedly committed by rebel groups, the FARDC and the police nationale congolaise.[1394]

In addition to these judicial deficits of a more capacity-related nature, the Secretary-General also reported of judicial corruption, frequent interferences in the justice process by government officials, state institutions that had become co-opted by private interests and the manipulation of justice, in particular in cases involving opposition leaders and civil society representatives.[1395] The described deficiencies affecting the national judiciary in the Democratic Republic of the Congo can clearly be qualified as pertaining to its independence, impartiality, effectiveness or capacity. The Council, however, invoked none of these concepts in its resolutions on the situation in the DRC during the concerned reporting period. To the extent that the Secretary-General reported about problems pertaining to the independence and impartiality of the judiciary, such omissions derogate from a possible trend towards the legalisation of Council language and action.

Reporting on the situation in South Sudan, the Secretary-General noted a weak administration of justice and a lack of capacity in judicial institutions.[1396] The government needed support in developing its military justice system and in building an independent and competent judicial system.[1397] Further problems related to a lack of accountability and arbitrary detentions due to high

2013/119 (n 1390) [22]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (2014) UN Doc S/2014/157 [62]; SG Report S/2016/833 (n 1389) [49].

1394 UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (2015) UN Doc S/2015/172 [52]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region' (2016) UN Doc S/2016/232 [20]; SG Report S/2016/233 (n 853) [44]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (2016) UN Doc S/2016/579 [21; 39; 42]; SG Report S/2016/833 (n 1389) [48].

1395 SG Report S/2010/164 (n 1391) [49]; SG Report S/2013/119 (n 1390) [19; 22]; SG Report S/2016/833 (n 1389) [46].

1396 UNSC Report of the Secretary-General, 'Special report of the Secretary-General on the Sudan' (2011) UN Doc S/2011/314 [32]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on South Sudan' (2011) UN Doc S/2011/678 [60].

1397 SG Report S/2011/314 (n 1396) [32; 41].

caseloads.[1398] The Council resolution responding to these circumstances did not explicitly identify capacity-building of the judiciary as the goal of operational measures but came close to it when holding that UNMISS' mandate should be implemented with a view to strengthening the capacity of the government and developing the government's capacity to establish the rule of law and strengthen the justice sector.[1399] Problems with regard to the independence of the judicial system as reported by the Secretary-General, however, were not reflected in the corresponding resolution.

In Côte d'Ivoire, the Secretary-General reported that most of the judicial infrastructure had been damaged or destroyed and that as a result of the crisis, the judicial system had practically ceased to function, with the judiciary collapsing in the south.[1400] The majority of the southern courts were partially damaged or looted and in the north many redeployed judges and prosecutors had abandoned their posts.[1401] The judiciary suffered from insufficient material and financial resources, inefficient proceedings and inadequate case management.[1402] Additionally, the Secretary-General reported of an absent independence of the judiciary, a politicisation of its personnel and of judicial corruption.[1403] Even though these problems could have been easily subsumed under the concepts, the Council did neither identify the impartiality, independence nor the capacity of the judiciary as goals of the national justice sector strategy, the multi-year joint UN justice support programme or the re-establishment and reinforcement of the judiciary.[1404] With regard to a trend towards the legalisation of Council language and action, the use of operational instead of non-technical language does not constitute a problem. The Council's omission of invocations of a need to enhance the impartiality and independence of the judiciary in reaction to the circumstances prevailing in Côte d'Ivoire, however, clearly derogates from such a trend.

In Sierra Leone, the Secretary-General over a number of years observed a generic weakness of the judicial sector, an absence of (qualified) judicial personnel, inadequate material resources for judicial institutions, precarious security conditions for judicial personnel, a backlog in court cases and a lack of

[1398] SG Report S/2011/314 (n 1396) [32]; SG Report S/2011/678 (n 1396) [62].
[1399] UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996 [3 (c) (i)].
[1400] UNSC Report of the Secretary-General, 'Twenty-eighth report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2011) UN Doc S/2011/387 [24; 31].
[1401] ibid [31].
[1402] ibid.
[1403] ibid.
[1404] UNSC Res 2000 (27 July 2011) UN Doc S/RES/2000 [7 (f); 10].

accountability for sexual and gender-based violence.[1405] A 2007 report emphasised a steady progress in promoting the independence of the judiciary, indicating that problems had existed in this regard.[1406] Council resolutions on the situation in Sierra Leone, however, do not provide a deeper insight as to what exactly the Council might have understood by its assessment that the judiciary needed to be strengthened.[1407] They neither referred to problems with regard to judicial independence, effectiveness or capacity nor to any related guarantee or concept and did, thus, not shed additional light on how the Council concretely classified the judiciary's deficiencies.

On Guinea-Bissau the Secretary-General reported that the state was hardly present outside the capital, state institutions remained weak and the capacity of Guinea-Bissau to ensure minimum access to basic social services in national institutions such as, eg, the judiciary, was insufficient.[1408] Access to justice was undermined by an insufficient and degraded state infrastructure and an inadequate legislative framework.[1409] There was a prevailing culture of impunity as the judiciary was incapable of ensuring accountability for crimes.[1410] Judicial authorities were unable to address violence against women and children as they lacked sufficient material and human resources and the judicial system was marked by an absence of judges and prosecutors.[1411] The measures to support the country were described as capacity development measures such as training in civil- and criminal law for magistrates, judges and

[1405] UNSC Report of the Secretary-General, 'Fifth report of the Secretary-General on the United Nations Mission in Sierra Leone' (2000) UN Doc S/2000/751 [11]; UNSC Report of the Secretary-General, 'Twenty-sixth report of the Secretary-General on the United Nations Mission in Sierra Leone' (2005) UN Doc S/2005/596 [33]; UNSC Report of the Secretary-General, 'Third report of the Secretary-General on the United Nations Integrated Office in Sierra Leone' (2006) UN Doc S/2006/922 [49]; UNSC Report of the Secretary-General, 'Sixth report of the Secretary-General on the United Nations Integrated Office in Sierra Leone' (2008) UN Doc S/2008/281 [42].

[1406] UNSC Report of the Secretary-General, 'Fifth report of the Secretary-General on the United Nations Integrated Office in Sierra Leone' (2007) UN Doc S/2007/704 [24].

[1407] UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315 [preamble, indent 11]; UNSC Res 1734 (22 December 2006) UN Doc S/RES/1734 [7]; UNSC Res 1793 (31 December 2007) UN Doc S/RES/1793 [7]; UNSC Res 1829 (4 August 2008) UN Doc S/RES/1829 [7]; UNSC Res 1886 (15 September 2009) UN Doc S/RES/1886 [6].

[1408] SG Report S/2013/262 (n 1298) [45]; SG Report S/2014/333 (n 1305) [39]; SG Report S/2015/37 (n 1053) [49; 53].

[1409] SG Report S/2013/262 (n 1298) [45].

[1410] ibid [46]; SG Report S/2015/37 (n 1053) [53]; SG Report S/2015/626 (n 1301) [19].

[1411] SG Report S/2015/626 (n 1301) [20]; UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and the activities of the United Nations Integrated Peacebuilding Office in Guinea-Bissau' (2016) UN Doc S/2016/141 [27].

prosecutors and the construction of courts and the National Programme for Justice Reform was, ia, meant to strengthen human and material capacities.[1412]

Additionally, the Secretary-General reported that the actual independence of the judiciary from political interference was not warranted in Guinea-Bissau, that the judiciary was susceptible to corruption and bribery owing to low wages and frequent delays in the payment of salaries, that security measures for judges and prosecutors were inadequate and that judicial actors were exposed to threats.[1413] Reflecting these judicial deficits, training measures of judicial officials were addressed at strengthening their independence and impartiality.[1414]

The problems affecting the judiciary in Guinea-Bissau would have provided ample ground for an invocation of the need to enhance the independence, impartiality, effectiveness or capacity of the judiciary. Council resolutions reacting to Secretary-General reports that included references to problems with regard to the independence, impartiality, effectiveness or capacity of the judiciary, however, did not portray the reform of the justice sector as directed at guaranteeing or restoring any of these rule of law guarantees or judicial virtues. The Council did, however, mandate UNIOGBIS to provide advice and support in developing civilian and military justice systems that are compliant with international standards.[1415] Council resolutions may thus be read to react to Secretary-General reports if one bears in mind that the guarantee of an independent and impartial tribunal may be subsumed under the notion of international standards pertaining to the judiciary.[1416] As discussed above, however, the notion of international standards is relatively vague and does, thus, not provide a precise guideline or contribute significantly to a legalisation of Council language and action.

In the Central-African Republic, UN support measures aimed at the establishment of judicial institutions such as the Special Criminal Court, the deployment of magistrates, judges and prosecutors, the rehabilitation of courts, the training of judicial personnel, the consolidation of the justice sector's governance- and accountability structures and at augmenting local capacity to process criminal cases.[1417] The Secretary-General recommended that the

[1412] SG Report S/2015/37 (n 1053) [20]; SG Report S/2015/626 (n 1301) [47].

[1413] SG Report S/2013/262 (n 1298) [46]; SG Report S/2014/333 (n 1305) [16]; SG Report S/2015/37 (n 1053) [49; 53]; SG Report S/2016/141 (n 1411) [27].

[1414] SG Report S/2015/37 (n 1053) [28; 53].

[1415] UNSC Res 2103 (22 May 2013) UN Doc S/RES/2103 [1 (e)]; UNSC Res 2157 (29 May 2014) UN Doc S/RES/2157 [1 (d)]; UNSC Res 2203 (18 February 2015) UN Doc S/RES/2203 [2 (b)]; UNSC Res 2267 (26 February 2016) UN Doc S/RES/2267 [2 (b)].

[1416] SG Report S/2004/616 (n 439) [n 6f].

[1417] SG Report S/2016/305 (n 950) [43f]; SG Report S/2016/565 (n 944) [24; 39; 47].

country's national courts be strengthened and encouraged the appointment of national magistrates and the provision of financial and technical support to establish the Special Criminal Court and called upon all actors to ensure accountability for crimes committed during the unrest of September 2015.[1418] The judicial system was further described as incapable of ensuring accountability for serious crimes and the judiciary suffered from an absence of judicial personnel with adequate professional training and lacking resources.[1419] Observations regarding the absence of relevant legislation guaranteeing the independence of the judiciary and of threats to magistrates and their families and the Secretary-General's call upon national authorities to implement the reforms necessary to establish an independent judiciary also proved deficiencies with regard to the independence of the judiciary.[1420]

The Council did not identify whether the strengthening of justice institutions or the restoration and administration of the judiciary in the Central African Republic were directed at guaranteeing judicial independence or any other rule of law guarantee or at re-establishing the capacity of the judiciary. Both resolutions which used operational language, however, did also contain references to a need to build the capacities of the national judicial system and the resolution following the Secretary-General report that had emphasised deficits with regard to judicial independence authorised MINUSCA to help CAR authorities reinforce the independence of the judiciary.[1421] The Council, thus, seemed to react to the input provided by the Secretary-General in its resolutions, albeit it did not clearly establish whether the operational measures were directed at restoring the capacity or independence of the judiciary. This, however, may be legitimately inferred.

On Afghanistan the Secretary-General reported that the justice sector lacked the required number of skilled staff and that permanent justice institutions were in need of rehabilitation measures.[1422] Several years later, the situation was marked, ia, by insufficient security conditions for judges and prosecutors as judicial institutions were subjected to violent attacks, corruption among the judiciary and prosecutorial services and a limited presence of justice officials at district levels due to security concerns, poor infrastructure and low salaries.[1423]

[1418] SG Report S/2016/305 (n 950) [44].
[1419] SG Report S/2016/565 (n 944) [24].
[1420] ibid [24; 63].
[1421] UNSC Res 2217 (28 April 2015) UN Doc S/RES/2217 [33 (a) (i)]; UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [35 (a) (i)].
[1422] SG Report A/59/581–S/2004/925 (n 1294) [26f].
[1423] SG Report A/64/705–S/2010/127 (n 1296) [page 17]; SG Report A/66/604–S/2011/772 (n 1295) [38]; SG Report A/67/889–S/2013/350 (n 1296) [19; 27]; SG Report A/68/609-S/2013/535 (n 1296) [35].

The emphasis of judicial deficits in Afghanistan lay, thus, on problems which could have justified Council resolutions invoking the concept of judicial independence or references to the effectiveness or capacity of the judicial system. The Council used operational language only in the preambular parts of its resolutions on Afghanistan. There, it repeatedly emphasised a need to accelerate justice reform and the importance of strengthening judicial institutions, whereas the operative parts of its resolutions focused on the need to establish a fair and transparent judicial system.[1424] It may, thus, be concluded that the emphasis of Council resolutions lay on building a judicial system satisfying the standards of fairness and transparency. As already discussed, the invocation of the concepts of judicial fairness and transparency can be read as a more or less adequate reaction to the concrete problems affecting the national judiciary as described by the Secretary-General. In reaction to the situation in Afghanistan, the Council's reaction may thus be interpreted to not derogate from but rather contribute to a possible trend of legalisation of Council action and language.

3. Analysis

a. Relationship of Council Language to a Trend of Legalisation

A typical characteristic of operational language is its vague and abstract character. It is often difficult to determine what the Council has in mind exactly when requiring, eg, that the judicial system or judiciary be *reorganised, strengthened, reformed, assessed, developed* or *supported*. Often also, Council resolutions identify only abstract goals for which such operational measures should aim. In Somalia, eg, re-establishing the judicial system was geared

[1424] For operational language in the preambular parts of Council resolutions on Afghanistan, see UNSC Res 1589 (24 March 2005) UN Doc S/RES/1589 [preamble, indent 4]; UNSC Res 1943 (13 October 2010) UN Doc S/RES/1943 [preamble, indent 22]; UNSC Res 2011 (12 October 2011) UN Doc S/RES/2011 [preamble, indent 28]; UNSC Res 2069 (9 October 2012) UN Doc S/RES/2069 [preamble, indent 27]; UNSC Res 2120 (10 October 2013) UN Doc S/RES/2120 [preamble, indent 28]. For legalised language in the operative parts of Council resolutions on Afghanistan, see UNSC Res 1536 (26 March 2004) UN Doc S/RES/1536 [10]; UNSC Res 1589 (24 March 2005) UN Doc S/RES/1589 [9]; UNSC Res 1662 (23 March 2006) UN Doc S/RES/1662 [11]; UNSC Res 1746 (23 March 2007) UN Doc S/RES/1746 [13]; UNSC Res 1806 (29 March 2008) UN Doc S/RES/1806 [21]; UNSC Res 1868 (23 March 2009) UN Doc S/RES/1868 [23]; UNSC Res 1917 (22 March 2010) UN Doc S/RES/1917 [30]; UNSC Res 1974 (22 March 2011) UN Doc S/RES/1974 [31]; UNSC Res 2041 (22 March 2012) UN Doc S/RES/2041 [37]; UNSC Res 2096 (19 March 2013) UN Doc S/RES/2096 [38]; UNSC Res 2145 (17 March 2014) UN Doc S/RES/2145 [38]; UNSC Res 2210 (16 March 2015) UN Doc S/RES/2210 [37]; UNSC Res 2274 (15 March 2016) UN Doc S/RES/2274 [46].

towards the *restoration of public order*.[1425] In Haiti, the strengthening of the judicial system was directed at *supporting a more integrated and cohesive Haitian security sector*.[1426] MONUSCO in the DRC was mandated to support efforts of the authorities to strengthen and reform judicial institutions in order to contribute to *stabilisation and peace consolidation*.[1427] In South Sudan, the Council identified justice sector support as a *peacebuilding task* and in Sierra Leone the strengthening of the judiciary was aimed at *promoting good governance*.[1428]

Only rarely does the Council name concrete goals of the measures it expects to be undertaken when using operational language. Whereas the abstract goals couch operational measures in terms of the Council's general mandate to maintain international peace and security, the more concrete goals add some clarity to the question as to what this may entail concretely such as fighting corruption and guaranteeing access to justice in Guinea-Bissau, ensuring accountability for crimes in Timor-Leste, Côte d'Ivoire and Somalia, addressing impunity in the DRC or protecting civilians in Liberia and the DRC.[1429]

[1425] UNSC Res 886 (18 November 1993) UN Doc S/RES/886 [8]; UNSC Res 897 (4 February 1994) UN Doc S/RES/897 [preamble, indent 10] (emphasis added).

[1426] UNSC Res 2012 (14 October 2011) UN Doc S/RES/2012 [preamble, indent 23]; UNSC Res 2070 (12 October 2012) UN Doc S/RES/2070 [preamble, indent 10]; UNSC Res 2119 (10 October 2013) UN Doc S/RES/2119 [preamble, indent 7]; UNSC Res 2180 (14 October 2014) UN Doc S/RES/2180 [preamble, indent 7]; UNSC Res 2243 (14 October 2015) UN Doc S/RES/2243 [preamble, indent 9] (emphasis added).

[1427] UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925 [12 (l)] (emphasis added).

[1428] On South Sudan, see UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996 [18]. On Sierra Leone, see UNSC Res 1734 (22 December 2006) UN Doc S/RES/1734 [7]; UNSC Res 1793 (31 December 2007) UN Doc S/RES/1793 [7]; UNSC Res 1829 (4 August 2008) UN Doc S/RES/1829 [7]; UNSC Res 1886 (15 September 2009) UN Doc S/RES/1886 [6] (emphasis added).

[1429] On Guinea-Bissau, see UNSC Res 2203 (18 February 2015) UN Doc S/RES/2203 [preamble, indent 4; 10]; UNSC Res 2267 (26 February 2016) UN Doc S/RES/2267 [preamble, indent 3; 14]. On Timor-Leste, see UNSC Res 1338 (31 January 2001) UN Doc S/RES/1338 [8]; UNSC Res 1745 (22 February 2007) UN Doc S/RES/1745 [9]. On Côte d'Ivoire see, UNSC Res 2000 (27 July 2011) UN Doc S/RES/2000 [10]. On Somalia, see UNSC Res 2102 (2 May 2013) UN Doc S/RES/2102 [2 (d) (iv)]; UNSC Res 2158 (29 May 2014) UN Doc S/RES/2158 [1 (d) (iv)]. On Liberia, see UNSC Res 2190 (15 December 2014) UN Doc S/RES/2190 [preamble, indent 3]; UNSC Res 2239 (17 September 2015) UN Doc S/RES/2239 [preamble, indent 4]. On the DRC, see UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098 [preamble, indent 24]; UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147 [preamble, indents 27 & 28]; UNSC Res 2211 (26 March 2015) UN Doc S/RES/2211 [16; 29]; UNSC Res 2277 (30 March 2016) UN Doc S/RES/2277 [2].

