Chapter 11

The Security Council, Peace-making and Peace Settlement: Between Executive and Pragmatic

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11.1. Introduction

'Peacemaking' was defined by the UN Secretary-General Boutros Boutros-Ghali in 'An Agenda for Peace' (1992) as 'action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations'.[1] In this sense, consensual 'peacemaking' can be distinguished from coercive peace enforcement under Chapter VII, or from newer consensual concepts such as 'peacekeeping', which originated in the first such UN force in 1956, and 'peacebuilding' given momentum by the UN's Peacebuilding Commission created at the UN's World Summit in 2005.[2] In many ways, in contrast to the resources put into the normative and practical development of peacekeeping, peacebuilding, and – to a lesser extent – peace enforcement, peace-making seems to have remained firmly rooted in traditional concepts of international law such as sovereign equality, consent and agreement, embodied in Chapter VI of the UN Charter. Peace-making operates in the shadow, to some extent, of the Security Council's enforcement powers under Chapter VII.

This chapter asks the question whether peace-making leading to peace settlements remains rooted in Chapter VI, or whether it has undergone normative development, including any blurring into peace enforcement, peacekeeping, peacebuilding or other related areas. In addition to considering peace-making as a legal concept, this contribution looks at its application as a political instrument in the hands of the Security Council. In general terms, the relative lack of attention given to the normative development and strengthening of peace-making would appear incongruous when peace-making is arguably the main and most

[1] UN Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, 17 June 1992, UN Doc. A/47/277-S/24111, para. 20.

[2] 'An Agenda for Peace' defined 'peace-keeping' as 'the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well' (para. 20); and 'peace-building' as 'action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict' (para. 21).

effective method of both preventing conflicts as well as ending them in some form of peace settlement. It is axiomatic that without effective peace-making there would be no peace settlement. With the advent of the UN, there is also the prospect of peace settlement being enforced by the Security Council under Chapter VII, although this contribution casts doubt upon whether an imposition of peace on the parties works and argues that, more realistically, Chapters VI and VII can be used together to achieve peace settlements. That said, the achievement of peace in any given context involves many political, legal, military and economic variables, meaning that any general propositions made in this contribution cannot be seen as a blueprint for peace, only as guidance.

To this end, the chapter shows how the Security Council's peace-making powers and functions found in Chapter VI were formally applied during the immediate post-1945 period within an executive model of peace-making, with limited success in terms of peace settlements. Over time, however, the absence of any real normative development of peace-making by or for the Security Council reflected a rejection of an executive approach and a turn to pragmatism in the Cold War period. In the aftermath of the Cold War, the chapter then traces what might be called an ideological era of peace-making, which shows that while the normative aspects have remained relatively static and rooted in Chapter VI, the empty shell of some of those provisions have enabled the Security Council to reflect certain ideological changes in international law and relations in its peace-making efforts, broadly reflecting a collective conception of 'justice' found in the obligation to settle disputes in Article 2(3) of the Charter. Some of these changes (for example, democracy) have proved to be more ephemeral than others (the concern to address gender issues in peace and security). Thus, contrary to first appearances, which suggest the Security Council's peace-making powers have remained both static and stable, this chapter demonstrates that considerable changes in peace-making have been wrought, reflecting broader contextual changes in international law and international relations. The Chapter finishes with a return to pragmatism as the ideological consensus of the immediate post-Cold War era has given way to a narrow approach in which counter-terrorism is the threat around which consensus can be achieved amongst the permanent five. This signifies that where the interests of the permanent members are strong, as in the Syrian conflict, peace-making and peace settlement through the Security Council are unachievable. However, in conflicts where the interests of the permanent five are limited, or one permanent member seeks a role for the Security Council, consensus may be

achieved on peace-making efforts and the Security Council may be able to endorse and promote peace settlements, as has been the case in a number of African states.

11.2. Chapter VI and the 'Pacific Settlement of Disputes'

Chapter VI reinforces the obligation that member states have undertaken in Article 2(3) of the Charter to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'.[3] Article 33(1) requires states that are parties 'to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security' to first of all seek a solution using the traditional forms of peaceful settlement: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, or resort to regional organisations. Thereby, Chapter VI is demonstrably based on traditional forms of diplomacy and settlement.[4] Article 33(2) brings the Security Council into the equation when stating that the Council 'shall, when it deems necessary, call upon the parties to settle their disputes by such means'. Thereafter, Chapter VI iterates the Security Council's powers to: investigate the dispute (Article 34); recommend procedures or methods of adjustment to the disputants (Article 36); or, indeed, recommend terms of settlement to them (Article 37). The latter has obvious relevance for this contribution, enabling the Council to take the initiative and propose the terms within which settlement could occur, especially given the terms of Article 37(1), which requires the parties to refer the dispute to the Security Council if they have failed to settle it peacefully.

Security Council practice has shown that the Charter provides a flexible framework to shape its actions. Peacekeeping hovers between Chapters VI and VII, while peace enforcement under Chapter VII has been crafted in a way that utilises the Council's power to take military action but disregards those provisions that would seem to require special agreements on the provision of force and control of those forces by the Military Staff Committee. Similarly, in the context of peace-making, Security Council practice is not always clear-cut as to which power is being utilised within any specific dispute, but resolutions are crafted within this framework, as well as the specific political context framing the dispute and the broader geopolitical context. This interplay was evident in the Security Council's close involvement

[3] Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945 (hereinafter 'UN Charter'), certified true copy at https://treaties.un.org/doc/Publication/CTC/uncharter.pdf (last accessed 7 January 2019), Article 2(3).
[4] John G. Merrills, *International Dispute Settlement*, 6th ed. (Cambridge: Cambridge University Press, 2017); Leland M. Goodrich, 'Pacific Settlement of Disputes' (1945) 39 *American Political Science Review* 956.

in helping achieve peaceful settlement in Indonesia,[5] an early example of an armed struggle for independence (in that case from the Netherlands). Indeed, as Kelsen points out, the initial debate over Indonesia concerned whether this should be settled within the framework of Chapter VII, on the basis that the situation constituted a threat to or breach of the peace under Article 39, bearing in mind that Article 39 does not necessarily mean that enforcement action will be taken, but allows for the making of recommendations or decisions imposing coercive measures.[6] Political pressures concerning the premature entry into Chapter VII, and the unwillingness of some members to even suggest that the Council might 'decide' on the future status of Indonesia,[7] led to the removal of implied determinations under Article 39 in Security Council resolutions on Indonesia, but did not prevent the Council from helping guide the parties towards a peace settlement, culminating in the adoption of Resolution 67 on 28 January 1949. In this Resolution, the Council invoked its primary responsibility for peace and security and built on the expressed desires of both parties in the Linggadjati and Renville Agreements – facilitated with the aid of the Council's Committee of Good Offices for Indonesia – to establish a federal, independent and sovereign Indonesia.[8] The Council recommended the establishment of an interim federal government, elections to an Indonesian constituent assembly, and the transfer of sovereignty to Indonesia, all within a specified timetable, and to be supported by a UN Commission for Indonesia.[9] Following these developments, Indonesia achieved independence from the Netherlands in December 1949.