Another way to ascertain what operational language implies concretely is to have a look at whether the Council identified concrete measures that need to be undertaken in the name of such language. Here also, however, the Council usually paints with a broad brush and omits to explain what precise actions its operational language shall involve if implemented on the ground. UNOSOM II, eg, was mandated to assist in the *reorganisation* of the Somali judicial system without further directions as to what this reorganisation should involve.[1430] UNMIL in Liberia was required to assist the transitional government in developing a strategy to *consolidate* judicial institutions without specifying what consolidation exactly amounts to.[1431] In Timor-Leste, the Council referred to a need to *strengthen* and *support* the justice sector but did not elaborate what this would entail concretely.[1432] Also in Burundi, the Council mandated ONUB to provide advice and assistance to the transitional government to complete the *reform* of the judiciary but did not clarify what exactly this judicial reform should involve.[1433]

Sometimes, however, the Council goes into more detail and provides an insight into what measures it expects to be undertaken when using operational language. In Haiti, eg, reform of the judicial system and of rule of law institutions involved the *provision of experts to serve as professional resources*, the *establishment of and ongoing support to the Superior Council of the Judiciary, nominations for superior judicial institutions*, the *reorganisation and standardisation of court registration processes* and the *management of cases*.[1434] Also in the Central African Republic, the Council was relatively concrete with regard the measures it expected to be undertaken when using operational language. It, eg, called on authorities to take concrete steps to strengthen justice institutions and in this regard to *swiftly implement the law*

[1430] UNSC Res 897 (4 February 1994) UN Doc S/RES/897 [2 (d)] (emphasis added).

[1431] UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509 [3 (q)] (emphasis added).

[1432] UNSC Res 1543 (14 May 2004) UN Doc S/RES/1543 [preamble, indent 8; 3 (i)]; UNSC Res 1745 (22 February 2007) UN Doc S/RES/1745 [9]; UNSC Res 1912 (26 February 2010) UN Doc S/RES/1912 [10]; UNSC Res 1969 (24 February 2011) UN Doc S/RES/1969 [12]; UNSC Res 2037 (23 February 2012) UN Doc S/RES/2037 [11] (emphasis added).

[1433] UNSC Res 1545 (21 May 2004) UN Doc S/RES/1545 [6].

[1434] UNSC Res 1702 (15 August 2006) UN Doc S/RES/1702 [14]; UNSC Res 1840 (14 October 2008) UN Doc S/RES/1840 [17]; UNSC Res 1892 (13 October 2009) UN Doc S/RES/1892 [15]; UNSC Res 1944 (14 October 2010) UN Doc S/RES/1944 [9]; UNSC Res 2012 (14 October 2011) UN Doc S/RES/2012 [8]; UNSC Res 2070 (12 October 2012) UN Doc S/RES/2070 [11]; UNSC Res 2119 (10 October 2013) UN Doc S/RES/2119 [14]; UNSC Res 2180 (14 October 2014) UN Doc S/RES/2180 [16]; UNSC Res 2243 (14 October 2015) UN Doc S/RES/2243 [20]; UNSC Res 2313 (13 October 2016) UN Doc S/RES/2313 [22] (emphasis added).

establishing the Special Criminal Court, to *ensure access to fair and equal justice for all* and to *swiftly operationalize the Special Criminal Court*.[1435] Resolutions that provide concrete input as to the measures the Council expects to be undertaken when reverting to operational language, however, remain the exception. Usually, when trying to determine what measures the Council envisaged when using operational language, one is thus left to the interpretation of supplementary materials such as Secretary-General reports. If the Council does not clearly identify the rule of law guarantee that is affected by judicial deficits and that should be re-established when using operational measures, a detailed description of the measures it expects to be undertaken may also contribute to a crystallisation of its rule of law understanding to the extent that it identifies concretely what it considers necessary to establish or strengthen a national judiciary.

Regarding a possible trend towards the legalisation of Council language, the use of operational language must be qualified as a derogation from such a process if judicial deficits could have also been described and addressed with reference to rule of law guarantees pertaining to the judiciary. In many countries with regard to which the Security Council used operational language to address judicial deficits, the judiciary was affected by problems that related to its effective functioning or capacity. Secretary-General reports focused on deficits in the effective functioning of the judiciary or judicial capacity in countries such as Burundi, the Central African Republic, Côte d'Ivoire, the Democratic Republic of the Congo, Liberia, Sierra Leone, Somalia and South Sudan. Rarely, however, did Council resolutions pick up on this specific input and invoked a need to address a lack in judicial effectiveness or capacity. The Council did so, however, in Timor-Leste where it considered it necessary to enhance the effectiveness of the judiciary system and to build the capacity of the justice sector or in Burundi where it requested BINUB to strengthen the justice system, including the capacity of the judiciary.

If deficits affecting the judiciary or judicial system can only be described in terms of its lacking capacity, the use of operational language does not necessarily derogate from a possible trend in legalisation of Council action and language. It does so only if a lack in judicial capacity could have also been described as affecting rule of law guarantees such as, eg, the effectiveness of the judiciary which can be related to the rights of an effective remedy or expeditious proceedings. It is more problematic with a view to a possible trend of legalisation of Council action if Secretary-General reports contain explicit

[1435] UNSC Res 2217 (28 April 2015) UN Doc S/RES/2217 [11]; UNSC Res 2301 (26 July 2016) UN Doc S/RES/2301 [10].

references to deficits in judicial independence, impartiality, effectiveness, fairness or transparency and the Council only uses operational language. In Sierra Leone, eg, the situation of the judiciary could have easily been interpreted as to affect its independence and effectiveness. The Secretary-General even explicitly referred to problems with regard to the independence of the judiciary. Nonetheless, the Council did neither invoke the concept of judicial independence nor that of judicial effectiveness. In Liberia too, the judiciary was plagued by challenges to its independence for several years but the Council invoked the concept just once and then only in the preambular part of the concerned resolution. In Burundi, the Secretary-General clearly identified problems with regard to the impartiality, independence and effectiveness of the judiciary but the Council invoked a need to strengthen the independence of the judiciary only once. In Haiti, Secretary-General reports contained abundant references to problems with regard to the independence of the judiciary but the Council primarily reverted to operational language. In South Sudan, the Secretary-General reported that the government needed support in building an independent and competent judicial system but the Council did not refer to the principle of judicial independence in its resolutions on the country. Also in the DRC and Côte d'Ivoire, Secretary-General reports contained references to deficits in judicial independence and impartiality but the Council did not invoke these rule of law guarantees.

Of course, there are some counterexamples too, where the Council seemed to react more directly to Secretary-General reports and reverted to legalised language to address judicial deficits. In Afghanistan, eg, the Council used operational language only in the preamble and referred to a need to establish a fair and transparent judicial system in the operative part of its resolutions. Secretary-General reports had contained several references to problems that could be described as affecting the independence of the judiciary. The reference to a need to establish a fair judicial system can be understood as capturing problems in this regard. In Timor-Leste too, the Council did not only use operational language in response to Secretary-General reports of problems with regard to judicial independence and effectiveness but also referred to a need to respect the independence of the judiciary – albeit only in the preamble – and to enhance the effectiveness of the judiciary system. These examples, however, seem to be the exception rather than the rule.

Regarding a possible trend towards the legalisation of Council action, it may thus be summarised that the use of operational language certainly does not contribute to such a process. If the Council uses operational language only in reaction to situations that could not also be addressed with reference to rule of law guarantees pertaining to the judiciary, however, it neither derogates from

such a trend. Only in those cases where Secretary-General reports referred to judicial deficits which could have also been described with reference to rule of law guarantees pertaining to the judiciary, the use of operational language by the Council clearly opposes a trend towards legalisation. As has just been illustrated, this has often been the case.

b. Contribution of Council Language to Norm Emergence

As a consequence of the preceding analysis, operational Council language does neither contribute to the emergence of the rule of law as an international norm in the international society as the Council does not revert to precise language to identify and address judicial deficits that can be related to the rule of law and does not connect its language to identifiable standards whose legitimacy within international society could be scrutinised. The consistency of the Council's reactions can neither be assessed as it uses a wide array of different formulations, which makes it impossible to create meaningful categories based on which the consistency of the use of particular formulations could be determined.

G. Final Analysis

1. Qualitative Analysis

a. Factors Advancing a Trend towards the Legalisation of Council Action and Language

A summary of the above-made observations presents a mixed picture with regard to a possible trend towards the legalisation of Council language. There are a number of factors that may be interpreted to support the existence of such a trend. The strongest case can be made with regard to Council references to the rule of law principle of *judicial independence*. It is the only use of legalised language by the Council, where a comparative analysis of preceding Secretary-General reports allows for the construction of a possible Council understanding of its content and meaning. Most relevant for a possible trend towards legalisation, the Council seems to invoke the principle of judicial independence in reaction to circumstances that are considered encroachments on the guarantee of an independent tribunal by the UN Human Rights Committee, the UN Special Rapporteur on the Independence of Judges and Lawyers and several regional human rights bodies. This suggests a process of legalisation on two levels. First, on a linguistic level, as the Council uses precise terms that expressly invoke a rule of law guarantee whose content enjoys a relatively established meaning in regional and international human rights law, ie the

guarantee of an independent tribunal. And second, on a level of application, as the Council seems to invoke the principle in reaction to circumstances that are considered encroachments on the guarantee of an independent tribunal by international and regional human rights bodies.

The Council used legalised language also in Afghanistan when mandating UNAMA to support the establishment of a *fair and transparent judicial system* in order to strengthen the rule of law and later using the same language when addressing Afghan state institutions. Here, in contrast to Council invocations of the principle of judicial independence, however, an analysis of Secretary-General reports preceding the relevant Council resolutions does not allow for a clear interpretation as to what the Council understands concretely by the concepts of judicial fairness and transparency. When assessing a possible trend towards the legalisation of Council language, it must be noted that the problems affecting the Afghan judicial system could have also been described as judicial capacity deficits. The Council, however, chose to use terms that can be related to rule of law guarantees pertaining to the judiciary as guaranteed by regional and international human rights law – ie fair trial rights and the right to a public hearing and judgment – even if the Council's concrete understanding of the terms cannot be discerned. This factor may be qualified as to contribute to a trend towards the legalisation of Council language. If compared with Council references to the principle of judicial independence – which seem to suggest that the Council engages in a trend of legalisation on a level of language and interpretation –, references to the fairness and transparency of the judicial system, however, seem to contribute only to the first level.

Also resonating with rule of law guarantees are Council references to the *effectiveness of the judiciary.* What exactly the Council understands by the concept of judicial effectiveness, however, is difficult to discern based on a comparative analysis of its resolutions with Secretary-General reports. In Timor-Leste and the Central African Republic, the judicial system was affected by problems that could have also been described as affecting the capacity or the independence of the judiciary. In both situations, the Council also used the two concepts in the same resolutions that invoked the principle of judicial effectiveness. Accordingly, a clear distinction between the Council's understanding of judicial effectiveness and its understanding of the other two concepts in these two cases is basically impossible. On a level of application, thus, the Council's references to judicial effectiveness do not contribute to a possible trend in legalisation. On a linguistic level, however, Council references to judicial effectiveness – which may be considered to resonate with rule of law guarantees such as the right to expeditious hearings or an effective remedy – further such a trend.

The vaguest reference – which may still be considered to contribute to a possible shift towards a legalisation of Council language – was used in response to the situation in Guinea-Bissau, where the Council mandated UNIOGBIS to develop civilian and military justice systems that are *compliant with international standards*. The contribution of this formulation to a legalisation of Council language must be qualified as relatively modest to the extent that the situation in Guinea-Bissau could have also triggered Council references to the clearly defined rule of law guarantees of an independent or impartial judiciary. Such precise references would have contributed to a clarification of what judicial qualities the Council considered affected concretely in Guinea-Bissau.

The Council also used legalised language when calling on the government of Côte d'Ivoire to ensure that the work of the Ivorian judicial system be *impartial, transparent and consistent with internationally agreed standards* as such language can be considered to resonate with the right to an impartial tribunal or the right to a public hearing and judgment. As illustrated above, however, a comparative analysis of Secretary-General reports preceding resolutions invoking the concepts of impartiality, transparency and international standards, does not reveal a discrete understanding of the different terms by the Council. Accordingly, the use of the terms contributes only to legalisation on a linguistic level but not on a level of application as it cannot be assessed whether the Council invoked the concepts in reaction to circumstances that are considered encroachments on the related rule of law guarantees by regional and international human rights bodies.

b. Factors Opposing a Trend towards the Legalisation of Council Action and Language

As discussed in the course of this chapter, there are also a number of factors that speak against a trend towards the legalisation of Council language and action. First, it must be noted that the Council regularly did not refer to the principle of judicial independence or other established rule of law guarantees even though the Secretary-General clearly reported about problems affecting these guarantees.

Second, the use of non-technical terms such as *judicial capacity* and *judicial authority* or the use of operational language neither contribute to a legalisation of Council language. Particularly not in those cases, where Secretary-General reports described circumstances that affected, eg, the independence of the judiciary, its impartiality or another judicial quality that could be identified with reference to established rule of law guarantees.

Several situations in response to which the Council referred to the authority of the judiciary or used operational language, could have also justified invocations of concrete rule of law guarantees based on the input provided by the Secretary-General. Only in situations to which the Council reacted by invoking a need to strengthen judicial capacity, the national judiciaries were indeed primarily affected by capacity-related deficits and the use of non-technical language did not contravene a possible trend towards the legalisation of Council language.

Regarding the two levels of legalisation discussed above, non-technical and operational language does not contribute to the crystallisation of a rule of law understanding of the Council. Such language does not invoke or resonate with rule of law guarantees as established in regional and international human rights law and its use can thus not be related to their interpretation by competent regional and international human rights bodies. Further, the use of non-technical and operational language sometimes even derogates from a trend towards the legalisation of Council language if used in reaction to situations that could have been addressed with reference to particular rule of law guarantees pertaining to the judiciary. Consequently, the use of non-technical and operational language does also not contribute to the dissemination of a Council rule of law understanding in the international society as it does not contribute to a meaningful process of ideation that could result in the emergence of the rule of law as an international norm that redefines state identities and interests.

On an operational level, however, it might not matter much whether the Council uses language that resonates with established rule of law guarantees or whether it reverts to non-technical or operational language. Implementing actors such as UNDPKO, UNDPA or OHCHR may engage in very similar programming or measures regardless of the concrete language used by the Council as the UN bureaucracy also reverts to internal standards or guidance notes to flesh out its programmes based on Council mandates.[1436] Secretary-General reports sometimes explicitly mention measures undertaken to, eg, enhance judicial independence even though the Council did not refer to the

[1436] See, eg, the various OHCHR rule-of-law tools for post-conflict states issued between 2006 and 2015 on archives, amnesties, national consultations on transitional justice, the monitoring of legal systems, truth commissions, the mapping of justice sectors, prosecution initiatives, vetting, reparations programmes, maximising the legacy of hybrid courts. ‹http://www.ohchr.org/EN/PublicationsResources/Pages/MethodologicalMaterials3.aspx› accessed 14 July 2017. Or, eg, UNDPKO, Handbook Multidimensional Peacekeeping Operations (n 899); SG Guidance Note UN Rule of Law Assistance (n 1044); UNDPKO, Handbook Judicial Affairs Officers (n 440).

guarantee. In Côte d'Ivoire, eg, the Secretary-General reported that UNOCI's rule of law unit met with the local judiciary to develop measures to strengthen the independence of the judiciary and to address problems of corruption.[1437] The related Council resolution, however, only mandated UNOCI to assist the government in re-establishing the authority of the judiciary.[1438] In the DRC, the Secretary-General reported that MONUC facilitated efforts to conduct an inventory of human and material resources in courts in order to increase the capacity *and* independence of the judiciary, including through the recruitment and deployment of magistrates.[1439] MONUC's mandate during this time, however, was only geared towards advising the government in strengthening the capacity of the judicial system.[1440] In this sense, the instructions of the *UNDPKO Handbook for Judicial Affairs Officers* for peacekeeping missions supporting the judiciary, eg, explicitly focus on the promotion of the independence of the judiciary and provide several concrete instructions how to achieve and maintain judicial independence.[1441]

From this perspective, non-technical or operational language also forms part of the rule of law work of the Council to the extent that it initiates reform of national judiciaries on the ground. As such, it aspires to contribute to the strengthening of the national rule of law. It, thus, needs to be counted as part of the Council's rule of law dissemination work even though it does not contribute to the evolution of a Council rule of law understanding, which could affect the emergence of a global concept of the rule of law in the international society by means of Council resolutions.

[1437] SG Report S/2005/398 (n 995) [40].

[1438] UNSC Res 1609 (24 June 2005) UN Doc S/RES/1609 [2 (x)].

[1439] SG Report S/2008/433 (n 941) [45].

[1440] UNSC Res 1756 (15 May 2007) UN Doc S/RES/1756 [2 (q)]; UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856 [4 (g)].

[1441] UNDPKO, Handbook Judicial Affairs Officers (n 440) 58 (the Handbook observes that peacekeeping missions that provide assistance to the judiciary may be called on to highlight any improper pressure on judges, prosecutors and courts; advise on the appointment and selection of judges, judicial tenure and judicial discipline; monitor the judicial process, including observing trials; collect, analyse and disseminate criminal justice data; strengthen court administration and case management; develop ongoing training programmes (both on- and off-the-job training); mentor and advise judges, prosecutors and lawyers; improve the quality of justice and access to justice through reform of criminal law, policy and practice and provide personnel for positions where local capacity is lacking).

c. *Contribution of Council Language to the Emergence of the Rule of Law as an International Norm*

Closely related to the question whether a legalisation of Council language and action can be observed and whether the Council has developed an understanding of the rule of law or certain of its sub-guarantees, is the question whether the Council may contribute to the evolution of a global understanding of the rule of law and its emergence as an international norm.

The Council may contribute to such a global understanding based on its authority to issue binding decisions against UN member states that reform their rule of law systems and thus change their internal governance structure and thereby possibly also their rule of law understanding. According to a social-constructivist approach, the Council may further affect the emergence of the rule of law as an international norm independently of the use of its enforcement powers by way of initiating and contributing to a process of ideation on the principle's meaning within the international society. A social-constructivist analysis considers international organisations and their organs as independent agents, who can provide organisational platforms for the creation and diffusion of common meanings and ideas and thus contribute to the emergence of norms that redefine state identities and interests.