The aim in this section is not to provide a run-through of the practice of the UN Security Council under Chapter VI of the Charter,[10] but to try and understand what the powers contained therein signify and how they might or might not work to bring the parties to an

[5] UNSC Resolution 27 (1947), UN Doc. S/RES/27(1947); UNSC Resolution 30 (1947), UN Doc. S/RES/30(1947); UNSC Resolution 31 (1947), UN Doc. S/RES/31(1947); UNSC Resolution 36 (1947), UN Doc. S/RES/36(1947); UNSC Resolution 67 (1949), UN Doc. S/RES/67(1949).
[6] Hans Kelsen, *The Law of the United Nations* (New York, NY: Praeger, 1950), 438-443.
[7] See statement by Belgium in UNSC Official Records, 417th meeting, 11 March 1949, UN Doc. S/PV.417, at 9: 'With regard to the settlement of the substance of the question, the Council can only make recommendations, and it could not be otherwise. To acknowledge the Council's right to decide on the liberation of the peoples of Indonesia, or of any other people, would be the equivalent of granting it the authority to settle the fate of a territory'.
[8] UNSC Resolution 67 (1949), para. 3 and Preamble, para. 8.
[9] *Ibid*., paras. 3-4.
[10] See generally Christian Tomuschat, 'Article 33', in Bruno Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., 2 vols. (Oxford: Oxford University Press, 2012), vol. I, 1069-1170; Jean-Pierre Cot *et al.* (eds.), *La Charte des Nations Unies: Commentaire Article par Article*, 3rd ed. (Paris: Economica, 2005); Norman Bentwich and Andrew Martin, *A Commentary on the Charter of the United Nations* (London: Routledge, 1950), 76-87; Leland M. Goodrich *et al.*, *Charter of the United Nations: Commentary and Documents*, 3rd ed. (New York, NY: Columbia University Press, 1969); Repertoire of Security Council practice available at: http://www.un.org/en/sc/repertoire/studies/overview.shtml (last accessed 7 January 2019).

agreement. In this regard, Tomuschat's analysis of Chapter VI, in his commentary on Article 33 of the Charter, provides a very useful entry to understanding the nature of Chapter VI, arguing that it was realistic for the drafters of the Charter to involve the Security Council so intimately with attempts at peace settlement, as compliance with Article 2(3) would not be achieved by the obligation alone. By involving the Security Council and the General Assembly, 'they intended to create avenues suitable in every instance of crisis threatening the very existence of a State, after all opportunities for remedial action in the bilateral relationship between the parties concerned had been exhausted'.[11]

By tying the obligation to settle disputes placed on states to the powers of the Security Council, the idea was that the Security Council would help the parties towards a peace agreement and settlement after they had tried and failed to sort out their dispute themselves, though in practice the Security Council has not necessarily waited for this to happen.[12] The question remains whether peace-making is enhanced by involving the Security Council in a function that traditionally, even in periods of institutionalisation under the Concert of Europe and the League of Nations, was within the realms of states.

11.3. An Executive Approach to Peace-making?

Writing in the immediate post-Charter period, James Brierly saw the UN not as a continuation of the League of Nations in terms of improving the model of collective security, but both more ambitious and weaker than its predecessor. According to Brierly, the League only set up an association of states; it did not purport to set up the beginnings of a system of world government. The League's effectiveness depended upon the 'conduct of the members individually' and their willingness to comply with their obligations; they could not be 'made to act together, and a majority of them' could not 'decide or act for the whole body'.[13] Sovereign equality for independent states meant exactly that under the Covenant; while under the UN Charter, the move was away from 'the purely cooperative basis of international organization',[14] which is one of the reasons why the Charter is so much longer than the Covenant (111 articles compared to 26). Brierly depicts the Covenant as the outline of a constitution, enabling members to adjust the working of the Council and Assembly to suit, whilst the Charter contains details on the powers of each UN organ, and gives decision-

[11] Tomuschat, 'Article 33', 1070.
[12] *Ibid.*, 1072; Bentwich and Martin, 'A Commentary', 76.
[13] James L. Brierly, 'The Covenant and the Charter' (1946) 23 *British Yearbook of International Law* 83, at 85.
[14] *Ibid.*

making competence to the UN Security Council both under Chapter VI (powers of peaceful settlement) and Chapter VII (coercive powers).

For Brierly, the moves towards greater constitutionalisation and institutionalisation in the Charter are fraught with problems, leading to both a concentration of power and a lack of effective decision-making in the UN Security Council. This is reflected not only in the enforcement provisions of Chapter VII of the Charter, but also in the way the UN is empowered to settle international disputes. The Covenant of the League did give some detail on dispute settlement in the procedures that the members of the League were to follow in Articles 12-15 of the Covenant. The Charter, however, pushes most of this responsibility on to the Security Council, apart from the general obligation on member states to settle disputes peacefully in Articles 2(3) and 33(1), and, in an important departure from the Covenant's provisions, to renounce the use of force in Article 2(4). Brierly thought that this move towards executive-style government would stymie both the peace-making and peace enforcement functions of the Security Council, as the veto could be applied – and has been applied – indiscriminately to proposals under both Chapters;[15] but of course it has already been established that states are not dependent upon the Security Council to seek to settle their disputes. The powers found in Chapter VII, in contrast, cannot be triggered by states alone, acting outside of the Security Council. In any case, without a concerted push from the Council, either under Chapter VI or VII or both, conflicts and disputes may just settle into ongoing stalemates, as a number of the world's intractable disputes show.