It has been proposed that the Council can figure as a norm entrepreneur and contribute to the emergence of the rule of law as an international norm under particular circumstances. Accordingly, it is considered most likely that the Council contributes to the emergence of a global understanding of the rule of law if it uses precise language in connection with the rule of law, if it invokes this language consistently in reaction to similar circumstances and if the standards it relates to the rule of law are perceived legitimate in the international society. This proposition assumes that vague and inconsistent references to the rule of law or its sub-guarantees are unlikely to initiate a potent and contoured process of ideation in the international society as regards the meaning of the rule of law. It further assumes that borrowing rule of law guarantees from regional and international human rights law with regard to the language used and the circumstances of their invocation, vests them with procedural legitimacy as they constitute standards in whose elaboration a large number of affected states were involved or to which they subsequently acceded. Borrowing the language and interpretation of rule of law guarantees from regional and international human rights law further contributes to their substantive legitimacy as they come closest to universal standards.

The requirements proposed for the Council to contribute to the emergence of a global rule of law understanding are satisfied to a large extent in those cases in which Council language and action with regard to certain rule of law sub-

guarantees can be described as legalised. The norm emergence requirement of precision of language can be considered satisfied in those cases in which the Council uses terms that expressly invoke or resonate with rule of law guarantees whose content enjoys a relatively established meaning in regional and international human rights law. The norm emergence requirement of consistent invocation can be considered satisfied if the Council invokes particular rule of law guarantees in reaction to circumstances that are considered encroachments upon these guarantees by regional and international human rights bodies. Borrowing rule of law language and the conditions of its invocation from regional and international human rights law further satisfies the norm emergence requirement of procedural and substantive legitimacy.

To the extent that the criteria of norm emergence largely coincide with the criteria of legalisation of Council language and action, the Council is most likely to affect the evolution of a global understanding of the rule of law guarantee of judicial independence. To a certain extent, the criteria were also fulfilled with regard to Council invocations of an effective, fair, transparent and impartial judicial system with regard to the criterion of precision of language as these concepts resonate with rule of law guarantees whose content enjoys a relatively established meaning in regional and international human rights law. As has been illustrated above, however, the consistency of Council invocations of such concepts cannot be assessed adequately as the Council did not clearly connect them to particular judicial deficits as reported by the Secretary-General. Their procedural and substantive legitimacy can be affirmed to the extent that they invoke more or less universally recognised human rights guarantees. As it cannot be determined whether the Council invokes such concepts in reaction to circumstances that are considered encroachments upon the relatable human rights guarantees, however, it cannot be concluded that it actually implements such standards.

The requirements of norm emergence proposed here are, thus, best fulfilled by Council invocations of the concept of the independence of the judiciary.

2. Quantitative Analysis

If one takes the position that the use of language by international organisations can shape and disseminate ideas in international society or reflect such processes, a quantitative analysis seems to be a necessary corollary to a qualitative analysis as it must be assumed that often and repeatedly expressed ideas are more influential than ideas that are only rarely invoked. The present thesis, thus, presents the quantitative results based on the resolutions it has examined.[1442]

[1442] While the thesis has tried to work with all relevant resolutions that were issued on the respective subjects, the selection of resolutions and Council paragraphs has relied on the

The Council referred to the principle of judicial independence in a total of 35 resolutions, 38 paragraphs and in reaction to 12 country situations.[1443] 11 of the 37 paragraphs invoking the term were of a binding nature, 14 non-binding but in the operative part of the concerned resolutions and 13 in the preambular part. These numbers are remarkable if compared to the use of non-technical terms in Council resolutions. For example, the Council invoked the concept of judicial authority in only five resolutions and only in reaction to the situation in Côte d'Ivoire. All references, however, were of a binding nature. The concept of judicial capacity was referred to in 26 Council resolutions and 43 paragraphs, reacting to only five country situations.[1444] Eight of the 26 paragraphs were binding, 16 non-binding but in the operative part of the said resolutions and 11 in the preambular part.

Only the use of operational language may compare with the frequency and legal effects of references to the principle of judicial independence. In 70 resolutions, 102 paragraphs and with regard to 13 country situations did the Council use operational language to address judicial deficits.[1445] 19 of the said paragraphs were of a binding character, 32 non-binding but included in the operative part of the concerned resolutions and 51 in the preambular part.

In comparison, of course, this clearly shows that the Council most frequently used operational language in its resolutions, which does not contribute to the legalisation of Council language and action. However, half of the uses of operational language occurred in the preambular part of resolutions and only 19 in binding paragraphs.

If looking at a wider trend towards the legalisation of Council language, one also needs to illustrate the use of the other concepts referred to by the Council that are qualified here as legalised language. The Council, eg, invoked the need for judicial institutions compliant with international standards in six resolutions, six binding paragraphs and in reaction to one country situation, ie Guinea-Bissau. It used the reference to an impartial, transparent and fair judicial

results of the online UN Official Document System's full-text search programme as well as on a qualitative reading of Council resolutions containing explicit references to the rule of law. A certain degree of inaccuracy is thus possible and the presented figures must be understood as plausible approximations that are as accurate as possible.

1443 Guinea-Bissau, Sudan & South Sudan, Somalia, Sierra Leone, Burundi, Eastern Chad, Libya, Democratic Republic of the Congo, Central African Republic, Haiti, Liberia and Timor-Leste.

1444 Timor-Leste, Democratic Republic of the Congo, Central African Republic, Liberia and Somalia.

1445 Somalia, Liberia, Timor-Leste, Burundi, Haiti, Democratic Republic of the Congo, South Sudan, Côte d'Ivoire, Sierra Leone, Guinea-Bissau, Central African Republic, Afghanistan and Liberia.

system, consistent with internationally agreed standards in 18 resolutions and 18 paragraphs, two of which were binding and 16 non-binding but in the operative part of the concerned resolutions and in reaction to two country situations. The concept of an effective judiciary was invoked in 16 resolutions (including one thematic resolution) and 16 paragraphs, six of which were binding, five non-binding but included in the operative part of the said resolutions and five in the preambular parts.

If one compares the total of all paragraphs using legalised language with the total of paragraphs using non-technical and operational language, the result is the following: The Council used legalised language in 25 binding paragraphs, 35 non-binding but operative paragraphs and 17 preambular paragraphs. Non-technical language was used in 13 binding, 20 non-binding but operative and 15 preambular paragraphs. As already stated, operational language was used in 19 binding, 32 non-binding but operative and 51 preambular paragraphs. Overall, the use of non-technical and operational language with regard to the judiciary, thus, prevails but the numbers also illustrate a clear Council commitment to the use of legalised language based on a simple quantitative assessment and to the extent that such language was often included in binding or non-binding but operative paragraphs.

An overall assessment, thus, reveals several factors speaking against a trend towards the legalisation of Council language and action while a non-negligible number of observations can also be invoked to support such a trend. From a normative perspective, it seems desirable that the Council follows and substantiates this trend if its observations, recommendations and decisions can be framed with reference to established rule of law guarantees as contained in regional and international (human rights) law. This would underline a Council commitment to the Secretary-General's observation that the UN Charter, international human rights-, humanitarian-, criminal- and refugee law form the normative foundation of UN work in advancing the rule of law.[1446] To the extent that these norms and standards are universally applicable, basing Council decisions, recommendations and observations on them provides the latter with a high degree of legitimacy not least because it respects the principle of state sovereignty.[1447] If the Council issues measures with regard to rule of law guarantees pertaining to the judiciary which are guaranteed in international or regional (human rights) law, its action is thus also legitimised by the fact that it invokes guarantees to whose legal bindingness the affected states already expressed their consent.

[1446] SG Report S/2004/616 (n 439) [9].
[1447] art 2 (1) UN.

Additionally, Council decisions, recommendations and observations regarding national judiciaries may also contribute to the enforcement of human rights if they aim at initiating or supporting the implementation of human rights obligations of the concerned states. Of all possible rule of law areas in which the Council may be active, reforming national judiciaries may further be considered particularly relevant for the protection of human rights if one assumes a connection 'between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights'.[1448]

[1448] UNComHR, Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, Res 1994/41 (4 March 1994) UN Doc E/CN. 4/RES/1994/41 [preamble, indent 7].

Part 4 – Evaluation

The present thesis responds to the phenomenon that the UN Security Council has prominently invoked the rule of law in its resolutions for more than two decades. Legal scholarship has taken note of the Council's engagement with the rule of law and addressed the question as to whether the Council has developed an understanding of the principle's content and meaning. The overall conclusion has been that the Council's rule of law understanding is inconclusive and legal scholars largely left it at identifying the various contexts in which the Council invoked the principle. No study, however, has yet attempted to provide a detailed analysis of the language used by the Council in connection with the rule of law or a comparative examination of the circumstances that have triggered the Council's use of particular rule of law vocabulary. Such an analysis, however, is indispensable to determine whether the Council has developed or develops an understanding of the rule of law or its sub-guarantees and whether its rule of law language may affect the emergence of a global understanding of the rule of law in the international society.

The present thesis has thus inquired whether references to the rule of law in Council documents may indicate an already existing consensus on the principle's content among the wider UN membership and thus basically the majority of states. An analysis of the UN organ's composition and the concrete chances of non-permanent members and non-Council members to affect its deliberations and the content of its decisions, however, does not suggest that references to the rule of law in Council documents reflect an already existing international consensus as to the meaning of the rule of law. Since the Council is hardly representative enough for a convincing claim that concepts used in its documents reflect an international consensus, the thesis then focused on the question whether Council resolutions reflect the Council's understanding of the meaning of the rule of law, ie of its function and content. As the scope of the thesis did not allow for a comprehensive analysis of the Council's engagement with the rule of law, it focused on an analysis of the circumstances and purposes that have triggered rule of law references in Council resolutions and on a particular sub-set of the Council's rule of law vocabulary, ie rule of law requirements for national judiciaries.

The thesis claims the existence of indicators of a possible trend towards the crystallisation of a Council rule of law understanding and describes this trend as a legalisation of Council language and action. Legalised Council language uses

terms that resonate with or expressly invoke a rule of law guarantee whose content enjoys a relatively established meaning in regional and international (human rights) law. The Council's actions are described as legalised if the Council invokes such rule of law guarantees in reaction to circumstances that are considered encroachments upon them in the jurisprudence of regional or international human rights bodies. The legalisation of Council language and action can be observed with regard to the rule of law guarantee of judicial independence. Council language referring to the principle of an independent judiciary expressly invokes the human rights guarantee of an independent tribunal as guaranteed in the ICCPR and various regional human rights treaties. Additionally, the Council has invoked the rule of law principle in reaction to circumstances that are considered encroachments upon the guarantee of an independent tribunal by the UN Human Rights Committee, the UN Special Rapporteur on the Independence of Judges and Lawyers and by various regional human rights bodies. With regard to the rule of law guarantee of an independent tribunal, a legalisation of Council language and action can thus be confirmed.

A legalisation of Council language can further be observed with regard to resolutions that invoke a need to enhance, strengthen or ensure the effectiveness of the judiciary or judicial institutions. The language used by the Council can be considered to resonate with the human rights to expeditious proceedings and an effective remedy. The Council's invocation of the concept, however, cannot be considered to contribute to a trend of legalisation on a level of application as a comparative reading of Secretary-General reports and Council resolutions does not result in a clear determination of the Council's understanding of the concept of judicial effectiveness. It is thus impossible to determine whether the Council invoked the concept in reaction to circumstances that are considered encroachments upon the rights to expeditious hearings and an effective remedy by regional and international human rights bodies.

The same applies more or less to Council references to the impartiality, fairness, transparency and compliance with internationally agreed standards of judicial systems. Here again, a legalisation of Council language can be observed to the extent that such references can be related to the right to an impartial tribunal, fair trial rights or the right to a public hearing and judgment. As the Council has always invoked these terms collectively, however, it is impossible to discern its discrete understanding of the different concepts. It can thus only be assumed which terms the Council uses in response to which particular judicial deficits as reported by the Secretary-General. Accordingly, the construction of a tentative Council understanding of the concepts used

becomes rather hypothetical and it is impossible to conclusively assess whether the Council invoked these concepts in reaction to circumstances that are considered encroachments upon relatable rule of law guarantees in the jurisprudence of regional or international human rights bodies.

Overall, the thesis thus concludes that there is evidence of a legalisation of Council language and action which contributes to a crystallisation of the Council's rule of law understanding but that this trend is not sufficiently entrenched at the present time to amount to a clear tendency of legalisation of Council language and action in the context of the rule of law.

The thesis further assessed whether Council language on rule of law requirements for national judiciaries fulfils certain criteria that may affect the emergence of the rule of law as an international norm that redefines state identities and interests. The requirements proposed for the Council to affect the emergence of a global understanding of the content of the rule of law or its sub-guarantees included the precision of its language, the consistency of its reactions and the legitimacy of the standards it relates to the rule of law. To the extent that the criteria of norm emergence largely coincide with the criteria of legalisation of Council language and action, it was proposed that the Council is most likely to affect the evolution of a global understanding of the rule of law guarantee of judicial independence.

Whether a process of legalisation and norm emergence can be observed with regard to other rule of law guarantees as found in Council documents such as, eg, the right to due process or the principle of separation of powers, merits future research that analyses the situations in reaction to which the Council invoked these rule of law guarantees and an examination of the question whether it responded to circumstances that are considered encroachments upon these guarantees in regional or international (human rights) law.[1449]

A critical reading of the Council's engagement with the rule of law may submit that it is a symptom of an only thin or even crumbling consensus within the Council regarding its role in the promotion of human rights.[1450] If the Council's rule of law agenda would indeed develop at the cost of its human rights agenda and not only serve its disguise, then the criticism may be levelled

[1449] Such a comparative analysis will be easier with regard to rule of law guarantees that are protected by clearly identifiable human rights guarantees and be more challenging regarding rule of law guarantees that are only partially protected by regional or international human rights law or only as an aggregate of various different guarantees.

[1450] Cross-Cutting Report on the Rule of Law (n 3) 14 ('Incorporating the rule of law into its vocabulary has allowed for the Council to promote the protection of human rights without labelling its actions as such, thus avoiding tensions and criticism by those who view the link between international peace and security and human rights as tenuous.').

that the rule of law constitutes 'a convenient substitute for human rights' to the extent that it is less transformative with regard to social change and more amenable to the introduction of instrumental goals and purposes by promoting actors.[1451] Against this argument, however, it must be advanced that the institutionalisation of the rule of law may precisely serve the promotion of human rights to the extent that human rights require a functioning institutional framework for their enforcement.[1452] Further, as has been illustrated, several human rights guarantees coincide with sub-elements of the rule of law.

Another strand of criticism relates to the argument that the rule of law serves powerful states sitting on the Council as a tool to engage in the imposition of domestic institutions in an attempt to dominate states of strategic interest.[1453] This assessment may be substantiated by the fact that the Council has developed its rule of law understanding primarily externally with regard to other states but did not attribute it equal importance internally with regard to its own actions as exemplified in the fields of targeted sanctions or its decision-making procedures.[1454] Regardless of the possible motives behind the Council's engagement with the rule of law, it is obviously desirable from a normative perspective that the Council considers itself bound by rule of law principles if it aspires to figure as a norm entrepreneur in international society regarding the function and content of the rule of law.[1455] This normative position is also underpinned by the familiar 'real-political' argument that the Council's effectiveness hinges on its legitimacy.[1456]

[1451] Rajagopal (n 13) 1359 ('Unlike human rights, the rule of law does not promise the achievement of any substantive social, political, or cultural goal. It is much more empty of content and capable of being interpreted in many diverse, sometimes contradictory, ways.'). For a discussion of the evolution of the status of human rights in Council resolutions in the context of UN peace operations see, eg, Månsson (n 11) 79-107.

[1452] Woodward (n 707) 54 f.

[1453] John Owen, 'The Foreign Imposition of Domestic Institutions' (2002) 56 *IO* 375 (who claims that 'forcible promotion [of domestic institutions] is most likely when great powers (1) need to expand their power; and (2) find that, by imposing on smaller states those institutions most likely to keep their ideological confreres in power, they can bring those states under their influence.›); Hurd, 'The International Rule of Law' (n 18) 39 (who finds that 'rather than being a universal institution that expresses the shared interests and goals of states, the international rule of law provides political resources with which states and other actors legitimize and delegitimize contending policies'). The same claim was traditionally advanced against the promotion of human rights. See, eg, Upendra Baxi, *The Future of Human Rights* (3rd edn, OUP 2008) 203 f.

[1454] Farrall, *United Nations Sanctions* (n 16) 22; Elgebeily (n 16).

[1455] For a similar argument with regard to the EU Rule of Law Mission in Kosovo, see Altwicker and Wieczorek (n 413) 115–133.

[1456] See, eg, Bianchi (n 462) 881–919; Frederking (n 7) 39; Christine Gray, 'The Security Council and the Rule of Law: An Overview' (2009) 103 *ASIL Proceedings* 245, 247;

It may well be that the Council's engagement with the rule of law serves concealed policy interests given that 'in public settings impartial arguments and appeals to collective interest fare better than self-serving arguments'.[1457] The rule of law may well figure as such an impartial argument and provide a convenient entry point for powerful Council members to advance their geopolitical goals in foreign states. A social-constructivist account that emphasises the relevance of norms for the explanation of state behaviour does not preclude such a reading. Finnemore and Sikkink invoke the concept of 'strategic social construction' to describe how instrumental rationality and norm relevance may coincide.[1458] They propose that norm entrepreneurs 'are making detailed means-ends calculations to maximize their utilities, but the utilities they want to maximize involve changing the other players' utility function in ways that reflect the normative commitments of the norm entrepreneur'.

However, so-called impartial arguments that are used to advance hidden strategic goals still carry the potential 'civilizing force of hypocrisy' and accordingly may 'lead to concessions to the general interest and more equitable outcomes'.[1459] The Council's strategic engagement with the rule of law may thus still cater more to the interests of the wider international society as any of its actions explicitly undertaken in the interest of some Council members only. Further, even if the Council employs the rule of law strategically to disguise its true policy interests, this does not speak against the assumption that its – maybe strategic – use could contribute to the emergence of a global understanding of the rule of law and that this might be a normatively desirable international development if it indeed stabilises fragile states and contributes to the guarantee of higher living standards for individuals inhabiting such states. In any case, Council references to rule of law guarantees enjoy an enhanced procedural and substantive legitimacy if informed by regional and international human rights law with regard to states but also the individuals living in them – even if undertaken for strategic reasons. Regardless of the possible motivation of the Council when invoking the rule of law, it is thus normatively desirable that it bases its rule of law understanding on existing regional or international (human rights) law to compensate for the lack of inclusion of affected states in

Asada (n 669) 332; Clemens Feinäugle, 'Theoretical Approaches to the Rule of Law and Its Application to the United Nations' in Clemens Feinäugle (ed), *The Rule of Law and its Application to the United Nations* (Nomos 2016) 29, 43.

[1457] Johnstone, 'Security Council Deliberations' (n 24) 454 (referring to Jon Elster, 'The Strategic Uses of Argument' in Kenneth Arrow and others (eds), *Barriers to Conflict Resolution* (Norton 1995) 236–257).

[1458] Finnemore and Sikkink (n 24) 910.

[1459] Johnstone, 'Security Council Deliberations' (n 24) 454 (again invoking Elster (n 1457)).

the elaboration of the applied rule of law standards and to ensure that they come as close as possible to representing universal values.[1460] Additionally, such an approach would be in line with the United Nations purpose to promote and encourage respect for human rights and fundamental freedoms according to art 1 (3) and art 55 (c) UN Charter.

[1460] For a related proposal, see Hestermeyer (n 410) 131–147.

Abbreviations

ACHR	American Convention on Human Rights (Pact of San José, Costa Rica) (adopted 22 November 1969, entered into force 18 July 1978)
ACHPR	African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986)
AComHPR	African Commission on Human and Peoples' Rights
Adel. L. Rev.	Adelaide Law Review
Afr. Hum. Rts. L.J.	African Human Rights Law Journal
AJIL	American Journal of International Law
AMISOM	African Union Mission in Somalia
Am. J.Comp. L.	The American Journal of Comparative Law
Am. Polit. Sci. Rev.	American Political Science Review
ao	and others
App	No Application number
Arch. Rechts-Sozialphilos.	Archiv für Rechts- und Sozialphilosophie
art	article
arts	articles
ASIL	American Society of International Law
AU	African Union
BGE	Bundesgerichtsentscheid des Schweizer Bundesgerichts
BINUB	United Nations Integrated Office in Burundi
BINUCA	United Nations Integrated Peacebuilding Office in the Central African Republic
B.U. L. Rev.	Boston University Law Review
CAR	Central African Republic
CCP	Chinese Communist Party
cf	confer
CFC	Federal Court of Canada
Chinese J. Int'l L.	Chinese Journal of International Law
ch	chapter
CJEU	Court of Justice of the European Union, including the ECJ, the EGC and the specialised Civil Service Tribunal
cl	clause
CoE	Council of Europe
Colum. L. Rev.	Columbia Law Review

Com No	Communication Number
CTED	Counter-Terrorism Committee Executive Directorate
DARIO	Draft Articles on the Responsibility of International Organizations adopted by the UN International Law Commission in its report of the 63rd session (26 April – 3 June and 4 July – 12 August 2011), UN GAOR 66th session supplement (no 10) UN Doc A/66/10 (2011) ch V
DFS	Department of Field Support
DRC	Democratic Republic of the Congo
Duke L.J.	Duke Law Journal
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered in to force 3 September 1953; European Convention on Human Rights, as amended)
ECOSOC	United Nations Economic and Social Council
ECR	European Court Reports
ECtHR	European Court of Human Rights
edn	edition
eg	exempli gratia (for example)
EGC	General Court of the European Union
EJIL	European Journal of International Law
ELJ	European Law Journal
Emory L.J.	Emory Law Journal
Erasmus L. Rev.	Erasmus Law Review
EU	European Union
Eur. J. Int. Rel.	European Journal of International Relations
et al	et alii (and others)
etc	et cetera
EWHC (Admin)	High Court (Administrative Court) of the United Kingdom
f	and following (next page)
FARDC	Forces Armées de la République Démocratique du Congo
ff	and following (next pages)
Fordham Int'l L.J.	Fordham International Law Journal
Foreign Aff.	Foreign Affairs
Ga. L. Rev	Georgia Law Review
Geo. Wash.L. Rev.	The George Washington Law Review
German Y.B. Int'l L.	German Yearbook of International Law
Harv. Hum Rts. J.	Harvard Human Rights Journal
HJRL	Hague Journal on the Rule of Law

ia	inter alia
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ie	that is
ILC	International Law Commission
IMO	International Maritime Organization
impr	impression
Int'l Aff.	International Affairs
Int'l & Comp. L.Q.	International and Comparative Law Quarterly
Int'l J.	International Journal
Int'l Org. L. Rev.	International Organizations Law Review
In'l Pol.	International Politics
Int. Security	International Security (Journal)
IO	International Organization
Irish Y.B. Int'l L.	The Irish Yearbook of International Law
J. Conflict & Sec. L.	Journal of Conflict & Security Law
J. Eur. Pub. Pol'y	Journal of European Public Policy
LJIL	Leiden Journal of International Law
Max Planck Y.B. U.N. L.	Max Planck Yearbook of United Nations Law
Mich.L. Rev.	Michigan Law Review
MINUJUSTH	United Nations Mission for Justice Support in Haiti
MINURCAT	United Nations Mission in the Central African Republic and Chad
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MINUSTAH	United Nations Stabilization Mission in Haiti
MISCA	African-led International Support Mission to the Central African Republic
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo

MPEPIL	Max Planck Encyclopedia of Public International Law
n	footnote
Neth. Q. Hum. Rts.	Netherlands Quarterly of Human Rights
NGO	Non-governmental organisation
No	number
NPC	National People's Congress of the People's Republic of China
Nw. U. J. Int'l Hum. Rts.	Northwestern Journal of International Human Rights
NYIL	Netherlands Yearbook of International Law
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Politics
OAS	Organization of American States
ODIHR	Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
ONUB	United Nations Operation in Burundi
OSCE	Organization for Security and Co-operation in Europe
p	page
P5	Permanent Members of the United Nations Security Council
para	paragraph
paras	paragraphs
PCC	Police Contributing Country/Countries
PCIJ	Permanent Court of International Justice
Philos. Public. Aff.	Philosophy & Public Affairs
PL	Public Law (Journal)
Polish Y.B. Int'l L.	Polish Yearbook of International Law
pp	pages
r	rule
Rep	Reports
Res	Resolution
rev	revised
RHDI	Revue Hellénique de Droit International
SCNPC	Standing Committee of the National People's Congress of the People's Republic of China
SCOTUS	Supreme Court of the United States
s	section
SG	United Nations Secretary-General

Sing. J. Legal Stud.	Singapore Journal of Legal Studies
SP	Special Rapporteur
SRSG	Special Representative of the United Nations Secretary-General
ss	sections
Stan. J. Int'l L.	Stanford Journal of International Law
Syracuse J. Int'l L. & Com.	Syracuse Journal of International Law and Commerce
Texas L. Rev	Texas Law Review
TCC	Troop Contributing Country/Countries
U. Chi.L. Rev.	The University of Chicago Law Review
UDHR	Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III)
UK	United Kingdom of Great Britain and Northern Ireland
UKHL	House of Lords of the United Kingdom
UKSC	Supreme Court of the United Kingdom
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMSIL	United Nations Mission in Sierra Leone
UN Charter	Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 145 BSP 805
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNComHR	United Nations Commission on Human Rights
UNCT	United Nations Country Team
UNDP	United Nations Development Programme
UNDPA	United Nations Department of Political Affairs
UNDPKO	United Nations Department for Peacekeeping Operations
UNESCR	United Nations Committee on Economic, Social and Cultural Rights
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner of Human Rights
UNHRC	United Nations Human Rights Council
UNHRCee	United Nations Human Rights Committee
UNIOGBIS	United Nations Integrated Peacebuilding Office in Guinea-Bissau
UNIOSIL	United Nations Integrated Office in Sierra Leone
UNIPSIL	United Nations Integrated Peacebuilding Office in Sierra Leone
UNMIK	United Nations Interim Administration Mission in Kosovo

UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in Sudan
UNMISET	United Nations Mission of Support in East Timor
UNMISS	United Nations Mission in South Sudan
UNMIT	United Nations Integrated Mission in Timor-Leste
UNOCI	United Nations Operation in Côte d'Ivoire
UNODC	United Nations Office on Drugs and Crime
UNOGBIS	United Nations Peacebuilding Support Office in Guinea Bissau
UNOSOM II	United Nations Operation in Somalia II
UNPOS	United Nations Political Office for Somalia
UNSC	United Nations Security Council
UNSMIL	United Nations Support Mission in Libya
UNSOM	United Nations Assistance Mission in Somalia
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
U. Pa. J. Int'l L.	University of Pennsylvania Journal of International Economic Law
U. Pitt. L. Rev.	University of Pittsburgh Law Review
US	United States of America
U. Toronto L.J.	University of Toronto Law Journal
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
v	versus
Va. J. Int'l L.	Virginia Journal of International Law
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331
Wash. U. Global Stud. L. Rev.	Washington University Global Studies Law Review
WHO	World Health Organization
WMD	weapons of mass destruction
Wm. & Mary L. Rev.	William and Mary Law Review
WTO	World Trade Organization
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Literature

Abbott K and others, 'The Concept of Legalization' (2000) 54 *IO* 401

Adler E, 'Seizing the Middle Ground: Constructivism in World Politics' (1997) 3 *Eur. J. Int. Rel*. 319

– 'Constructivism in International Relations: Sources, Contributions, and Debates' in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *Handbook of International Relations* (Sage 2013) 112

Akram M and Shah SH, 'The Legislative Powers of the United Nations Security Council' in Ronald Macdonald and Douglas Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Nijhoff 2005) 431

Alldén S and Amer R, 'The United Nations and Peacekeeping: Lessons Learned from Cambodia and East Timor' in Per Bergling, Jenny Ederlöf and Veronica Taylor (eds), *Rule of Law Promotion: Global Perspectives, Local Applications* (Iustus Förlag 2009) 111

Alston P and Goodman R, *International Human Rights* (OUP 2013)

Altwicker T and Diggelmann O, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25 *EJIL* 425

– and Wieczorek N, 'Bridging the Security Gap through EU Rule of Law Missions? Rule of Law Administration by EULEX' (2016) 21 *J. Conflict & Sec. L.* 115

Alvarez J, *International Organizations as Law-makers* (OUP 2005)

Amao O, 'Civil and Political Rights in the African Charter' in Manisuli Ssenyonjo (ed), *The African Regional Human Rights System* (Nijhoff 2012) 29

Amar A, *The Bill of Rights: Creation and Reconstruction* (Yale University Press 1998)

– *America's Constitution: A Biography* (Random House 2005) 389.

Amichai M, 'The Rule of Law and its Promotion Abroad: Three Problems of Scope' (2009) 45 *Stan. J. Int'l L.* 51

Andreopoulos A, 'The Challenges and Perils of Normative Overstretch' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 103

Antkowiak T and Gonza A, *The American Convention on Human Rights* (OUP 2017)

Arcari M, 'Limits to Security Council Powers under the UN Charter and Issues of Charter Interpretation' (2012) XXXII *Polish Y.B. Int'l L.* 239

Arnold R and Sieben H, 'Art. 2' in Bernd Wieser (ed), *Handbuch der Russischen Verfassung* (Verlag Österreich 2014)

Asada M, 'Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation' (2009) 13 *J. Conflict & Sec. L.* 303

Aust HP and Nolte G, 'International Law and the Rule of Law at the National Level' in Michael Zürn, André Nollkaemper and Randall Peerenboom (eds), *Rule of Law Dynamics in an Era of International and Transnational Governance* (CUP 2012) 48

Austin J, *How To Do Things With Words – Lecture VIII* (2nd edn, Harvard University Press 1975)

Bailey S, Ching S and Taylor N, *The Modern English Legal System* (5th edn, Sweet & Maxwell 2007)

Bantekas I and Oette L, *International Human Rights Law and Practice* (CUP 2016)

Barber N, 'The Rechtsstaat and the Rule of Law' (2003) 53 *U. Toronto L.J.* 443

Barnett H, *Constitutional & Administrative Law* (11th edn, Routledge 2016)

Barnett M, 'The New United Nations Politics of Peace: From Juridical Sovereignty to Empirical Sovereignty' (1995) 1 *Global Governance* 79
– and Finnemore M, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004)
– 'Social Constructivism' in John Baylis, Steve Smith and Patricia Owens (eds), *The Globalization of World Politics: An Introduction to International Relations* (7th edn, OUP 2017) 144

Baxi U, *The Future of Human Rights* (3rd edn, OUP 2008)

Beaulac S, 'The Rule of Law in International Law Today' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 197

Berger P and Luckmann T, *The Social Construction of Reality* (Penguin Press 1966)

Bergling P, Wennerström E and Sannerholm R, 'Rule of Law and Security Sector Reform: Casual Assumptions, Unintended Risks and the Need for Norms' (2012) 4 *HJRL* 98

Beuren J, *Das Al Qaida-Sanktionenregime als Ausübung supranationaler Kompetenzen durch den Sicherheitsrat* (Duncker & Humblot 2016)

Bianchi A, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17 *EJIL* 881

Biersteker T, 'Targeted Sanctions and Individual Human Rights' (2009-10) 65 *IJ* 99–117

Bingham T, *The Rule of Law* (Allen Lane Penguin 2011)

Blichner L and Molander A, 'Mapping Juridification' (2008) 14 *ELJ* 36

von Bogdandy A, Dann P and Goldmann M, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010) 3

Bogdanovskaia I and Vassilieva T, *Constitutional Law in Russia* (Wolters Kluwer 2012)

Bosco D, *Five to Rule them All: The UN Security Council and the Making of the Modern World* (OUP 2009)

Bourantonis D, *The History and Politics of UN Security Council Reform* (Routledge 2005)

Bowett D, 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 *EJIL* 89

Boyd A, *Fifteen Men on a Powder Keg* (Methuen 1971)

Boyron S, *The Constitution of France: A Contextual Analysis* (Hart Publishing 2013)

de Brabandere E, 'UN Post-Conflict Peacebuilding Activities' (2014) 18 *Max Planck Y.B. U.N. L.* 188

de Brichambaut MP, 'The Role of the United Nations Security Council in the International Legal System' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 269

Brownlie I, *The Rule of Law in International Affairs* (Martinus Nijhoff Publishers 1998)

Buchan R, 'International Community and the Occupation of Iraq' (2007) 12 *J. Conflict & Sec. L.* 37

Bull C, *No Entry without Strategy: Building the Rule of Law under UN Transitional Administration* (UN University Press 2008)

Burgogue-Larsen L and Úbeda de Torres A, *The Inter-American Court of Human Rights* (OUP 2011)

Butler W, *Russian Law and Legal Institutions* (Wildy, Simmonds & Hill Publishing 2014)

Byers M 'Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity' (2004) 10 *Global Governance* 165

Cannizzaro E, 'A Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 3 *Int'l Org. L. Rev.* 189

Casper G, 'Rule of Law? Whose Law?' in Stephan Lorenz and others (eds), *Festschrift für Andreas Heldrich* (CH Beck 2005) 1109

Cassese A, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *EJIL* 23

Chan P, *China, State Sovereignty and International Legal Order* (Brill Nijhoff 2015)

Chang W and others, *Constitutionalism in Asia: Cases and Materials* (Hart Publishing 2014)

Charlesworth H and Farrall J, 'Regulating the Rule of Law through the Security Council' in Jeremy Farrall, Hilary Charlesworth (eds), *Strengthening the Rule of Law through the UN Security Council* (Routledge 2016)

Chayes A and Handler Chayes A, 'On Compliance' (1993) 47 *IO* 175

Checkel J, 'International Norms and Domestic Politics: Bridging the Rationalist—Constructivist Divide' (1997) 3 *Eur. J. Int. Rel*. 473
– 'The Constructivist Turn in International Relations Theory' (1998) 50 *World Politics* 324
– 'Why Comply? Social Learning and European Identity Change' (2001) 55 *IO* 553

Chesterman S, 'Rule of Law' (MPEPIL 2007)
– 'The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-based International System. Final Report and Recommendations from the Austrian Initiative, 2004–2008' (2008) Federal Ministry for European and International Affairs and others
– 'An International Rule of Law?' (2008) 56 *Am.J.Comp.L.* 331
– 'I'll Take Manhattan: The International Rule of Law and the United Nations Security Council' (2009) 1 *HJRL* 67
– 'UNaccountable? The United Nations, Emergency Powers, and the Rule of Law' (2009) 42 *Vand. J. Transnat'l L.* 1509

Chesterman S, Johnstone I and Malone D, *Law and Practice of the United Nations* (OUP 2016)

Chongde X and Wenzhan N, *Constitutional Law in China* (Wolters Kluwer 2013)

Cohen HG, 'Theorizing Precedent in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 268

Conforti B and Focarelli C, *The Law and Practice of the United Nations* (5th edn, Brill Nijhoff 2016)

Craig P, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *PL* 467

Crawford J, 'International Law and the Rule of Law' (2003) 24 *Adel. L. Rev.* 3

Cronin B, 'International Consensus and the Changing Legal Authority of the UN Security Council' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 57

– and Ian Hurd, 'Conclusion: Assessing the Council's Authority' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 199

Datan M, 'Security Council Resolution 1540: WMD And Non-State Trafficking' (28 May 2004)

Deitelhoff N, 'The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case' (2009) 63 *IO* 33

Delbrück J, 'Article 25' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary*, vol I (C.H. Beck 2002)

Department of Constitutional Affairs, 'Constitutional Reform: A Supreme Court for the United Kingdom' (2003)

Dicey AV, 'Lectures Introductory to the Study of the Law of the Constitution' in J.W.F. Allison (ed), *Lectures Introductory to the Study of the Law of the Constitution*, vol I (OUP 2013)

Diez T, 'Speaking 'Europe': The Politics of Integration' (1999) 6 *J. Eur. Pub. Pol'y* 598

Diggelmann O and Altwicker T, 'Is There Something Like a Constitution of International Law? (2008) 68 *ZaöRV* 623

Doehring K, 'Unlawful Resolutions of the Security Council and their Legal Consequences' (1997) 1 *Max Planck Y.B. U.N. L.* 91

Dolowitz D and Marsh D, 'Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making' (2000) 13 *Governance* 5

Dolzer R and Kreuter-Kirchhof C, 'Article 31' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012)

Doswald-Beck L and Kolb R, *Judicial Process and Human Rights* (NP Engel Publisher 2004)

Doyle M, 'Kant, Liberal Legacies, and Foreign Affairs' (1983) *Philos. Public. Aff.* 205