The first version of the UN Charter – the Dumbarton Oaks proposals of 1944 – was essentially directed at Germany and Japan as continuing to pose the greatest threats, as they were still immensely powerful (at least outwardly) in 1944. This gave rise to the idea of a world police force based on the alliance of the Second World War continuing into the post-1945 era. German and Japanese aggression had clearly been planned, unlike the actions that led to the First World War.[16] The post-1945 world order therefore required executive-style government to prevent deliberate aggression happening again, and an approach that infused

[15] The veto power is contained in Article 27(3) of the UN Charter. For discussion of practice, see Sydney D. Bailey, *Voting in the Security Council* (Bloomington, IN: Indiana University Press, 1969), 18-25, 33-37; Loraine Sievers and Sam Daws, *The Procedure of the UN Security Council*, 4th ed. (Oxford: Oxford University Press, 2014), 341.

[16] Brierly, 'The Covenant and the Charter', 91; J. Adam Tooze, *The Deluge: The Great War and the Remaking of Global Order* (London: Penguin, 2014), 256.

both peace-making and peace enforcement functions; this executive model, however, was readily blocked by the opposition of already one permanent member.[17] According to Brierly:

> [T]he Covenant scheme had weaknesses … and perhaps it might not have worked even if it had been given a fair trial … [b]ut we must realize that what we have done is to exchange a scheme which might or might not have worked for one which cannot work, and that instead of limiting the sovereignty of states we have actually extended the sovereignty of the Great Powers, the only states whose sovereignty is a still a formidable reality in the modern world.[18]

Brierly saw executive peace-making under Chapter VI or peace enforcement under Chapter VII as unachievable due to the reality that to trigger such executive powers required agreement amongst the five permanent members. The super-sovereignty of the permanent members is illustrated in their practice regarding the veto, which they have applied to resolutions proposed under Chapter VI as well as proposals made under Chapter VII. Whereas straightforward procedural matters require an affirmative vote of nine out of the 15 members (seven out of 11 until 1966),[19] on substantive matters – such as resolutions on disputes or situations raising concerns of international peace and security – Article 27(3) of the Charter requires 'an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting'.

There was mixed early evidence that supports Brierly's scepticism regarding the ability of the Security Council to undertake executive peace-making that would lead to settlements or peace agreements in the crises that emerged in the immediate shadow of the Second World War, including the Iranian,[20] Greek,[21] and Spanish Questions. In these crises, the provisions of Chapter VI were discussed in the Security Council, though limited use was made of the range of powers. In this period, formalism – in the shape of legally driven decisions – was used to ensure greater control of the agenda by the permanent members. This was

[17] Brierly, 'The Covenant and the Charter', 91.
[18] *Ibid.*, 91-92.
[19] UN Charter, Article 27(2).
[20] UNSC Resolution 5 (1946), UN Doc. S/RES/5(1946), in which the Security Council resolved to 'defer further proceedings on the Iranian matter in order that the Government of Iran may have time in which to ascertain … whether all USSR troops have been withdrawn from the whole of Iran'. The USSR was absent from the Council at the adoption of the resolution.
[21] UNSC Resolution 15 (1946), UN Doc. S/RES/15(1946), in which the Security Council established a Commission of Investigation under Article 34 of the Charter to 'ascertain the facts relating to the alleged border violations' along borders between Greece on the one hand, and Albania, Bulgaria and Yugoslavia on the other.

demonstrated in the early years by a formal approach to the 'triggers' that would unlock the Council's powers under Chapters VI or VII. The idea that the Security Council, as a body, had to classify a situation as either 'likely to endanger international peace and security' (Articles 33 and 34), and so appropriate for Chapter VI recommendations, or as a 'threat to the peace, breach of the peace, or act of aggression' (Article 39) requiring recommendations for settlement or action under Chapter VII, before resolutions could be adopted, meant that debates focused on these triggers, rather than on the needs of peace and security themselves.

That these terms were in reality indeterminate was shown by the fact that the original Dumbarton Oaks proposals had provided for a link between Chapters VI and VII of the Charter. The proposals had a provision at the beginning of Chapter VII that empowered the Council to find a threat to the maintenance of international peace and security if the procedures in Article 33(1) or recommendations made under Article 36(1) had failed or had been ignored.[22] In other words, the scale or nature of the security situation might not have changed to signify a move into Chapter VII – rather, it may simply be the case that the Council had failed to end it under Chapter VI. This provision was removed not because it muddied the distinction between a danger to the peace under Chapter VI and a threat to the peace under Chapter VII, but because it might have fettered the Council's power to make those determinations.[23] So even though the concepts of danger and threat had no determinate meaning, they were treated as preconditions before the Security Council could act under Chapters VI or VII and, more importantly, before states should follow such measures in pursuit of their Charter duties.

The need for an executive decision on the type of security situation faced by the disputants as well as the UN was exemplified by the Security Council's response to the 'Spanish Question' in 1946. The Council adopted a resolution establishing a sub-committee of five members to determine whether the existence and activities of the Franco regime in Spain endangered international peace and security.[24] The sub-committee reported that the situation did not 'justify direct executive action by the Security Council itself under Chapter VII which deals with various types of enforcement action which Members are obligated to take at the

[22] *Documents of the United Nations Conference on International Organization*, 22 vols. (New York, NY: United Nations Organization, 1945-1954), vol. III, 13.
[23] Ruth B. Russell and Jeannette E. Muther, *A History of the United Nations Charter* (Washington, DC: Brookings, 1958), 669-670.
[24] UNSC Resolution 4 (1946), UN Doc. S/RES/4(1946).

direction of the Security Council'.[25] It was of 'international concern' but not yet a 'threat to the peace' within Article 39.[26] There was a 'potential menace to international peace' and, therefore, a situation likely to endanger international peace within the meaning of Article 34 of Chapter VI.[27] Accordingly, it was held that the 'situation in Spain thus falls to be dealt with by the Security Council under Chapter VI of the Charter, which covers measures of peaceful settlement and adjustment'.[28]

Although the Security Council was unable to agree on any peace-making resolution under Chapter VI that would have led to settlement or agreement, the General Assembly did recommend the withdrawal of ambassadors from Spain,[29] and Spain remained outside the UN until 1955. Yet at the same time, no agreement was made in the UN on how to address the problems posed to peace by the last remaining Fascist regime in Europe, and one brought to power with the aid and assistance of Fascist Germany and Italy.[30] The sub-committee's report made it clear that Spain was a menace to neighbouring states – France having closed its border in 1946 – and to its own population: 'the Franco regime continues to practise those methods of persecution of political opponents and police supervision over its people which are characteristic of Fascist regimes and which are inconsistent with the principles of the United Nations concerning the respect for human rights and for the fundamental freedoms'.[31] That overt concern for the internal situation in Spain was an early sign of the Council's competence over intra-state situations and conflicts, but did not manifest a development of methods to settle such disputes.