– 'Liberalism and World Politics' (1986) 80 *Am. Polit. Sci. Rev.* 1151

– and Sambanis N, 'Peacekeeping Operations' in Thomas Weiss and Sam Daws (eds), *The Oxford Handbook on the United Nations* (OUP 2007) 323

Douzinas C, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing 2000)

Dworkin R, *A Matter of Principle* (reprinted 1992, OUP 1986)
– *Law's Empire* (3rd impr, Fontana Press 1990)

Easterday J, 'The Rule of Law at the National and International Levels in Post-Conflict Peace Agreements' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016) 383

Eitel T, 'The UN Security Council and its Future Contribution in the Field of International Law' (2000) 4 *Max Planck Y.B. U.N. L.* 53

Elgebeily S, *The Rule of Law in the United Nations Security Council Decision-making Process: Turning the Focus Inwards* (Routledge 2017)

Elster J, 'The Strategic Uses of Argument' in Kenneth Arrow and others (eds), *Barriers to Conflict Resolution* (Norton 1995) 236

Epstein R, 'Beyond the Rule of Law: Civic Virtue and Constitutional Structure' (1987) 56 *Geo. Wash.L. Rev.* 149

Fallon R, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 *Colum. L. Rev.* 1
– *The Dynamic Constitution* (2nd edn, CUP 2013)

Farrall J, *United Nations Sanctions and the Rule of Law* (CUP 2007)
– 'Impossible Expectations? The UN Security Council's Promotion of the Rule of Law after Conflict' in Brett Bowden, Hilary Charlesworth and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (CUP 2009) 134
– 'Rule of Accountability or Rule of Law? Regulating the UN Security Council's Accountability Deficits' (2014) 19 *J. Conflict & Sec. L.* 389

Fassbender B, *UN Security Council Reform and the Right of Veto: A Constitutionalist Perspective* (Kluwer Law International 1998)
– 'Quis judicabit? The Security Council, Its Powers and Its Legal Control' (2000) 11 *EJIL* 219
– *Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to ensure Fair and Clear Procedures are made available to Individuals and Entities targeted with Sanctions under Chapter VII of the UN-Charter* (Study commissioned by the United Nations, Office of Legal Affairs, 20 March 2006)
– 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-Up Action by the United Nations' (20 March 2006)

– *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff 2009)
– 'Article 2(1)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012)

Feinäugle C, 'Theoretical Approaches to the Rule of Law and Its Application to the United Nations' in Clemens Feinäugle (ed), *The Rule of Law and its Application to the United Nations* (Nomos 2016) 29

Feldman D, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change* (Hart Publishing 2013) 93

Feng C, 'China's Socialist Rule of Law: A Critical Appraisal of the Relationship between the Communist Party and Comprehensive Law Reform' in John Garrick and Yan Chang Bennett (eds), *China's Socialist Rule of Law Reforms under Xi Jinping* (Routledge 2016) 45

Fikfak V, 'Judicial Strategies and their Impact on the Development of the International Rule of Law' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016) 45

Finnemore M, *National Interests in International Society* (Cornell University Press 1996)
– and Sikkink K, 'International Norm Dynamics and Political Change' (1998) 52 *IO* 887

Finnis J, *Natural Law and Natural Rights* (first published 1980, 2nd edn, OUP 2011)

Fitschen T, 'Inventing the Rule of Law for the United Nations' (2008) 12 *Max Planck Y.B. U.N. L.* 347

Fordham M, *Judicial Review Handbook* (6th edn, Hart Publishing 2012)

Franck T, 'The Emerging Right to Democratic Governance' (1992) 86 *IO* 46
– *Fairness in International Law and Institutions* (Clarendon Press Oxford 1995)

Fraas M, *Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof* (Peter Lang 1998)

Frederking B, *The United States and the Security Council* (Routledge 2007)

Frowein J, 'Unilateral Interpretation of Security Council Resolutions – A Threat to Collective Security?' in Volkmar Götz, Peter Selmer and Rüdiger Wolfrum (eds), *Liber Amicorum Günther Jaenicke – Zum 85. Geburtstag* (Springer 1998) 97
– 'Implementation of Security Council Resolutions Taken under Chapter VII in Germany' in Vera Gowland-Debbas (ed), *United Nations Sanctions and International Law* (Kluwer 2001)

Fuller L, *The Morality of Law* (rev edn, YUP 1969) 39

Gadin H, *Der Schutz der grundlegenden Menschenrechte durch militärische Maßnahmen des Sicherheitsrates – das Ende staatlicher Souveränität*? (Duncker & Humblot 1996)

Gass S, Kiener R and Stadelmann T (eds), *Standards on Judicial Independence* (Editions Weblaw 2012)

Geesmann R, *Soziale Grundrechte im deutschen und französischen Verfassungsrecht und in der Charta der Grundrechte der Europäischen Union* (Peter Lang 2004)

Geiger R, 'Article 23' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012)

Giegerich T, '"A Fork in the Road" – Constitutional Challenges, Chances and *Lacunae* of UN Reform' (2005) 48 *German Y.B. Int'l L.* 29
– 'Article 36' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012)
– 'Article 37' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012)

Gill T, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter' (1995) 26 *NYIL* 33

Goodman R and Jinks D, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke Law Journal* 621

Gosalbo-Bono R, 'The Significance of the Rule of Law and Its Implications for the European Union and the United States' (2010) 72 *U. Pitt. L. Rev.* 229

Gottlieb G, 'The Nature of International Law: Toward a Second Concept of Law' in Cyril Black and Richard Falk (eds), *The Future of the International Legal Order*, vol IV (Princeton University Press 1972) 331

Gowlland-Debbas V, 'The Functions of the United Nations Security Council in the International Legal System' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 277
– and Pergantis V, 'Rule of Law' in Chetail Vincent (ed), *Post-conflict Peacebuilding: A Lexicon* (OUP 2009) 320
– 'Security Council Change: The Pressure of Emerging International Public Policy' (2009-10) 65 *Int'l J.* 119
– 'The Security Council as Enforcer of Human Rights' in Bardo Fassbender (ed), *Securing Human Rights*? (OUP 2011) 36
– 'The Security Council and Issues of Responsibility under International Law' (Strengthening the Rule of Law through the United Nations Security Council Workshop Paper Series No 2.2 (2011))

Grabenwarter C and Pabel K, *Europäische Menschenrechtskonvention* (6th edn, C.H. Beck 2016)

Graubart J, 'NGOs and the Security Council: Authority All Around But for Whose Benefit?' in Bruce Cronin, Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 154

Gray C, 'The Security Council and the Rule of Law: An Overview' (2009) 103 *ASIL Proceedings* 245

Grote R, 'Rule of Law, Rechtsstaat and "État de droit"' in Christian Starck (ed), *Constitutionalism, Universalism and Democracy: A Comparative Analysis* (Nomos 1999) 269
– Rainer Grote, 'The People's Republic of China: Introductory Note' (OUP 2005) Oxford Constitutional Law Online
– 'The German Rechtsstaat in a Comparative Perspective' in James Silkenat, James Hickey and Peter Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer 2014) 193

Guilfoyle D, 'Counter-Piracy Law Enforcement and Human Rights' (2010) 59 *Int'l & Comp. L.Q.* 141

Guzzini S, 'A Reconstruction of Constructivism in International Relations' (2000) 6 *Eur. J. Int. Rel*. 147

Haeck Y and others, *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015)

Happold M, 'United Nations Sanctions and the Rule of Law' in Clemens Feinäugle (ed), *The Rule of Law and its Application to the United Nations* (Nomos 2016) 75

Harris D and others (eds), *Law of the European Convention on Human Rights* (3rd edn, OUP 2014)

Hassler S, *Reforming the UN Security Council Membership* (Routledge 2013)

Hay P, *The Law of the United States* (Routledge 2017)

von Hayek FA, *The Road to Serfdom* (London 1944)
– *The Political Ideal of the Rule of Law* (National Bank of Egypt 1955)

Hazan P, 'Reconciliation' in Chetail Vincent (ed), *Post-conflict Peacebuilding: A Lexicon* (OUP 2009) 256

Henderson C and Lubell N, 'The Contemporary Legal Nature of UN Security Council Ceasefire Resolutions' (2013) 26 *LJIL* 369

Henderson J, *The Constitution of the Russian Federation: A Contextual Analysis* (Hart Publishing 2011)

Henkin L, *How Nations Behave* (Pall Mall Press 1968)

Herbst J, *Rechtskontrolle des UN-Sicherheitsrates* (Peter Lang 1997)

Hermann T, 'Reconciliation: Reflections on the Theoretical and Practical Utility of the Term' in Yaacov Bar-Siman-Tov (ed), *From Conflict to Reconciliation* (OUP 2004) 37

Hestermeyer H, 'A Rights-based Approach to the Rule of Law in International Law' in Clemens Feinäugle (ed), *The Rule of Law and its Application to the United Nations* (Nomos 2016) 131

Heupel M, 'Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards' (2009) 85 *Int'l Aff.* 307
– 'Rule of Law Promotion through International Organizations and NGOs' in Michael Zürn, André Nollkaemper and Randy Peerenboom (eds), *Rule of Law Dynamics in an Era of International and Transnational Governance* (CUP 2012) 133

Hinojosa Martinez LM, 'The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits' (2008) 57 *Int'l & Comp. L.Q.* 333

Holzinger K and Knill C, 'Causes and Conditions of Cross-National Policy Convergence' (2005) 12 *J. Eur. Pub. Pol'y* 775

Hovell D, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (OUP 2016)

Hulton S, 'Council Working Methods and Procedure' in David Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner 2004) 237

Hurd I, 'The International Rule of Law: Law and the Limit of Politics' (2014) 28 *Ethics & International Affairs* 39
– 'Three Models of the International Rule of Law' (2015) 23 *Revista de Filosofía de la Universidad del Norte* 37

Jouanjan O, 'Frankreich' in Armin von Bogdandy and Peter Huber (eds), *Handbuch Ius Publicum Europaeum*, vol I (CF Müller Verlag 2007)
– 'Verfassungsrechtsprechung in Frankreich' in Armin von Bogdandy and Peter Huber (eds), *Handbuch Ius Publicum Europaeum*, vol VI (CF Müller Verlag 2016)

Johnstone I, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 *EJIL* 437
– 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 *AJIL* 275
– 'The Security Council as Legislature' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 80

Jong M and Stoter S, 'Institutional Transplantation and the Rule of Law: How this Interdisciplinary Method can Enhance the Legitimacy of International Organisations' (2009) *Erasmus L. Rev.* 311

Joseph S and Castan M, *The International Covenant on Civil and Political Rights* (3rd edn, OUP 2013)

Jowell J, 'The Rule of Law' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, OUP 2015) 13

Kälin W and Künzli J, *The Law of International Human Rights Protection* (OUP 2009)

Kahn J, 'The Law Is a Causeway: Metaphor and the Rule of Law in Russia' in James Silkenat, James Hickey and Peter Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer 2014) 229

Kanetake M, 'The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions' (2012) 9 *Int'l Org. L. Rev.* 267

– and André Nollkaemper, 'The International Rule of Law in the Cycle of Contestations and Deference' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016) 445

Kant I, 'Perpetual Peace. A Philosophical Sketch' in Hans Reiss (ed), *Kant: Political Writings* (2nd edn, CUP 1991) 93

Katzenstein P, 'Introduction: Alternative Perspectives on National Security' in Peter Katzenstein (ed), *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press 1996)

Kelsen H, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens & Sons Limited 1964)

Kennedy P, *The Parliament of Man: The United Nations and the Quest for World Government* (Penguin Allen Lane 2006)

Klaaren J, 'The Human Right to Information and Transparency' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013)

Kleinfeld R, 'Competing Definitions of the Rule of Law' in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace 2006) 31

Kloke T, *Der Sicherheitsrat der Vereinten Nationen als Weltgesetzgeber – eine kritische Betrachtung aus völkerrechtlicher Sicht* (Cuncker & Humblot 2016)

Köchler H, *The Security Council as Administrator of Justice? Reflections on the Antagonistic Relationship between Power and Law* (International Progress Organization 2011)

Kolb R, *Peremptory International Law – Jus Cogens* (Hart Publishing 2015)

Korhonen O, 'The "State-building Enterprise": Legal Doctrine, Progress Narratives and Managerial Governance' in Brett Bowden, Hilary Charlesworth and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (CUP 2009)

Koskenniemi M, 'The Police in the Temple. Order Justice and the UN: A Dialectical View' (1995) 6 *EJIL* 325

Koslowski R and Kratochwil F, 'Understanding Change in International Politics: The Soviet Empire's Demise and the International System' (1994) 48 *IO* 215

Kratochwil F, 'Is International Law "Proper" Law?' (1983) 69 *Arch. Rechts-Sozialphilos*. 13
– *Rules, Norms, and Decisions* (CUP 1989)
– 'How Do Norms Matter?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 35

Krieger H, 'Trumping International Law? Implications of the 2016 US Presidential Election for the International Legal Order', EJIL: Talk! (3 January 2017)

Krisch N, 'Article 39' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol II (3rd edn, OUP 2012)
– 'Article 41' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol II (3rd edn, OUP 2012)
– 'The General Framework' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol II (3rd edn, OUP 2012)

Krivenko EY, 'Revisiting the Reservations Dialogue: Negotiating Diversity while Preserving Universality Through Human Rights Law' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016) 289

Krygier M, 'Rule of Law' in Michel Rosenfeld and András Sajó (eds), *Comparative Constitutional Law* (OUP 2012) 233
– 'The Rule of Law after the Short Twentieth Century: Launching a Global Career' in Richard Nobles and David Schiff (eds), *Law, Society and Community: Essays in Honour of Roger Cotterrell* (Ashgate 2014) 327
– 'The Security Council and the Rule of Law' in Jeremy Farrall and Hilary Charlesworth (eds), *Strengthening the Rule of Law through the UN Security Council* (Routledge 2016) 13

Kumm M, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 *Va. J. Int'l L.* 19

Legro J, 'Which Norms Matter? Revisiting the "Failure" of Internationalism' (1997) 51 *IO* 31

Lehr P, 'Security Council Resolutions on Somali Piracy' in Vesselin Popovski and Trudy Fraser (eds), *The Security Council as Global Legislator* (Routledge 2014) 143

Leininger J, 'Democracy and UN Peace-keeping' (2006) 10 *Max Planck Y.B. U.N. L.* 465

Leyland P, *The Constitution of the United Kingdom: A Contextual Analysis* (3rd edn, Hart Publishing 2016)

Liivoja R, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 *Int'l & Comp. L.Q.* 583

Lorinser B, *Bindende Resolutionen des Sicherheitsrates* (Nomos 1996)

Loughlin M, 'Grossbritannien' in Armin von Bogdandy and Peter Huber (eds), *Handbuch Ius Publicum Europaeum*, vol I (CF Müller Verlag 2007)

Luchterhandt O, 'Art. 1' in Bernd Wieser (ed), *Handbuch der Russischen Verfassung* (Verlag Österreich 2014)

Mahbubani K, 'The Permanent and Elected Council Members' in David Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner 2004) 253

Malone D, 'Eyes on the Prize: The Quest for Nonpermanent Seats on the UN Security Council' (2000) 6 *Global Governance* 3

Manby B, 'Civil and Political Rights in the African Charter on Human and Peoples' Rights: Articles 1–7' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (2nd edn, CUP 2010) 171

Månsson K, 'UN Peace Operations and Security Council Resolutions: A Tool for Measuring the Status of International Human Rights Law?' (2008) 26 *Neth. Q. Hum. Rts*. 79

Manusama K, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (Martinus Nijhoff Publishers 2006)

Marrani D, *Dynamics in the French Constitution* (Routledge 2013)

Marschik A, 'Legislative Powers of the Security Council' in Ronald Macdonald and Douglas Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Nijhoff 2005) 457

Martenczuk B, *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrats* (Duncker & Humblot 1996)

Mastronardi P, 'Recht und Kultur: Kulturelle Bedingtheit und Universaler Anspruch des Juristischen Denkens' 61 (2001) *ZaöRV* 61

McCorquodale R, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65 *Int'l & Comp. L.Q.* 277
– 'The Rule of Law Internationally' in Clemens Feinäugle (ed), *The Rule of Law and its Application to the United Nations* (Nomos 2016) 51

Medina C, *The American Convention on Human Rights* (Intersentia 2014)

Meyer-Ohlendorf N, *Gerichtliche Kontrolle des Sicherheitsrates der Vereinten Nationen durch den Internationalen Gerichtshof* (Verlag für Wissenschaft und Forschung 2000)

Möllers C, 'Pouvoir Constituant–Constitution–Constitutionalisation' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2010) 169

Musila G, 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *Afr. Hum. Rts. L.J.* 441

Nasu H, 'Who Guards the Guardian? Towards Regulation of the UN Security Council's Chapter VII Powers through Dialogue' in Jeremy Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (CUP 2009) 123

Ngugi J, 'Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse' (2005) 26 *U. Pa. J. Int'l L.* 513

Nollkaemper A, 'The Process of Legalisation After 1989 and its Contribution to the International Rule of Law' (2010) 3 *Select Proceedings of the European Society of International Law* 89
– 'Universality' (MPEPIL 2011)
– *National Courts and the International Rule of Law* (OUP 2011)

Nolte G, 'The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 315

Nowak M, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, N.P. Engel 2005)

Öberg M, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 *EJIL* 879

O'Neill JT and Rees N, *United Nations Peacekeeping in the Post-Cold War Era* (Routledge 2005)

Onuf N, *World of Our Making* (first published 1989, Routledge 2013)

Oosthuizen G, 'Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law' (1999) 12 *LJIL* 521

Orakhelashvili A, 'The Power of the UN Security Council to Determine the Existence of a "Threat to the Peace"' (2006) 1 *Irish Y.B. Int'l L.* 61
– 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 *Max Planck Y.B. U.N. L.* 143
– *Collective Security* (OUP 2011)

Orford A, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2003)

Owada H, 'The Rule of Law in a Globalizing World – An Asian Perspective' (2009) 8 *Wash. U. Global Stud. L. Rev.* 187

Owen J, 'The Foreign Imposition of Domestic Institutions' (2002) 56 *IO* 375

Papastavridis E, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis' (2007) 56 *Int'l & Comp. L.Q.* 83

Paris R, *At War's End* (CUP 2004)
– 'Post-Conflict Peacebuilding' in Thomas Weiss and Sam Daws (eds), *The Oxford Handbook on the United Nations* (OUP 2007) 404

Park S, 'Theorizing Norm Diffusion Within International Organizations' (2006) 43 *In'l Pol.* 342