11.4. The Normative Development of Chapter VI

Despite those early signs of conceptualisation, there was little development of peace-making in the Cold War beyond a re-iteration of the core obligations of states and the powers of the Security Council and the General Assembly. A strengthening of the normative framework might have improved both the legitimacy and effectiveness of peace-making, especially by developing the nexus between the obligations of states, the methods of peaceful settlement, and the powers of the UN. The reality, however, is that the concept of peace-making has not

[25] UNSC, *Report of the Sub-Committee on the Spanish Question*, 1 June 1946, UN Doc. S/75, paras. 16 and 22.
[26] *Ibid*., paras. 3 and 22.
[27] *Ibid*., para. 30(a).
[28] *Ibid.*, para. 27.
[29] UNGA Resolution 39(I): *Relations of Members of the United Nations with Spain*, 12 December 1946, UN Doc. A/RES/39(I).
[30] UN Doc. S/75, para. 6(a).
[31] *Ibid.*, para. 7.

been developed significantly. For example, the seminal 1970 General Assembly Declaration on Friendly Relations focused on states' obligations to settle disputes under Article 2(3), with no mention of the Security Council's role.[32] The oft-cited 1982 Manila Declaration on the Peaceful Settlement of International Disputes was directed in part at the Council's powers under Chapter VI, but its concern is clearly to increase the Security Council's level of activity as a peace-maker.[33] Another prominent law-making resolution of the General Assembly – the 1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field – concentrated on the preventive peace-making function of the Council.[34]

Meanwhile, the post-Cold War era has been characterised by a focus on freeing the peace enforcement powers of the Security Council. The seminal document from 1992, *An Agenda for Peace*, defined peace-making in terms of achieving agreement through those peaceful means foreseen in Chapter VI,[35] while concentrating on unlocking the Chapter VII potential of the Security Council. The report of the 2004 High Level Panel on Threats, Challenges and Change also reflected a desire to unblock the Council's Chapter VII powers, as well as a concentration on peacebuilding. There was no mention of peaceful or pacific settlement of disputes in the report; Chapter VI was only mentioned in relation to peacekeeping; and 'peacemaking' was only expressly mentioned in one paragraph, which simply noted that '[s]ince the end of the cold war, peacemaking, peacekeeping and post-conflict peacebuilding in civil wars has become the operational face of the United Nations in international peace and security'.[36]

The reality of the UN being faced with threats caused by civil wars was recognised by the High Level Panel, but its report did not make any concrete recommendations on how to bring the parties to such conflicts to a peaceful solution. Chapter VI is predicated on disputes between states being the subject of recommendatory powers of the Security Council and, although the provisions of Chapter VI can be used by way of analogy to end civil wars and

[32] UNGA Resolution 2625 (XXV): *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 24 October 1970, UN Doc. A/RES/2625(XXV).
[33] UNGA Resolution 37/10: *Manila Declaration on the Peaceful Settlement of International Disputes*, 15 November 1982, UN Doc. A/RES/37/10, para. II.4.
[34] UNGA Resolution 43/51: *Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field*, 5 December 1988, UN Doc. A/RES/43/51, paras. 1.12-1.15.
[35] 'An Agenda for Peace', para. 20.
[36] High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, 2 December 2004, UN Doc. A/59/565, para. 84.

other violent or potentially violent internal disputes, there is a need to develop a set of peace-making powers more specifically for intra-state conflicts, which tend to dominate the UN's agenda. In particular, these powers should overcome two conceptual hurdles. First, while disputes between states are predicated on sovereign equality, meaning both parties are at least legally equal, there is no such formal equality within states between government and opposition. Indeed, the sovereignty of states protects the government from intervention against it, unless the Security Council is undertaking peace enforcement under Chapter VII.[37] Furthermore, dispute settlement between states is predicated on restoring normal peaceful relations between them, which often signifies a restoration of the *status quo ante*, reflected in the 2001 Articles on State Responsibility.[38] Issued a year after the High Level Panel's report, the 2005 World Summit Outcome Document contained four paragraphs on the 'Pacific Settlement of Disputes', which likewise failed to address these concerns,[39] in contrast to the stronger, if vague, language used to embody the idea of a Responsibility to Protect in response to the commission of core international crimes.[40]

Other normative resolutions and documents have concentrated on aspects of Chapter VI – for example, a series of General Assembly resolutions on strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution.[41] These recall Chapter VI, specifically Article 33(1)'s reference to mediation, where the emphasis is clearly on the obligation of member states to settle their disputes, rather than on the role of the Security Council to settle them for states. The Security Council itself has affirmed that 'as the organ with the primary responsibility for the maintenance of international peace and security, it has a responsibility to promote and support mediation as an important means for the pacific settlement of disputes'.[42] In a 2014 resolution, the Security Council recognised that 'some of

[37] UN Charter, Article 2(7).
[38] Kimberley N. Trapp, *State Responsibility for International Terrorism* (Oxford: Oxford University Press, 2011), 263; International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, annexed to UNGA Resolution 56/83: *Responsibility of States for internationally wrongful acts*, 12 December 2001, UN Doc. A/RES/56/83.
[39] UNGA Resolution 60/1: *2005 World Summit Outcome*, 16 September 2005, UN Doc. A/RES/60/1, paras. 73-76.
[40] *Ibid*., paras. 138-139.
[41] UNGA Resolution 65/283: *Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution*, 22 June 2011, UN Doc. A/RES/65/283; UNGA Resolution 66/291: *Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution*, 13 September 2012, UN Doc. A/RES/66/291; UNGA Resolution 68/303: *Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution*, 31 July 2014, UN Doc. A/RES/68/303 (2014); UNGA Resolution 70/304: *Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution*, 9 September 2016, UN Doc. A/RES/70/304.
[42] *Statement by the President of the Security Council*, 23 September 2008, UN Doc. S/PRST/2008/36, para. 3. See also *Statement by the President of the Security Council*, 22 September 2011, UN Doc. S/PRST/2011/18.

the tools in Chapter VI … which can be used for conflict prevention, have not been fully utilized', but then went on to list the methods that states should use under Article 33, rather than the powers of the Security Council regarding peaceful settlement.[43] The Office of Legal Affairs' 1992 *Handbook on the Peaceful Settlement of Disputes* was primarily confined to the methods and mechanisms available to states and therefore provided flesh on the bare bones of the methods listed in Article 33. The *Handbook* was stated to have been 'prepared in strict conformity with the Charter of the United Nations; being descriptive in nature and not a legal instrument'. Further, it was confined to disputes between states, excluding any internal disputes.[44] In sum, settlement remains in the hands of the parties, and those parties are primarily states.