Payandeh M, 'Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte' (2006) 66 *ZaöRV* 41

Pech L, 'Rule of Law in France' in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S.* (Routledge 2004) 79

Peerenboom R, 'Competing Conceptions of Rule of Law in China' in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S.* (Routledge 2004) 113
– 'Judicial Independence in China: Common Myths and Unfounded Assumptions' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUP 2010) 69
– 'Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What Does the 4th Plenum Decision Mean for Legal Reforms in China?' (2015) 7 *HJRL* 49

Peters A, 'The Globalization of State Constitutions' in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (OUP 2007) 251
– 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 263

– 'The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and its Members' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest* (OUP 2011) 297
– 'The Constitutionalisation of International Organisations' in Walker Neil, Shaw Jo and Tierney Stephen (eds), *Europe's Constitutional Mosaic* (Hart Publishing 2011) 253
– and Tilmann Altwicker, *Europäische Menschenrechtskonvention* (2nd edn, C.H. Beck 2012)
– 'Article 24' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012)
– 'Article 25' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012)
– and Ulrich Preuss, 'International Relations and International Law' in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 33
– 'Novel Practice of the Security Council: Wildlife Poaching and Trafficking as a Threat to the Peace', EJIL: Talk! (12 February 2014)
– 'Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person – Parts I & II', EJIL: Talk! (20 & 21 November 2014)
– 'Global Constitutionalism' in Michael Gibbons and others (eds), *The Encyclopedia of Political Thought*, vol III (3rd edn, Wiley Blackwell 2015) 1484
– 'After Trump: China and Russia move from Norm-Takers to Shapers of the International Legal Order', EJIL: Talk! (10 November 2016)

Petrig A, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff 2014)

Prantl J, *The UN Security Council and Informal Groups of States* (OUP 2006)

Provost R, 'Interpretation in International Law as Transcultural Project' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 290

Qvortrup M, '"Let Me Take You to a Foreign Land": The Political and the Legal Constitution' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change* (Hart Publishing 2013) 55

Radin M, 'Reconsidering the Rule of Law' (1989) 69 *B.U. L. Rev.* 781

Rajagopal B, 'Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination' (2008) 49 *Wm. & Mary L. Rev.* 1345

Ratner S, 'The Security Council and International Law' in David Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner 2004) 591

Rauschning D, 'Article 75' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol II (3rd edn, OUP 2012)

Rawls J, *A Theory of Justice* (rev edn, OUP 1999)

Raz J, *The Authority of Law* (2nd ed, OUP 2009)

Reinisch A, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *AJIL* 851

Richmond O, 'Emancipatory Forms of Human Security and Liberal Peacebuilding' (2007) 62 *Int'l J.* 458

Risse T, 'Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War' (1994) 48 *IO* 185
– '"Let's Argue!": Communicative Action in World Politics' (2000) 54 *International Organization* 1
– 'Social Constructivism Meets Globalization' in David Held and Anthony McGrew (eds), *Globalization Theory: Approaches and Controversies* (Polity Press 2007) 126

Rodriguez D, McCubbins M and Weingast B, 'The Rule of Law Unplugged' (2010) 59 *Emory L.J.* 1455

Rosand E, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?' (2004-5) 28 *Fordham Int'l L.J.* 542

Rosenfeld M, 'Rule of Law versus Rechtsstaat' in Peter Häberle and Jörg Paul Müller (eds), *Menschenrechte und Bürgerrechte in einer vielgestaltigen Welt* (Helbing & Lichtenhahn 2000) 49

Ruggie J, 'What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge' (1998) 52 *IO* 855

Sannerholm R, *Rule of Law after War and Crisis* (Intersentia 2012)

Scalia A, 'The Rule of Law as a Law of Rules' (1989) 56 *U. Chi.L. Rev.* 1175

Schachter O, 'Metaphors and Realism in International Law' (2002) 96 *ASIL Proceedings* 268

Schaller C, 'Towards an International Legal Framework for Post-conflict Peacebuilding' (German Institute for International and Security Affairs, February 2009)

Schott J, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency' (2008) 6 *Nw. U. J. Int'l Hum. Rts*. 24

Schill S, 'The Rule of Law and the Division of Labour Between National and International Law: The Case of International Energy Relations' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016) 409

Sedler R, *Constitutional Law in the United States* (2nd ed, Wolters Kluwer 2014)

Shah S, 'Detention and Trial' in Daniel Moeckli and others (eds), *International Human Rights Law* (2nd edn, OUP 2014) 259

Sievers L and Daws S, *The Procedure of the UN Security Council* (4th edn, OUP 2014)

Simma B, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *EJIL* 1

Simmonds N, 'Law as a Moral Idea' (2005) 55 *U. Toronto L.J.* 61

Sinding Aasen H and others, *Juridification and Social Citizenship in the Welfare State* (Edward Elgar 2014)

Slapper G and Kelly D, *The English Legal System* (Routledge 2013)

Slaughter A, 'International Law in a World of Liberal States' (1995) *EJIL* 503
– and Hale T, 'International Relations, Principal Theories' (MPEPIL 2013)

Sriram CL, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice' in Vincent Chetail and Oliver Jütersonke (eds), *Peacebuilding*, vol II (Routledge 2015) 357

Stein A, *Der Sicherheitsrat der Vereinten Nationen und die Rule of Law* (Nomos 1999)

Stephenson M, 'Rule of Law as a Goal of Development Policy' (Washington D.C., World Bank Research 2005)

Šturma P, 'Does the Rule of Law also Apply to the Security Council?' (2012) 32 *Polish Y.B. Int'l L.* 299–305

Summers R, 'A Formal Theory of the Rule of Law' (1993) 6 *Ratio Juris* 127

Szasz P, 'The Security Council Starts Legislating' (2002) 96 *AJIL* 901

Talmon S, 'The Statements by the President of the Security Council' (2003) 2 *Chinese J. Int'l L.* 419
– 'The Security Council as World Legislature' (2005) 99 *AJIL* 175
– 'Security Council Treaty Action' (2009) 62 *RHDI* 65

Tamanaha B, *On the Rule of Law: History, Politics, Theory* (CUP 2004)
– 'Rule of Law in the United States' in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S.* (Routledge 2004) 56
– 'The Tension between Legal Instrumentalism and the Rule of Law' (2005) 33 *Syracuse J. Int'l L. & Com.* 131
– *Law as a Means to an End: Threats to the Rule of Law* (CUP 2006)
– 'The History and Elements of the Rule of Law' (2012) *Sing. J. Legal Stud.* 232

Tiedemann P, 'The Rechtsstaat-Principle in Germany: The Development from the Beginning Until Now' in James Silkenat, James Hickey and Peter Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer 2014) 171

Tolbert D and Solomon A, 'United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies' (2006) 19 *Harv. Hum Rts. J.* 29

Trebilcock M and Daniels R, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar 2008)

True-Frost C, 'The Security Council and Norm Consumption' (2007) 40 *N.Y.U. J. Int'l L. & Pol.* 115

Tushnet M, *The Constitution of the United States of America: A Contextual Analysis* (2nd edn, Hart Publishing 2015)

Tzanakopoulos A, *Disobeying the Security Council: Contermeasures against Wrongful Sanctions* (OUP 2011)
– 'Transparency in the Security Council' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 367

Venzke I, *How Interpretation Makes International Law – On Semantic Change and Normative Twists* (OUP 2012)

Vig S, 'The Conflictual Promises of the United Nations' Rule of Law Agenda: Challenges for Post-Conflict Societies' (2009) 13 *Journal of International Peacekeeping* 131

Waldron J, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137
– 'The Concept and the Rule of Law' (2008) 43 *Ga. L. Rev* 1
– 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *EJIL* 315

Weiß W, 'Security Council Powers and the Exigencies of Justice after War' (2008) 12 *Max Planck Y.B. U.N. L.* 45

Wendt A, 'Constructing International Politics' (1995) 20 *Int. Security* 71
– *Social Theory of International Politics* (CUP 1999)

Wennerström E, *The Rule of Law and the European Union* (Iustus Förlag 2007)

de Wet E, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004)
– 'Human Rights and the Rule of Law as Applicable to the UNSC: Implications for the Right to a Fair Hearing' in Clemens Feinäugle (ed), *The Rule of Law and its Application to the United Nations* (Nomos 2016) 181

Wheatley S, 'The Security Council, Democratic Legitimacy and Regime Change in Iraq' (2006) 17 *EJIL* 531

White N, 'To Review or Not to Review? The Lockerbie Cases Before the Word Court' (1999) 12 *LJIL* 418
– and Saul M, 'Legal Means of Dispute Settlement in the Field of Collective Security: The Quasi-Judicial Powers of the Security Council' in Duncan French, Matthew Saul and Nigel White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart Publishing 2010) 191

Windlesham D, 'The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change' (2005) *PL* 806

Wolfram M, *Entscheidungsprozesse im Sicherheitsrat der Vereinten Nationen* (Nomos 2011)

Wolfrum R, 'Sources of International Law' (MPEPIL 2011)

Wood M, 'Security Council Working Methods and Procedure: Recent Developments' (1996) 45 *Int'l & Comp. L.Q.* 150
– 'The Interpretation of Security Council Resolutions' (1998) *Max Planck Y.B. U.N. L.* 73
– 'The UN Security Council and International Law' (Hersch Lauterpacht Memorial Lectures 2006; First Lecture: 'The Legal Framework of the Security Council')
– 'Security Council' (MPEPIL 2007)

Woodward S, *The Ideology of Failed States: Why Intervention Fails* (CUP 2017)

Wouters J and Odermatt J, 'Quis custodiet consilium securitatis? Reflections on the Law-making Powers of the Security Council' in Vesselin Popovski and Trudy Fraser (eds), *The Security Council as Global Legislator* (Routledge 2014) 71

Wuerth I, 'International Law in the Post-Human Rights Era' (2017) 96 *Texas L. Rev.* (forthcoming)

Xingzhong Y, 'Western Constitutional Ideas and Constitutional Discourse in China, 1978–2005' in Stéphanie Balme and Michael Dowdle (eds), *Building Constitutionalism in China* (Palgrave Macmillan 2009) 111

Yee A, 'The Causal Effects of Ideas on Policies' (1996) 50 *IO* 69

Zhang Q, *The Constitution of China: A Contextual Analysis* (Hart Publishing 2012)
– 'Judicial Reform in China: An Overview' in John Garrick and Yan Chang Bennett (eds), *China's Socialist Rule of Law Reforms under Xi Jinping* (2016) 17

Zimmermann A, 'Article 27' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012)

Primary Sources Index

Middle East

UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757

Sierra Leone

UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315

UNSC Res 1436 (24 September 2002) UN Doc S/RES/1436

UNSC Res 1470 (28 March 2003) UN Doc S/RES/1470

UNSC Res 1508 (19 September 2003) UN Doc S/RES/1508

UNSC Res 1537 (30 March 2004) UN Doc S/RES/1537

UNSC Res 1562 (17 September 2004) UN Doc S/RES/1562

UNSC Res 1610 (30 June 2005) UN Doc S/RES/1610

UNSC Res 1620 (31 August 2005) UN Doc S/RES/1620

UNSC Res 1734 (22 December 2006) UN Doc S/RES/1734

UNSC Res 1793 (31 December 2007) UN Doc S/RES/1793

UNSC Res 1829 (4 August 2008) UN Doc S/RES/1829

UNSC Res 1886 (15 September 2009) UN Doc S/RES/1886

UNSC Res 2065 (12 September 2012) UN Doc S/RES/2065

Somalia

UNSC Res 886 (18 November 1993) UN Doc S/RES/886

UNSC Res 897 (4 February 1994) UN Doc S/RES/897

UNSC Res 923 (31 May 1994) UN Doc S/RES/923

UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816

UNSC Res 1838 (7 October 2008) UN Doc S/RES/1838

UNSC Res 1844 (20 November 2008) UN Doc S/RES/1844

UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846

UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851

UNSC Res 1863 (16 January 2009) UN Doc S/RES/1863

UNSC Res 1872 (26 May 2009) UN Doc S/RES/1872

UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897

UNSC Res 1910 (28 January 2010) UN Doc S/RES/1910

UNSC Res 1918 (27 April 2010) UN Doc S/RES/1918

UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950

President of the United Nations Security Council

UNSC Note by the President 165 (1999) UN Doc S/1999/165

UNSC Note by the President 56 (2002) UN Doc S/2002/56

UNSC Presidential Statement 15 (2003) UN Doc S/PRST/2003/15

UNSC Presidential Statement 34 (2004) UN Doc S/PRST/2004/34

UNSC Presidential Statement 28 (2006) UN Doc S/PRST/2006/28

UNSC Note by the President 507 (2006) UN Doc S/2006/507

UNSC Presidential Statement 24 (2009) UN Doc S/PRST/2009/24

UNSC Presidential Statement 1 (2010) UN Doc S/PRST/2010/1

UNSC Presidential Statement 11 (2010) UN Doc S/PRST/2010/11

UNSC Note by the President 507 (2010) UN Doc S/2010/507

UNSC Presidential Statement 1 (2012) UN Doc S/PRST/2012/1

UNSC Note by the President 402 (2012) UN Doc S/2012/402

UNSC Note by the President 922 (2012) UN Doc S/2012/922

UNSC Presidential Statement 12 (2013) UN Doc S/PRST/2013/12

UNSC Note by the President 515 (2013) UN Doc S/2013/515

UNSC Note by the President 630 (2013) UN Doc S/2013/630

UNSC Presidential Statement 5 (2014) UN Doc S/PRST/2014/5

UNSC Note by the President 268 (2014) Un Doc S/2014/268

UNSC Note by the President 565 (2014) UN Doc S/2014/565

Reports to the Security Council

UNSC Report of the Secretary-General, 'Further report of the Secretary-General submitted in pursuance of paragraph 19 of resolution 814 (1993) and paragraph A 5 of resolution 865 (1993)' (1993) UN Doc S/26738

UNSC Report of the Secretary-General, 'Further report of the Secretary-General submitted in pursuance of paragraph 4 of resolution 886 (1993)' (1994) UN Doc S/1994/12

UNSC Report of the Secretary-General, 'Fifth report of the Secretary-General on the United Nations Mission in Sierra Leone' (2000) UN Doc S/2000/751

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Transitional Administration in East Timor' (2002) UN Doc S/2002/432

UNSC Report of the Secretary-General, 'Fourteenth report of the Secretary-General on the United Nations Mission in Sierra Leone' (2002) UN Doc S/2002/679

UNSC Report of the Secretary-General, 'Fifteenth Report of the Secretary-General on the United Nations Mission in Sierra Leone' (2002) UN Doc S/2002/987

UNSC Report of the Secretary-General, 'Seventeenth report of the Secretary-General on the United Nations Mission in Sierra Leone' (2003) UN Doc S/2003/321

UNSC Report of the Secretary-General, 'Second Special Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (2003) UN Doc S/2003/566

UNSC Report of the Secretary-General, 'Report of the Secretary-General to the Security Council on Liberia' (2003) UN Doc S/2003/875

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Mission in Côte d'Ivoire submitted pursuant to Security Council resolution 1514 (2003) of 13 November 2003' (2004) UN Doc S/2004/3

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Mission in Côte d'Ivoire submitted pursuant to Security Council resolution 1514 (2003) of 13 November 2003' (2004) UN Doc S/2004/3/Add.1

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Burundi' (2004) UN Doc S/2004/210

UNSC Report of the Secretary-General, 'Twenty-first report of the Secretary-General on the United Nations Mission in Sierra Leone' (2004) UN Doc S/2004/228

UNSC Report of the Secretary-General, 'Second Progress Report of the Secretary-General on the United Nations Mission in Liberia' (2004) UN Doc S/2004/229

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Haiti' (2004) UN Doc S/2004/300

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Mission of Support in East Timor' (2004) UN Doc S/2004/333

UNSC Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004) UN Doc S/2004/616

UNSC Report of the Secretary-General, 'Twenty-third report of the Secretary-General on the United Nations Mission in Sierra Leone' (2004) UN Doc S/2004/724

UNSC Report of the Secretary-General, 'Second report of the Secretary-General on theUnited Nations Operation in Burundi' (2004) UN Doc S/2004/902

UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and on the activities of the United Nations Peacebuilding Support Office in that country' (2004) UN Doc S/2004/969

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Sudan' (2005) UN Doc S/2005/57

UNSC 'Report of the International Commission of Inquiry on Darfur to the Secretary-General' (2005) UN Doc S/2005/60

UNSC Report of the Secretary-General, 'Fourth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2005) UN Doc S/2005/186

UNSC Report of the Secretary-General, 'Twenty-fifth report of the Secretary-General on the United Nations Mission in Sierra Leone' (2005) UN Doc S/2005/273/Add.2

UNSC Report of the Secretary-General, 'Fifth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2005) UN Doc S/2005/398

UNSC Report of the Secretary-General, 'Twenty-sixth report of the Secretary-General on the United Nations Mission in Sierra Leone' (2005) UN Doc S/2005/596

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2006) UN Doc S/2006/60

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Sudan' (2006) UN Doc S/2006/160

UNSC Report of the Secretary-General, 'Seventh report of the Secretary-General on the United Nations Operation in Burundi' (2006) UN Doc S/2006/429

UNSC Report of the Secretary-General, 'Seventh report of the Secretary-General on the United Nations Operation in Burundi' (2006) UN Doc S/2006/429/Add.1

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2006) UN Doc S/2006/592

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Timor-Leste pursuant to Security Council resolution 1690 (2006)' (2006) UN Doc S/2006/628

UNSC Report of the Secretary-General, 'Tenth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2006) UN Doc S/2006/821

UNSC Report of the Secretary-General, 'Third report of the Secretary-General on the United Nations Integrated Office in Sierra Leone' (2006) UN Doc S/2006/922

UNSC Report of the Secretary-General, 'Eleventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2006) UN Doc S/2006/939

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2006) UN Doc S/2006/1003

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 9 August 2006 to 26 January 2007)' (2007) UN Doc S/2007/50

UNSC Report of the Secretary-General, 'Fourteenth progress report of the Secretary-General on the United Nations Mission in Liberia' (2007) UN Doc S/2007/151

UNSC Report of the Secretary-General, 'Twenty-third report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (2007) UN Doc S/2007/156

UNSC Report of the Secretary-General, 'Fifteenth progress report of the Secretary-General on the United Nations Mission in Liberia' (2007) UN Doc S/2007/479

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Chad and the Central African Republic' (2007) UN Doc S/2007/488