11.5. A Turn to Pragmatic Peace-making

Brierly was concerned that the veto would block executive action under both Chapters VI and VII, resulting in an ineffective Security Council. This was largely true during the Cold War, but the end of that confrontation almost immediately witnessed a combination of peace enforcement and settlement, with the Security Council-authorised response to Iraq's invasion of Kuwait,[45] and a Security Council-imposed settlement on Iraq under Chapter VII regarding partial disarmament and in terms of its boundary with Kuwait,[46] enforced by a continuation of the embargo first imposed on Iraq in 1990.

According to Inis Claude, however, even during periods when the exercise of executive powers of Security Council was frozen by political deadlock, the Security Council's diplomatic function was still achievable. The presence of the veto demonstrated that the Council was not designed with executive action as the norm, but as the exception.[47] For Claude, the Security Council was conceived as a 'joint directorate' of the great powers, but only 'in so far as they could agree upon joint policy and action'.[48] Claude saw the Council when acting under Chapter VII as an executive actor, but considered that the Cold War

[43] UNSC Resolution 2171 (2014), UN Doc. S/RES/2171(2014), para. 6.
[44] UN Office of Legal Affairs, *Handbook on the Peaceful Settlement of Disputes between States*, 1992, UN Doc. OLA/COD/2394, http://legal.un.org/cod/books/HandbookOnPSD.pdf (last accessed 7 January 2019), 1, adopted pursuant to UNGA Resolution 39/79: *Peaceful settlement of disputes between States*, 13 December 1984, UN Doc. A/RES/39/79, and UNGA Resolution 39/88: *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*, 13 December 1984, UN Doc. A/RES/39/88.
[45] UNSC Resolution 678 (1990), UN Doc. S/RES/678(1990).
[46] UNSC Resolution 687 (1991), UN Doc. S/RES/687(1991). See also Chapter 20 by Marcelo Kohen and Mamadou Hébié in this volume for a discussion of the Iraq-Kuwait boundary demarcation.
[47] Inis L. Claude Jr, 'The Security Council', in Evan Luard (ed.), *The Evolution of International Organizations* (London: Thames and Hudson, 1966), 68, at 70-72.
[48] *Ibid.*, 72.

prevented that function from being performed. Even Korea was viewed as purely exceptional (due to the absence of the Soviet Union and the enduring anachronism of Chinese representation), and then only a partial exercise in collective security (being dominated by the US). However, in contrast to Brierly, Claude viewed the peaceful settlement of disputes (when the Security Council uses its powers to attempt to help settle disputes between states, e.g. the failed efforts in the Middle East in 1948),[49] and the diplomatic function (when the Security Council is a forum for the peaceful adjustment of relations between the permanent members; e.g. the successful settlement of the 1962 Cuban missile crisis), as not being based on the executive model but as remaining within the cooperative and consensual model of traditional international law, and therefore, at least in the Cold War, the principal function of the Security Council. In his words, 'the drafters of the Charter conceived the Security Council as a body which the great powers should use as a vehicle for joint action in so far as they were in agreement, and as a forum for negotiation in so far as they found themselves in disagreement'.[50]

The diplomatic function would of course be the only relevant one when the dispute involved direct great power confrontation (as in the Cuban missile crisis), but would also be the most likely when the dispute in question closely involved one or more great powers (as in the Syrian crisis of today). Although it is a little naïve to think that the veto of enforcement action will lead to diplomatic efforts to find a solution, as the veto has the habit of permeating all debates whether under Chapters VI or VII, in some ways the Syrian conflict (discussed below) does support Claude's argument.

Although Claude's piece does not include reference to the 1962 Cuban missile crisis, one of the most dangerous situations to threaten world peace during the Cold War, his analysis of the diplomatic function of the Security Council is apposite. Although the confrontation between the two superpowers did not generate any resolution under Chapter VI, nor did it lead to any formal peace agreement, it did result in a peaceful settlement of the crisis and

[49] UNSC Resolution 42 (1948), UN Doc. S/RES/42(1948); UNSC Resolution 43 (1948), UN Doc. S/RES/43(1948); UNSC Resolution 44 (1948), UN Doc. S/RES/44(1948); UNSC Resolution 46 (1948), UN Doc. S/RES/46(1948); UNSC Resolution 48 (1948), UN Doc. S/RES/48(1948); UNSC Resolution 49 (1948), UN Doc. S/RES/49(1948); UNSC Resolution 50 (1948), UN Doc. S/RES/50(1948); UNSC Resolution 53 (1948), UN Doc. S/RES/53(1948); UNSC Resolution 54 (1948), UN Doc. S/RES/54 (1948); UNSC Resolution 56 (1948), UN Doc. S/RES/56(1948); UNSC Resolution 57 (1948), UN Doc. S/RES/57(1948); UNSC Resolution 59 (1948), UN Doc. S/RES/59(1948); UNSC Resolution 60 (1948), UN Doc. S/RES/60(1948); UNSC Resolution 61 (1948), UN Doc. S/RES/61(1948); UNSC Resolution 62 (1948), UN Doc. S/RES/62(1948); UNSC Resolution 66 (1948), UN Doc. S/RES/66(1948).
[50] Claude, 'The Security Council', 72-73.

shows the Security Council's diplomatic function to good effect. The US initially used the Council as a tactical device rather than a forum for negotiation with the USSR over the presence of nuclear missiles in Cuba.[51] The US convened the Council and introduced a draft resolution that had little chance of being adopted. The draft demanded the 'immediate dismantling and withdrawal from Cuba of all missiles and other offensive weapons', as well as the dispatch to Cuba of a UN observer corps to 'assure and report on compliance'. Only after an affirmative 'certification of compliance' would the quarantine imposed on Cuba by the US be terminated. The proposed demand for withdrawal of the missiles would, if adopted, have been a binding decision made under Article 40 of the Charter.[52] The Soviet Union responded by introducing a draft of its own, which was equally uncompromising, in that it condemned the actions of the US and called for the immediate revocation of the 'decision to inspect the ships of other states bound for' Cuba and, further, an end to 'any kind of interference in the internal affairs of' Cuba.[53]

The draft resolutions, though polarised, established the positions of the protagonists, which did have some common ground in that they both called for negotiations between the US and USSR to remove the threat to world peace. Acting Secretary-General U Thant seized on this common ground in letters to President Kennedy and Premier Khruschev in which he called for the 'voluntary suspension of all arms shipments to Cuba and also the voluntary suspension of the quarantine measures … for a period of two to three weeks'.[54] On 26 October 1962, President Kennedy agreed to the proposal, and the Soviet Union indicated its willingness to accept by stopping the shipments.[55] This eventually led to a settlement under which the USSR would remove their missiles from Cuba in return for the US withdrawal of missiles from Turkey.[56] In the most serious confrontation between the superpowers, the Security Council provided a public forum for rhetorical confrontation, behind which corridor diplomacy by the Secretary-General facilitated a diplomatic settlement.