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2007) UN Doc S/2007/503

UNSC Report of the Secretary-General, 'Fifth report of the Secretary-General on the United Nations Integrated Office in Sierra Leone' (2007) UN Doc S/2007/704

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 August 2007 to 7 January 2008)' (2008) UN Doc S/2008/26

UNSC Report of the Secretary-General, 'Sixteenth progress report of the Secretary-General on the United Nations Mission in Liberia' (2008) UN Doc S/2008/183

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2008) UN Doc S/2008/202

UNSC Report of the Secretary-General, 'Sixth report of the Secretary-General on the United Nations Integrated Office in Sierra Leone' (2008) UN Doc S/2008/281

UNSC Report of the Secretary-General, 'Twenty-sixth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (2008) UN Doc S/2008/433

UNSC Report of the Secretary-General, 'Seventeenth progress report of the Secretary-General on the United Nations Mission in Liberia' (2008) UN Doc S/2008/553

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2008) UN Doc S/2008/586

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 9 July 2008 to 20 January 2009)' (2009) UN Doc S/2009/72

UNSC Report of the Secretary-General, 'Eighteenth progress report of the Secretary-General on the United Nations Mission in Liberia' (2009) UN Doc S/2009/86

UNSC Report of the Secretary-General, 'Report of the Secretary-General pursuant to Security Council Resolution 1846 (2008)' (2009) UN Doc S/2009/146

UNSC Report of the Secretary-General, 'Twentieth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2009) UN Doc S/2009/196

UNSC Report of the Secretary-General, 'Twenty-first progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2009) UN Doc S/2009/344

UNSC Report of the Secretary-General, 'Report of the Secretary-General pursuant to Security Council Resolution 1820' (2009) UN Doc S/2009/362

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2009) UN Doc S/2009/439

UNSC Report of the Secretary-General, 'Report of the Secretary-General pursuant to Security Council Resolution 1846 (2008)' (2009) UN Doc S/2009/590

UNSC Report of the Secretary-General, 'Twenty-third progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2010) UN Doc S/2010/15

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 24 September 2009 to 20 January 2010)' (2010) UN Doc S/2010/85

UNSC Report of the Secretary-General, 'Thirty-first report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (2010) UN Doc S/2010/164

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Mission in the Central African Republic and Chad' (2010) UN Doc S/2010/217

UNSC Report of the Secretary-General, 'Twenty-fourth report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2010) UN Doc S/2010/245

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2010) UN Doc S/2010/446

UNSC Report of the Secretary-General, 'Report of the Secretary-General pursuant to Security Council Resolution 1897 (2009)' (2010) UN Doc S/2010/556

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2010) UN Doc S/2010/675

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 September 2010 to 7 January 2011)' (2011) UN Doc S/2011/32

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2011) UN Doc S/2011/277

UNSC Report of the Secretary-General, 'Special report of the Secretary-General on the Sudan' (2011) UN Doc S/2011/314

UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and on the activities of the United Nations Integrated Peacebuilding Office in that country' (2011) UN Doc S/2011/370

UNSC Report of the Secretary-General, 'Twenty-eighth report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2011) UN Doc S/2011/387

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2011) UN Doc S/2011/549

UNSC Report of the Secretary-General, 'Preventive Diplomacy: Delivering Results' (2011) UN Doc S/2011/552

UNSC Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2011) UN Doc S/2011/634

UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and on the activities of the United Nations Integrated Peacebuilding Office in that country' (2011) UN Doc S/2011/655

UNSC Report of the Secretary-General, 'Report of the Secretary-General on South Sudan' (2011) UN Doc S/2011/678

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 20 September 2011 to 6 January 2012)' (2012) UN Doc S/2012/43

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (2012) UN Doc S/2012/355

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2012) UN Doc S/2012/643

UNSC Report of the Secretary-General, 'Report of the Secretary-General pursuant to Security Council Resolution 2020 (2011)' (2012) UN Doc S/2012/783

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2013) UN Doc S/2013/69

UNSC Report of the Secretary-General, 'Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes region' (2013) UN Doc S/2013/119

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2013) UN Doc S/2013/139

UNSC Report of the Secretary-General, 'Special report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2013) UN Doc S/2013/197

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2013) UN Doc S/2013/261

UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau, including efforts towards the restoration of constitutional order, and on the activities of the United Nations Integrated Peacebuilding Office in that country' (2013) UN Doc S/2013/262

UNSC Report of the Secretary-General, 'Thirty-second report of the Secretary-General on the United Nations Operation in Côte d'Ivoire ' (2013) UN Doc S/2013/377

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2013) UN Doc S/2013/470

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2013) UN Doc S/2013/493

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Support Mission in Libya' (2013) UN Doc S/2013/516

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia' (2013) UN Doc S/2013/623

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Central African Republic submitted pursuant to paragraph 22 of Security Council resolution 2121 (2013)' (2013) UN Doc S/2013/677

UNSC Report of the Secretary-General, 'Thirty-third report of the Secretary-General on the United Nations Operationin Côte d'Ivoire' (2013) UN Doc S/2013/761

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2013) UN Doc S/2013/787

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Support Mission in Libya' (2014) UN Doc S/2014/131

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2014) UN Doc S/2014/140

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (2014) UN Doc S/2014/157

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Central African Republic submitted pursuant to paragraph 48 of Security Council resolution 2127 (2013)' (2014) UN Doc S/2014/142

UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and the activities of the United Nations Integrated Peacebuilding Office in Guinea-Bissau' (2014) UN Doc S/2014/333

UNSC Report of the Secretary-General, 'Thirty-fourth report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2014) UN Doc S/2014/342

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2014) UN Doc S/2014/562

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2014) UN Doc S/2014/617

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Support Mission in Libya' (2014) UN Doc S/2014/653

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia' (2014) UN Doc S/2014/740

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2014) UN Doc S/2014/857

UNSC Report of the Secretary-General, 'Thirty-fifth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2014) UN Doc S/2014/892

UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and the activities of the United Nations Integrated Peacebuilding Office in Guinea-Bissau' (2015) UN Doc S/2015/37

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia January 2015' (2015) UN Doc S/2015/51

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (2015) UN Doc S/2015/172

UNSC Report of the Secretary-General, 'Conflict-related Sexual Violence' (2015) UN Doc S/2015/203

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2015) UN Doc S/2015/227

UNSC Report of the Secretary-General, 'Small Arms and Light Weapons' (2015) UN Doc S/2015/289

UNSC Report of the Secretary-General, 'Thirty-sixth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2015) UN Doc S/2015/320

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2015) UN Doc S/2015/576

UNSC Report of the Secretary-General, 'Thirtieth progress report of the Secretary-General on the United Nations Mission in Liberia' (2015) UN Doc S/2015/620

UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and the activities of the United Nations Integrated Peacebuilding Office in Guinea-Bissau' (2015) UN Doc S/2015/626

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2015) UN Doc S/2015/667

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations and Conflict Prevention: A Collective Recommitment' (2015) UN Doc S/2015/730

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia' (2015) UN Doc S/2015/776

UNSC Report of the Secretary-General, 'Thirty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2015) UN Doc S/2015/940

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2016) UN Doc S/2016/27

UNSC Report of the Secretary-General, 'Report of the Secretary-General on developments in Guinea-Bissau and the activities of the United Nations Integrated Peacebuilding Office in Guinea-Bissau' (2016) UN Doc S/2016/141

UNSC Report of the Secretary-General, 'Thirty-first progress report of the Secretary-General on the United Nations Mission in Liberia' (2016) UN Doc S/2016/169

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2016) UN Doc S/2016/225

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region' (2016) UN Doc S/2016/232

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Organizations Stabilization Mission in the Democratic Republic of Congo' (2016) UN Doc S/2016/233

UNSC Report of the Secretary-General, 'Special report of the Secretary-General on the United Nations Operation in Côte d'Ivoire' (2016) UN Doc S/2016/297

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation in the Central African Republic' (2016) UN Doc S/2016/305

UNSC Report of the Secretary-General, 'Report of the Secretary-General on Somalia' (2016) UN Doc S/2016/430

UNSC Report of the Secretary-General, 'Special Report of the Secretary-General on the strategic review of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic' (2016) UN Doc S/2016/565

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (2016) UN Doc S/2016/579

UNSC Report of the Secretary-General, 'Thirty-second progress report of the Secretary-General on the United Nations Mission in Liberia' (2016) UN Doc S/2016/706

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (2016) UN Doc S/2016/753

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (2016) UN Doc S/2016/833

UNSC Report of the Secretary-General, 'Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia' (2016) UN Doc S/2016/843

UNSC Report of the Secretary-General, 'Special report of the Secretary-General on the United Nations Mission in Liberia' (2016) UN Doc S/2016/968

United Nations General Assembly

UNGA, Questions of Equitable Representation on the Security Council and the Economic and Social Council, UNGA Res 1991 A (XVIII) (17 December 1963) UN Doc A/RES/1991 (XVIII)

UNGA, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625

UNGA, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UNGA Res 40/32 (29 November 1985) UN Doc A/RES/40/32

UNGA, Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations, UNGA Res 45/100 (14 December 1990) UN Doc A/RES/45/100

UNGA, United Nations Millennium Declaration, UNGA Res 55/2 (8 September 2000) UN Doc A/RES/55/2

UNGA, 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1

UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (21 March 2006) UN Doc A/RES/60/147

UNGA, The Rule of Law at the National and International Levels, UNGA Res 61/39 (11 September 2006) UN Doc A/61/39

UNGA, International Year of Reconciliation, 2009, UNGA Res 61/17 (23 January 2007) UN Doc A/RES/61/17

UNGA, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UNGA Res 67/1 (30 November 2012) UN Doc A/RES/67/1

UNGA, The Rule of Law at the National and International Levels, UNGA Res 71/148 (20 December 2016) UN Doc A/RES/71/148

Reports to the General Assembly

UNGA Report of the Secretary-General, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping' (1992) UN Doc A/47/277-S/24111

UNGA Report of the Secretary-General, 'Implementing the Responsibility to Protect' (2009) UN Doc A/63/677

UNGA, Report of the Special Rapporteur on the Independence of Judges and Lawyers (9 April 2010) UN Doc A/HRC/14/26

UNGA, Report of the Special Rapporteur on the Independence of Judges and Lawyers (13 August 2012) UN Doc A/67/305

UNGA, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (4 September 2013) UN Doc A/68/362

UNGA Report of the Secretary-General, 'Strengthening and Coordinating United Nations Rule of Law Activities' (2014) UN Doc A/68/213/Add.1

UNGA, Report of the Special Rapporteur on the Independence of Judges and Lawyers (28 April 2014) UN Doc A/HRC/26/32

UNGA, Report of the Special Rapporteur on the Independence of Judges and Lawyers (11 August 2014) UN Doc A/69/294

UNGA Report of the Secretary-General, 'Strengthening and Coordinating United Nations Rule of Law Activities' (2015) UN Doc A/70/206

Reports to the General Assembly and the Security Council

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security: Emergency international assistance for peace, normalcy and reconstruction of war-stricken Afghanistan' (2004) UN Doc A/59/581–S/2004/925

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security: Emergency international assistance for peace, normalcy and reconstruction of war-stricken Afghanistan' (2006) UN Doc A/60/712–S/2006/145

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for peace and security' (2006) UN Doc A/61/326–S/2006/727

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2007) UN Doc A/61/799–S/2007/152

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2007) UN Doc A/62/345–S/2007/555

UNGA-UNSC Report of the Secretary-General, 'Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform' (2008) UN Doc A/62/659-S/2008/39

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2008) UN Doc A/62/722–S/2008/159

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2008) UN Doc A/63/372–S/2008/617

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2009) UN Doc A/63/751–S/2009/135

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2010) UN Doc A/64/705–S/2010/127

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2011) UN Doc A/66/604–S/2011/772

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2013) UN Doc A/67/889–S/2013/350

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2013) UN Doc A/68/609-S/2013/535

UNGA-UNSC Report of the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security' (2015) UN Doc A/69/929-S/2015/422

United Nations Secretary-General

UNSG, Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance (2008)

Special UN Reports

UNSC Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia (2011) UN Doc S/2011/30

UNSC Preliminary Report of the International Commission of Inquiry on the Central African Republic, submitted pursuant to Security Council Resolution 2127 (2014) UN Doc S/2014/373

United Nations Economic and Social Council

ECOSOC, Report of the Special Rapporteur: The Right to Freedom of Opinion and Expression (17 December 2004) UN Doc E/CN. 4/2005/64

ECOSOC Resolution 2006/23, Bangalore Principles of Judicial Conduct (27 July 2006) UN Doc E/RES/2006/23

International Court of Justice

ICJ, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion of 28 May 1948) ICJ Rep 57

ICJ, *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion of 11 April 1949) [1949] ICJ Rep 174

ICJ, *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (Advisory Opinion of 13 July 1954) [1954] ICJ Rep 47

ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion of 20 July 1962) [1962] ICJ Rep 151

ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion of 21 June 1971) [1971] ICJ Rep 16

ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion of 20 December 1980) [1980] ICJ Rep 73

ICJ, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Request for the Indication of Provisional Measures)* (Order of 14 April 1992) [1992] ICJ Rep 3

ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Order of 13 September 1993) [1993] ICJ Rep 325

ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion of 8 July 1996) [1996] ICJ Rep 66

ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, (Advisory Opinion of 22 July 2010) [2010] ICJ Rep 2010

Permanent Court of International Justice

PCIJ, *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)* (Advisory Opinion of 6 December 1923) PCIJ Series B no 8

International Criminal Tribunal for the former Yugoslavia

ICTY, *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of the Appeals Chamber of 2 October 1995; Case No IT-94-1-AR72)

ICTY, *Prosecutor v Tadic* (Appeals Chamber Judgment of 15 July 1999; Case No IT-94-1-A)

United Nations Human Rights Committee

UNHRCee, *Salgar de Montejo v Colombia* (Com No 64/79) UN Doc CCPR/C/15/D/64/1979 (24 March 1982)

UNHRCee, *Fals Borda et al v Colombia* (Com No 46/79) UN Doc CCPR/C/16/D/46/1979 (27 July 1982)

UNHRCee, *Mbenge v Zaire* (Com No 16/77) UN Doc CCPR/C/18/D/16/1977 (25 March 1983)

UNHRCee, *Tourón v Uruguay* (Com No 32/78) UN Doc CCPR/C/12/D/32/1978 (31 March 1984)

UNHRCee, *OF v Norway* (Com No 158/83) UN Doc UN Doc CCPR/C/23/D/158/1983 (26 October 1984) [

UNHRCee, *Ngalula Mpandanjila et al v Zaire* (Com No 138/83) UN Doc CCPR/C/27/D/138/1983 (26 March 1986)

UNHRCee, *AP v Italy* (Com No 204/86) UN Doc CCPR/C/31/D/204/1986 (2 November 1987)

UNHRCee, *Muñoz Hermoza v Peru* (Com No 203/86) UN Doc CCPR/C/34/D/203/1986 (4 November 1988)

UNHRCee, *RM v Finland* (Com No 201/88) UN Doc CCPR/C/35/D/301/1988 (23 March 1989)

UNHRCee, *Van Meurs v The Netherlands* (Com No 215/86) UN Doc CCPR/C/39/D/215/1986 (13 July 1990)

UNHRCee, *Pinto v Trinidad and Tobago* (Com No 232/87) UN Doc CCPR/C/39/D/232/1987 (20 July 1990)

UNHRCee, *Guesdon v France* (Com No 219/86) UN Doc CCPR/C/39/D/219/1986 (25 July 1990)

UNHRCee, *Wolf v Panama* (Com No 289/88) UN Doc CCPR/C/44/D/289/1988 (26 March 1992)

UNHRCee, *Karttunen v Finland* (Com No 387/89) UN Doc CCPR/C/46/D/387/1989 (23 October 1992)

UNHRCee, *Oló Bahamonde v Equatorial Guinea* (Com No 468/91) UN Doc CCPR/C/49/D/468/1991 (20 October 1993)

UNHRCee, *Grant v Jamaica* (Com No 353/88) UN Doc CCPR/C/50/D/353/1988 (31 March 1994)

UNHRCee, *Reid v Jamaica* (Com No 355/89) UN Doc CCPR/C/51/D/355/1989 (8 July 1994)

UNHRCee, *Perera v Australia* (Com No 536/93) UN Doc CCPR/C/53/D/536/1993 (28 March 1995)

UNHRCee, Comments of the Human Rights Committee on the United States of America (7 April 1995) UN Doc CCPR/C/79/Add.50

UNHRCee, *Peart and Peart v Jamaica* (Com Nos 464/91 & 482/91) UN Doc CCPR/C/54/D/464/1991 & 482/1991 (24 July 1995)

UNHRCee, Concluding Observations of the Human Rights Committee on Zambia (3 April 1996) UN Doc CCPR/C/79Add.62

UNHRCee, *Fuenzalida v Ecuador* (Com No 480/91) UN Doc CCPR/C/57/D/480/1991 (12 July 1996)

UNHRCee, Concluding Observations of the Human Rights Committee on Brazil (24 July 1996) UN Doc CCPR/C/79/Add.66

UNHRCee, Preliminary Observations of the Human Rights Committee on Peru (25 July 1996) UN Doc CCPR/C/79/Add.67

UNHRCee, *Lloydell Richards v Jamaica* (Com No 535/93) UN Doc CCPR/C/59/D/535/1993 (31 March 1997)

UNHRCee, *Hill and Hill v Spain* (Com No 526/93) UN Doc CCPR/C/59/D/526/1993 (2 April 1997)

UNHRCee, *Espinoza de Polay Campos v Peru* (Com No 577/94) UN Doc CCPR/C/61/D/577/1994 (6 November 1997)

UNHRCee, Concluding Observations of the Human Rights Committee on Sudan (19 November 1997) UN Doc CCPR/C/79/Add.85

UNHRCee, Concluding Observations of the Human Rights Committee on Finland (8 April 1998) UN Doc CCPR/C/79/Add.91

UNHRCee, Concluding Observations of the Human Rights Committee on Algeria (18 August 1998) UN Doc CCPR/C/79/Add.95

UNHRCee, Concluding Observations of the Human Rights Committee on Armenia (19 November 1998) UN Doc CCPR/C/79/Add.100

UNHRCee, Concluding Observations of the Human Rights Committee on Romania (28 July 1999) UN Doc CCPR/C/79/Add.111

UNHRCee, *Sánchez López v Spain* (Com No 777/97) UN Doc CCPR/C/67/D/777/1997 (18 October 1999)

UNHRCee, Concluding Observations of the Human Rights Committee on the Republic of the Congo (25 April 2000) UN Doc CCPR/C/79/Add.118