The Cuban missile crisis embodied a pragmatic approach to peace-making, where the forum of the Security Council, along with its procedures for introducing drafts and casting vetoes,

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[51] Brian Urquhart, *A Life in Peace and War* (London: Weidenfeld and Nicolson, 1987), 192-193.
[52] UNSC, *United States of America: draft resolution*, 22 October 1962, UN Doc. S/5182; UNSC Official Records, 1022nd meeting, 23 October 1962, UN Doc. S/PV.1022(OR).
[53] UNSC, *Union of Soviet Socialist Republics: draft resolution*, 23 October 1962, UN Doc. S/5187.
[54] Reproduced in UNSC Official Records, 1024th meeting, 24 October 1962, UN Doc. S/PV.1024(OR), para. 119.
[55] Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (Oxford: Oxford University Press, 1974), 83-84.
[56] *Ibid*., 97; Richard Gott, *Cuba: A New History* (New Haven: Yale University Press, 2004), 207.

were vehicles for the most important function of negotiating and hopefully making peace. In discussing pragmatism, Michael Glennon explains that rules are not binding because 'states have somehow consented to be obliged'; rather, a norm is obligatory 'because the costs of violation outweigh the benefits for nearly all states nearly all the time'.[57] In domestic legal systems, there is a separation of lawmakers and subjects, while there is no such separation in the international legal order – 'the system has no Leviathan of the sort that dominates a domestic legal system, no people in uniform with guns and handcuffs who show up when a violation occurs'.[58] Indeed, Glennon views the Security Council as an outdated 'rickety legalist institution', weaker than the Concert of Europe of the nineteenth century.[59] Although no supranational institution in this conception, the Security Council is still able to undertake a basic peace-making function. Such a conception of peace-making turns it wholly over to pragmatic diplomacy, so for the pragmatist, 'no rules will work that do not reflect underlying geopolitical realities', so that states will continue to judge for themselves what is required to defend their essential interests.[60] For the pragmatist, the 'question is always, what are the probable costs and benefits – the long and short-term consequences – of the proposed action?'[61] Thus the rules of international law were not determinate in the Cuban missile crisis: by any objective analysis the US quarantine was an illegal use of force and the Soviet supply of nuclear missiles was not a breach of any rule; but the resulting situation was nevertheless objectively a threat to the peace that could only be solved peacefully by the withdrawal of those missiles from Cuba.

Claude's identification of a non-executive peace-making function is not confined to corridor diplomacy; it can, through negotiation, also lead to the adoption of a resolution under Chapter VI. Although such resolutions may appear to embody an executive view of peace-making, in reality they are crafted to allow for minimal change. A good example of pragmatism embodied in a formal Chapter VI resolution is Resolution 242, adopted following the Six-Day War of 1967, when Israel captured large tracts of territory in pre-emptive military operations against its Arab neighbours. In negotiations leading up to the Resolution, earlier drafts presented by the Soviet Union, the US and India were not put to the vote,[62] but this did

[57] Michael J. Glennon, *The Fog of Law: Pragmatism, Security and International Law* (Stanford, CA: Stanford University Press, 2010), 54.
[58] *Ibid.*, 102.
[59] *Ibid.*, 168.
[60] *Ibid.*, 122-123.
[61] *Ibid.*, 124.
[62] Drafts in: UNSC, *Union of Soviet Socialist Republics: draft resolution*, 20 November 1967, UN Doc. S/8253; UNSC, *United States of America: draft resolution*, 7 November 1967, UN Doc. S/8229; UNSC, *India, Mali,*

not prevent the process of pragmatic compromise embodied in a UK-sponsored draft leading to the adoption of Resolution 242.[63] Although Resolution 242 appeared to be built upon respect for fundamental principles of international law – the non-use of force, territorial integrity and sovereignty – the desire to keep Israel engaged with the peace process meant that law played a secondary role to the politics of peace, since the Resolution did not make it clear that Israel should withdraw from 'all' the occupied territories, an interpretation Israel has followed to this day. Moreover, the Resolution contains no reference to the Palestinian right to self-determination, even though this right has been subsequently recognised by other organs in the UN system.[64] Although an international judicial body, if given the chance, may well decide that Israel should withdraw from 'all' occupied territories,[65] the pragmatism that drives consensus in the Security Council inevitably promotes an outcome that falls short of this. And while often cited as the basis for a peace agreement in the Middle East,[66] Resolution 242 is arguably too flawed to carry that weight.

11.6. The Advent of Just Peace

In the aftermath of the Cold War, Francis Fukuyama promised the 'end of history' in the sense of ending competing visions of governance.[67] Less dramatically, Thomas Franck argued that a democratic entitlement was emerging in international law so that, by the end of 1997, about 130 governments 'were legally committed to permit open, multiparty, secret-ballot elections with a universal franchise', with most having 'joined this trend within the previous decade'.[68] Democracy was 'thus on the way to becoming a global entitlement, one

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Nigeria: joint draft resolution, 7 November 1967, UN Doc. S/8227; discussed in UNSC Official Records, 1382nd meeting, 22 November 1967, UN Doc. S/PV.1382(OR).

[63] UNSC Resolution 242 (1967), UN Doc. S/RES/242(1967); see also UNSC, *United Kingdom: draft resolution*, 16 November 1967, UN Doc. S/8247.

[64] See e.g. UNGA Resolution 3236 (XXIX): *Question of Palestine*, 22 November 1974, UN Doc. A/RES/3236(XXIX).