UNHRCee, *Gridin v Russian Federation* (Com No 770/97) UN Doc CCPR/C/69/D/770/1997 (20 July 2000)

UNHRCee, *Gómez Vazquez v Spain* (Com No 701/96) UN Doc CCPR/C/69/D/701/1996 (20 July 2000)

UNHRCee, *Kavanagh v Ireland* (Com No 819/98) UN Doc CCPR/C/71/D/819/1998 (4 April 2001)

UNHRCee, Concluding Observations of the Human Rights Committee on Croatia (30 April 2001) UN Doc CCPR/CO/71/HRV

UNHRCee, *Sextus v Trinidad and Tobago* (Com No 818/98) UN Doc CCPR/C/72/D/818/1998 (16 July 2001)

UNHRCee, General Comment No 29: Article 4: Derogations during a State of Emergency (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11

UNHRCee, *Cagas, Butin and Astillero v Philippines* (Com No 788/97) UN Doc CCPR/C/73/D/788/1997 (23 October 2001)

UNHRCee, Concluding Observations of the Human Rights Committee on Georgia (19 April 2002) UN Doc CCPR/CO/74/GEO

UNHRCee, *Rodríguez Orejuela v Colombia* (Com No 848/99) UN Doc CCPR/C/75/D/848/1999 (23 July 2002)

UNHRCee, Concluding Observations of the Human Rights Committee on the Republic of Moldova (5 August 2002) UN Doc CCPR/CO/75/MDA

UNHRCee, Concluding Observations of the Human Rights Committee on Vietnam (5 August 2002) UN Doc CCPR/CO/75/VNM

UNHRCee, *Borisenko v Hungary* (Com No 852/99) UN Doc CCPR/C/76/D/852/1999 (14 October 2002)

UNHRCee, *Busyo et al v Democratic Republic of the Congo* (Com No 933/00) UN Doc CCPR/C/79/D/933/2000 (31 July 2003)

UNHRCee, *Pastukhov v Belarus* (Com No 814/98) UN Doc CCPR/C/78/D/814/1998 (5 August 2003)

UNHRCee, *Kurbanov v Tajikistan* (Com No 1096/02) UN Doc CCPR/C/79/D/1096/2002 (6 November 2003)

UNHRCee, General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (26 March 2004) UN Doc CCPR/C/21/Rev.1/Add. 13

UNHRCee, Concluding Observations of the Human Rights Committee on Namibia (August 2004) UN Doc CCPR/CO/81/NAM

UNHRCee, Concluding Observations of the Human Rights Committee on Liechtenstein (12 August 2004) UN Doc CCPR/CO/81/LIE

UNHRCee, *Deisl v Austria* (Com No 1060/02) UN Doc CCPR/C/81/D/1060/2002 (23 August 2004)

UNHRCee, Concluding Observations of the Human Rights Committee on Uzbekistan (25 April 2005) UN Doc CCPR/CO/83/UZB

UNHRCee, Concluding Observations of the Human Rights Committee on Kenya (29 April 2005) UN Doc CCPR/CO/83/KEN

UNHRCee, Concluding Observations of the Human Rights Committee on Tajikistan (18 July 2005) UN Doc CCPR/CO/84/TJK

UNHRCee, General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial (23 August 2007) UN Doc CCPR/C/GC/32

UNHRCee, Concluding Observations of the Human Rights Committee on Georgia (15 November 2007) UN Doc CCPR/C/GEO/CO/3

UNHRCee, *Lumanog and Santos v Philippines* (Com No 1466/06) UN Doc CCPR/C/92/D/1466/2006 (21 April 2008)

UNHRCee, *Bandaranayake v Sri Lanka* (Com No 1376/05) UN Doc CCPR/C/93/D/1376/2005 (24 July 2008)

UNHRCee, *Khoroshenko v Russian Federation* (Com No 1304/04) UN Doc CCPR/C/101/D/1304/2004 (29 March 2011)

UNHRCee, General Comment No 34: Article 19: Freedom of Opinion and Expression (12 September 2011) UN Doc CCPR/C/GC/34

UNHRCee, *Musaev v Uzbekistan* (Com Nos 1914, 1915 and 1916/09) UN Doc CCPR/C/104/D/1914,1915&1916/2009 (21 March 2012)

UNHRCee, Concluding Observations of the Human Rights Committee on Turkmenistan (19 April 2012) UN Doc CCPR/C/TKM/CO/1

UNHRCee, Concluding Observations on the Second Periodic Report of Kyrgyzstan (23 April 2014) UN Doc CCPR/C/KGZ/CO/2

UNHRCee, Concluding Observations of the Human Rights Committee on the United Kingdom of Great Britain and Northern Ireland (17 August 2015) UN Doc CCPR/C/GBR/CO/7

United Nations Committee on Economic, Social and Cultural Rights

UNCESCR, General Comment No 8: Article 14: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights (12 December 1997) UN Doc E/C.12/1997/8

UNCESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights on the United Kingdom of Great Britain and Northern Ireland (14 July 2016) UN Doc E/C.12/GBR/CO/6

United Nations Human Rights Council

UNHRC, Report of the Special Rapporteur on the Independence of Judges and Lawyers (24 March 2009) UN Doc A/HRC/11/41

UNHRC, Report of the Special Rapporteur on the Independence of Judges and Lawyers (9 April 2010) UN Doc A/HRC/14/26

UNHRC, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 (5 August 2013) UN Doc A/HRC/WG.6/17/CHN/1

UNHRC, Report of the Special Rapporteur on the Independence of Judges and Lawyers (30 April 2014) UN Doc A/HRC/26/32/Add.1

UNHRC, Final Report of the Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights (5 January 2015) UN Doc A/HRC/28/73

UNHRC, National Report submitted in accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 (18 February 2015) UN Doc A/HRC/WG.6/22/LBR/1

UNHRC, Report of the Special Rapporteur on the Situation of Human Rights Defenders (4 March 2015) UN Doc A/HRC/28/63/Add.1

United Nations Commission of Human Rights

UNComHR, Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, Res 1994/41 (4 March 1994) UN Doc E/CN. 4/RES/1994/41

United Nations Department of Peacekeeping Operations

UNDPKO, Handbook on United Nations Multidimensional Peacekeeping Operations (2003)

UNDPKO, Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law (2006)

UNDPKO, United Nations Peacekeeping Operations: Principles and Guidelines (2008) (Capstone Doctrine)

UNDPKO/DFS, Policy on Justice Components in United Nations Peace Operations (2009)

UNDPKO/OHCHR, The United Nations Rule of Law Indicators: Implementation Guide and Project Tools (2011)

UNDPKO, Handbook for Judicial Affairs Officers in United Nations Peacekeeping Operations (2013)

United Nations Office on Drugs and Crime

UNODC, Criminal Justice Assessment Toolkit 2: Access to Justice – The Independence, Impartiality and Integrity of the Judiciary (2006)

UNODC, Criminal Justice Assessment Toolkit 2: Access to Justice – The Courts (2006)

UNODC, Resource Guide on Strengthening Judicial Integrity and Capacity (2011)

Office of the United Nations High Commissioner for Human Rights

OHCHR, Rule-of-Law Tools for Post-conflict States: Monitoring Legal Systems (2006)

OHCHR, Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector (2006)

UNDPKO/OHCHR, The United Nations Rule of Law Indicators: Implementation Guide and Project Tools (2011)

Council of Europe

European Court of Human Rights

ECtHR, *Neumeister v Austria* (App No 1936/63) 27 June 1968

ECtHR, *Ringeisen v Austria* (App No 2614/65) 16 July 1971

ECtHR, *Piersack v Belgium* (App No 8692/79) 1 October 1982

ECtHR, *Zimmermann and Steiner v Switzerland* (App No 8737/79) 13 July 1983

ECtHR, *Axen v Germany* (App No 8273/78) 8 December 1983

ECtHR, *Campbell and Fell v Great Britain* (App No 7819/77, 7878/77) 28 June 1984

ECtHR, *Sramek v Austria* (App No 8790/79) 22 October 1984

ECtHR, *De Cubber v Belgium* (App No 9186/80) 26 October 1984

ECtHR, *Colozza v Italy* (App No 9024/80) 12 February 1985

ECtHR, *Lithgow ao v Great Britain* (App No 9006/80) 8 July 1986

ECtHR, *H v Belgium* (App No 8950/80) 30 November 1987

ECtHR, *Barberà, Messegué and Jabardo v Spain* (App No 10590/83) 6 December 1988

ECtHR, *Hauschildt v Denmark* (App No 10486/83) 24 May 1989

ECtHR, *Kamasinski v Austria* (App No 9783/82) 19 December 1989

ECtHR, *Demicoli v Malta* (App No 13057/87) 27 August 1991

ECtHR, *Pfeifer v Austria* (App No 10802/84) 25 February 1992

ECtHR, *Thorgeir Thorgeirson v Iceland* (App No 13778/88) 25 June 1992

ECtHR, *Funke v France* (App No 10828/84) 25 February 1993

ECtHR, *Padovani v Italy* (App No 13396/87) 26 February 1993

ECtHR, *Ruiz-Mateos v Spain* (App No 12952/87) 23 June 1993

ECtHR, *Nortier v Netherlands* (App No 13924/88) 24 August 1993

ECtHR, *Imbrioscia v Switzerland* (App No 13972/88) 24 November 1993

ECtHR, *Holm v Sweden* (App No 14191/88) 25 November 1993

ECtHR, *Muti v Italy* (App No 14146/88) 23 March 1994

ECtHR, *Saraiva de Carvalho v Portugal* (App No 15651/89) 22 April 1994

ECtHR, *Beaumartin v France* (App No 15287/89) 24 November 1994

ECtHR, *McMichael v the United Kingdom* (App No 16424/90) 24 February 1995

ECtHR, *Solakov v the former Yugoslav Republic of Macedonia* (App No 47023/99) 31 January 2002

ECtHR, *Rawa v Poland* (App No 38804/97) 14 January 2003

ECtHR, *Lagerblom v Sweden* (App No 26891/95) 14 April 2003

ECtHR, *Janosevic v Sweden* (App No 34619/97) 21 May 2003

ECtHR, *Hennig v Austria* (App No 41444/98) 2 October 2003

ECtHR, *Blücher v the Czech Republic* (App No 58580/00) (11 April 2005)

ECtHR, *Öcalan v Turkey* (App No 46221/99) 12 May 2005

ECtHR, *Kyprianou v Cyprus* (App No 73797/01) 15 December 2005

ECtHR, *Sürmeli v Germany* (App No 75529/01) 8 June 2006

ECtHR, *Jalloh v Germany* (App No 54810/00) 11 July 2006

ECtHR, *Ressegatti v Switzerland* (App No 17671/02) 13 July 2006

ECtHR, *Khudobin v Russia* (App No 59696/00) 26 January 2007

ECtHR, *Driza v Albania* (App No 33771/02) 13 November 2007

ECtHR, *Ramanauskas v Lithuania* (App No 74420/01) 5 February 2008

ECtHR, *Galstyan v Armenia* (App No 26986/03) 15 February 2008

ECtHR, *Hummatov v Azerbaijan* (App Nos 9852/03 and 13413/04) 29 February 2008

ECtHR, *Salduz v Turkey* (App No 36391/02) 27 November 2008

ECtHR, *Olujić v. Croatia* (App No 22330/05) 5 February 2009

ECtHR, *Bykov v Russia* (App No 4378/02) 10 March 2009

ECtHR, *Gorou v Greece (Nr. 2)* (App No 12686/03) 20 March 2009

ECtHR, *Stankiewicz v Poland* (App No 46917/99) 6 April 2009

ECtHR, *Társaság a Szabadságjogokért v Hungary* (App No 37374/05) 14 July 2009

ECtHR, *Luka v Romania* (App No 34197/02) 21 July 2009

ECtHR, *Petkov ao v Bulgaria* (App Nos 77568/01, 178/02 and 505/02) 11 September 2009

ECtHR, *Kari-Pekka Pietiläinen v Finland* (App No 13566/06) 18 November 2009

ECtHR, *Penev v Bulgaria* (App No 20494/04) 7 April 2010

ECtHR, *Massmann v Germany* (App No 11603/06) 4 May 2010

ECtHR, *Henryk Urban and Ryszard Urban v Poland* (App No 23614/08) 20 November 2010

ECtHR, *Rumpf v Germany* (App No 46344/06) 2 December 2010

ECtHR, *M.S.S. v Belgium and Greece* (App No 30696/09) 21 January 2011

ECtHR, *Bannikova v Russia* (App No 18757/06) 4 February 2011

ECtHR, *Makedonski v Bulgaria* (App No 36036/04) 20 April 2011

ECtHR, *Ilyadi v Russia* (App No 6642/05) 5 May 2011

ECtHR, *Al-Jedda v United Kingdom* (App No 27021/08) 7 July 2011

ECtHR, *Huseyn ao v Azerbaijan* (App Nos 35485/05, 45553/05, 35680/05 and 36085/05) 26 October 2011

ECtHR, *OAO Neftyanaya Kompaniya Yukos v Russia* (App No 14902/04) 8 March 2012

ECtHR, *Ajdarić v. Croatia* (App No 20883/09) 4 June 2012

ECtHR, *Nada v Switzerland* (App No 10593/08) 12 September 2012

ECtHR, *Gregačević v Croatia* (App No 58331/09) 10 October 2012

ECtHR, *Hümmer v Germany* (App No 26171/07) 19 October 2012

ECtHR, *Veselov ao v Russia* (App Nos 23200/10, 24009/07, 556/10) 2 January 2013

ECtHR, *Svinarenko u Slyadnev v Russia* (App Nos 32541/08 & 43441/08) 17 July 2014

ECtHR, *Chaushev a.o. v Russia* (App Nos 37037/03, 39053/03 and 2469/04) 25 January 2017

European Committee of Ministers

European Committee of Ministers, Recommendation No R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges (13 October 1994)

European Committee of Ministers, Explanatory Memorandum Recommendation Rec(1994)12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges

European Committee of Ministers, Appendix to Recommendation CM/Rec(2010) 12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities

African Union

AU, Constitutive Act of the African Union (11 June 2000)

Inter-American Court of Human Rights

IACtHR, Advisory Opinion OC-9/87 'Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights' (6 October 1987)

IACtHR, *Velásquez Rodríguez v Honduras* (Judgment of 29 July 1988; Series C No 4) (Merits)

IACtHR, *Genie Lacayo v Nicaragua* (Judgment of 29 January 1997; Series C No 30) (Merits, Reparations and Costs)

IACtHR, *Genie Lacayo v Nicaragua* (Judgment of 13 September 1997; Series C No 45)

IACtHR, *Loayza Tamayo v Peru* (Judgment of 17 September 1997; Series C No 33) (Merits) (Application for Judicial Review of the Judgment of Merits, Reparations and Costs)

IACtHR, *Castillo Petruzzi et al v Peru* (Judgment of 4 September 1998; Series C No 41) (Preliminary Objections)

IACtHR, *Castillo Petruzzi v Peru* (Judgment of 30 May 1999; Series C No 52) (Merits, Reparations, and Costs)

IACtHR, *Villagrán Morales et al (Street Children) v Guatemala* (Judgment of 19 November 1999; Series C No 63) (Merits)

IACtHR, *Durand and Ugarte v Peru* (Judgment of 16 August 2000; Series C No 68) (Merits)

IACtHR, *Cantoral Benavides v Peru* (Judgment of 18 August 2000; Series C No 69) (Merits)

IACtHR, *Constitutional Court v Peru* (Judgment of 31 January 2001; Series C No 71) (Merits, Reparations and Costs)

IACtHR, *Ivcher-Bronstein v Peru* (Judgment of 6 February 2001; Series C No 74) (Merits, Reparations and Costs)

IACtHR, *Juan Humberto Sánchez v Honduras* (Judgment of 7 June 2003; Series C No 99) (Preliminary Objection, Merits, Reparations and Costs)

IACtHR, *Bulacio v Argentina* (Judgment of 18 September 2003; Series C No 100) (Merits, Reparations and Costs)

IACtHR, *Herrera Ulloa v Costa Rica* (Judgment of 2 July 2004; Series C No 107) (Preliminary Objections, Merits, Reparations and Costs)

Inter-American Commission on Human Rights

African Commission on Human and Peoples' Rights

United Kingdom of Great Britain and Northern Ireland

House of Lords of the United Kingdom

UKHL, *Regina v Secretary of State for the Home Department ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115

UKHL, *Jackson and others v Her Majesty's Attorney General* [2005] UKHL 56, [2006] 1 AC 262

Supreme Court of the United Kingdom

UKSC, *HM Treasury v Mohammed Jabar Ahmed and others, HM Treasury v Mohammed al-Ghabra, R (Hari El Sayed Sabaei Youssef) v HM Treasury* [2010] UKSC 2 (Judgment of 27 January 2010)

High Court (Administrative Court) of the United Kingdom

Thoburn v Sunderland City Council [2002] EWHC 195 (Admin), [2003] QB 151

France

Conseil Constitutionnel de la République Française

Conseil Constitutionnel, Decision No 71-44 of 16 July 1971 ('Liberté d'association')

Conseil Constitutionnel, Decision No 80-199 DC of 22 July 1980

United States of America

Supreme Court of the United States

SCOTUS, *Marbury v Madison*, 5 U.S. 137 [1803]

SCOTUS, *Youngstown Sheet & Tube Co. v Sawyer* 343 U.S. 579 [1952]

SCOTUS, *Brown v Board of Education*, 347 U.S. 483 [1954]

SCOTUS, *Bolling v Sharpe*, 347 U.S. 497 [1954]

SCOTUS, *New York Times v Sullivan*, 376 U.S. 254 [1964]

SCOTUS, *Griswold v Connecticut*, 381 U.S. 479 [1965]

SCOTUS, *Miranda v Arizona*, 384 U.S. 436 [1966]

SCOTUS, *Roe v Wade*, 410 U.S. 113 [1973]

SCOTUS, *Webster v Reproductive Health Service*, 492 U.S. 490 [1989]

SCOTUS, *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833 [1992]

SCOTUS, *Lawrence v Texas*, 539 U.S. 558 [2003]

SCOTUS; *Obergefell v Hodges*, 576 U.S. ____ [2015]

Canada

Federal Court of Canada

CFC, *Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada*, 2009 FC 580 (Judgment of 4 June 2009)

Switzerland

Federal Supreme Court of Switzerland

BGE 133 II 450 (Youssef Nada (14 November 2007))

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