[65] Glenn Perry, 'Security Council Resolution 242: The Withdrawal Clause' (1977) 31 *Middle East Journal* 413, at 432.

[66] See e.g. the preamble to the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, which states, in part, 'that the aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, amongst other things, to establish a Palestinian Interim Self-Government Authority … for a transitional period not exceeding five years … leading to a permanent settlement based on Security Council Resolutions 242 and 338'. UNSC Resolution 338 (1973), UN Doc. S/RES/338(1973), was adopted during the 1973 conflict in the Middle East, simply called for a cease-fire and for the implementation of Resolution 242, and decided that negotiations shall start 'aimed at establishing a just and durable peace in the Middle East' (para. 3).

[67] Francis Fukuyama, *The End of History and the Last Man* (London: Penguin, 1993).

[68] Thomas M. Franck, 'Legitimacy and the Democratic Entitlement', in Gregory H. Fox and Brad R. Roth, *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), 25, at 27.

which may be promoted and protected by collective international processes',[69] often centred around the UN.

UN electoral assistance at the request of governments became the norm in the 1990s, but Franck posited this as a preliminary step towards a normative order whereby the UN would be at the fulcrum of validating the democratic processes and credentials of elected governments, asking: 'are we developing a global canon of legitimate rules and procedures by which to judge democracy of nations?'[70] In this regard, Franck pointed to Security Council peace-making practice that led to the settlement of intra-state conflicts, starting with the UN Transition Assistance Group (UNTAG) in Namibia in 1989 (a post neo-colonial operation),[71] Nicaragua in 1989 (a post-civil war operation),[72] and then the General Assembly-mandated mission in Haiti in 1990.[73] The latter was not confined to a threat to the peace and, thereby, constituted a potential precedent for universal election monitoring.[74] However, Franck also recognised that the decision to seek UN help still depends upon the consent of the government in question and is not yet an 'obligation owed by each government to its own people and to the other States of the global community'.[75]

The consensual process of peace-making leading to peace agreements containing an end of hostilities and the construction of a democratic peace based on UN-supervised elections was embodied in Cambodia in 1990.[76] Franck saw the Security Council's enforcement of democracy in Haiti in 1994 as exceptional,[77] but enforced peace-making in the form of the Dayton Peace Agreement in Bosnia in 1995 (outside of the Security Council)[78] was followed by Security Council-imposed peace-making in Kosovo and East Timor in 1999,[79] where the parties had no choice but to accept a Chapter VII peace settlement by the UN, in the shape of

[69] *Ibid.*, 26.
[70] *Ibid*., 31-32.
[71] UNSC Resolution 628 (1989), UN Doc. S/RES/628(1989); UNSC Resolution 629 (1989), UN Doc. S/RES/629(1989).
[72] UNSC Resolution 637 (1989), UN Doc. S/RES/637(1989).
[73] UNGA Resolution 45/2: *Electoral assistance to Haiti*, 10 October 1990, UN Doc. A/RES/45/2.
[74] Franck, 'Legitimacy', 35-40.
[75] *Ibid.*, 44.
[76] UNSC Resolution 668 (1990), UN Doc. S/RES/668(1990). See also Benny Widyono, 'United Nations Transitional Authority in Cambodia (UNTAC)' in Joachim A. Koops *et al.* (eds.), *The Oxford Handbook of United Nations Peacekeeping Operations* (Oxford: Oxford University Press, 2015), 3.
[77] Franck, 'Legitimacy', 47; UNSC Resolution 940 (1994), UN Doc. S/RES/940(1994).
[78] General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), 21 November 1995; but supported by the Security Council under Chapter VII in UNSC Resolution 1031 (1995), UN Doc. S/RES/1031(1995).
[79] UNSC Resolution 1244 (1999), UN Doc. S/RES/1244(1999); UNSC Resolution 1264 (1999), UN Doc. S/RES/1264(1999).

interventions arguably made in a liberal Western image.[80] Since the early 2000s, however, this has not been generally followed up by similar action.

Whereas democracy is a contested and shrinking space within the Security Council, there has been greater traction of more basic forms of human rights protection in the prosecution of peace, in the form of protection of civilians,[81] and in the incorporation of gender into the Security Council's peace-making agenda, most prominently through Resolution 1325 (2000).[82] This shift to human rights and peace settlement represents a more enduring form of just peace than the promotion of elections (which are likely to entrench existing hierarchies),[83] but there is a danger that the pragmatic hard security agenda in the Security Council may skew the understanding of human rights in peace settlements.[84]

The conception of the Security Council embodying masculine conceptions of militarisation and security is largely accurate but, as pointed out by Catherine O'Rourke,[85] Resolution 1325 was based on a strategic plan of action by the Secretary-General.[86] The Resolution's content reflects that report and is directed towards the multiple subjectivities of women in situations of conflict and violence. It does this by: urging states to ensure increased representation of women in all decision-making mechanisms, peace processes and at all levels of conflict resolution; as well as increasing the role of women as envoys to pursue good offices, as special representatives, and in peace operations.[87] Admittedly, the expected paternalism does come through, but it is at least balanced by a broader inclusive narrative, for example, when the Council 'requests the Secretary-General to provide to Member States training guidelines and materials on the protection, rights and the particular needs of women, as well as on the importance of involving women in all peacekeeping and peacebuilding measures'.[88] Other aspects of the Resolution refer to special measures that parties to a conflict and states must put in place to protect women and girls from gender-based violence, referring to obligations

[80] Roland Paris, 'International Peacebuilding and the Mission Civilisatrice' (2002) 28 *Review of International Studies* 637; Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press, 2010).
[81] See UNSC Resolution 1265 (1999), UN Doc. S/RES/1265(1999) and UNSC Resolution 1674 (2006), UN Doc. S/RES/1674(2006). On protection of civilians in peacekeeping mandates, see also Chapter 13 by Scott Sheeran and Catherine Kent in this volume.
[82] Starting with UNSC Resolution 1325 (2000), UN Doc. S/RES/1325(2000).
[83] On the subject of elections and democracy, see also Chapter 17 by Brad Roth in this volume.
[84] Catherine O'Rourke, 'Feminist Strategy in International Law: Understanding its Legal, Normative and Political Dimensions' (2017) 28 *European Journal of International Law* 1019, at 1021.
[85] *Ibid.*
[86] UNGA, *Improvement of the status of women in the Secretariat: Report of the Secretary-General*, 1 November 1994, UN Doc. A/49/587.
[87] UNSC Resolution 1325 (2000), paras. 1-5.
[88] *Ibid*., para. 6.

under humanitarian law and other treaties, and also to the different needs of female and male ex-combatants when planning for reintegration.[89] The Janus-faced nature of the Resolution is captured in the paragraph that 'invites the Secretary-General to carry out a study on the impact of armed conflict on women and girls, the role of women in peace-building and the gender dimension of peace processes and conflict resolution'.[90]

Overall, in Resolution 1325, the Security Council combines predictable paternalism and the need to protect the 'weaker' sex with a broader and more progressive gender-related peace-making agenda, although this is admittedly undermined by the fact that the Resolution was not adopted under Chapter VII and was clearly not intended to be binding.[91] Many later resolutions, however, have simply become ritualistic condemnations of sexual violence against women, including sexual abuse committed by peacekeepers,[92] though others reflect more the original intent of 1325.[93] A recent resolution on Women, Peace and Security (Resolution 2242) shows that intent and develops the normative content of the original resolution by, for instance, including a call to donor countries 'to provide technical and financial assistance to women involved in peace processes'; encouraging 'the meaningful participation of civil society organisations at international peace and security meetings' and conferences to ensure that gender considerations are included in any policies and programmes resulting therefrom; and stressing earlier calls for member states to develop national action plans to implement Resolution 1325.[94]

Resolution 2242 has a much fuller content, but worryingly broadens the gender-focused nature of the resolution by, for example, linking gender issues to the fight against terrorism, for instance by welcoming the 'increasing focus on inclusive upstream prevention efforts' by including women's organisations in developing strategies to combat terrorism and in developing counter-narratives to terrorism.[95] The development of a coherent and inclusive peace-making strategy is weakened by broadening the focus of the Women, Peace and Security agenda to include counter-terrorism, which after 9/11 has become the main consensus around which the Security Council is able to take executive and legislative action

[89] *Ibid*., paras. 9-14.
[90] *Ibid*., para. 16.
[91] See O'Rourke, 'Feminist Strategy', 1027-1028.
[92] See UNSC Resolution 1820 (2008), UN Doc. S/RES/1820(2008); UNSC Resolution 1888 (2009), UN Doc. S/RES/1888(2009); UNSC Resolution 1960 (2010), UN Doc. S/RES/1960(2010).
[93] UNSC Resolution 1889 (2009), UN Doc. S/RES/1889(2009); UNSC Resolution 2111 (2013), UN Doc. S/RES/2111(2013).
[94] UNSC Resolution 2242 (2015), UN Doc. S/RES/2242(2015), paras. 1-2.
[95] *Ibid*., para. 13.

without defining or, indeed, understanding terrorism.[96] This could be construed as an attempt to co-opt women's organisations into the counter-terrorism agenda of the Security Council,[97] which is premised on targeted sanctions (with their deleterious effects on the families of those targeted),[98] as well as increasingly recognising the militarisation of counter-terrorist responses (by airstrikes that result in a significant number of civilian deaths and injuries).[99] This is a strong indication that the Security Council is unable to resist bringing hard security concerns into its gender strategy, thereby undermining a promising development in its normative peace-making function that would lead to increased justice in the settlement of disputes and the adoption of sustainable peace agreements.

'Peace' and 'security' are not simply factual concepts, but are normative ones. The concept of peace itself is possible of conceptualisation into a myriad of forms and types and, it is argued, the Security Council should be concerned as much with a normative concept of peace as well as achieving a factual condition that can be called peace (in the sense of 'absence of war').[100] There is a pressing need to develop more nuanced normative understandings of peace, adaptable to different post-conflict situations, particularly those following intra-state conflicts, enabling the Security Council to adopt measures tailored to achieve a peaceful settlement in a given context. The Security Council has concerned itself with certain normative aspects of peace, for example in developing the Women, Peace and Security agenda, discussed above. But it needs to develop this further, by stating not only that women are to be involved in peace processes and negotiations, but also that peace agreements themselves should include strong anti-discrimination and equality provisions that are fundamental, institutionalised and enforceable. This, in a way, would connect the Security Council's peace-making function with peacebuilding and the development of a *jus post bellum*, which the UN is helping to shape in its practice.[101]

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[96] See e.g. UNSC Resolution 1373 (2001), UN Doc. S/RES/1373(2001); UNSC Resolution 2178 (2014), UN Doc. S/RES/2178(2014).

[97] See further Fionnuala Ní Aoláin, 'The "War on Terror" and Extremism: Assessing the Relevance of the Women, Peace and Security Agenda' (2016) 92 *International Affairs* 275.

[98] Starting with UNSC Resolution 1267 (1999), UN Doc. S/RES/1267(1999).

[99] See UNSC Resolution 2249 (2015), UN Doc. S/RES/2249(2015), which, in para. 5, called upon states 'that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL, also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL … and other terrorist groups, as designated by the United Nations Security Council'.

[100] On the different conceptualisations of peace, see also Chapter 1 by Mark Retter *et al.* in this volume.

[101] See e.g. *Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes*, April 2009,

There is some evidence that the Security Council is promoting a more normative understanding of peace-making that transcends the divide into peacebuilding, not just by developing the Women, Peace and Security agenda, in its exhortations to parties, or in endorsing peace agreements or processes. The evidence in peace agreements generally, however, is that peace and security is prioritised over justice (including human rights, transitional justice and accountability), gender issues and children's rights.[102] For example, the Security Council welcomed the efforts of the UN Support Mission in Libya (UNSMIL) and the Special Representative of the Secretary-General 'to facilitate a Libyan-led political solution to address the political, security, economic and institutional crises facing Libya, including through the formation of a Government of National Accord',[103] a step towards which was achieved by the signing of the Libyan Political Agreement in December 2015.[104] The Council's main aims were: to call upon states and other actors in Libya and elsewhere to ensure that the Government of National Accord can provide effective control and, therefore, ensure basic peace and security conditions in Libya; to establish governmental authority over the oil and banking sectors; to continue to enforce targeted sanctions against those that threaten peace in Libya; that states provide support to the Libyan government in helping it in its battle against the Islamic State in Iraq and the Levant (ISIL); and to ensure cooperation between the Libyan government and member states regarding the migrant crisis.[105] As regards human rights, the Council called on the Government of National Accord 'to promote and protect human rights of all individuals within its territory and subject to its jurisdiction, including those of women, children and people belonging to vulnerable groups, and to comply with its obligations under international law'; and to 'hold to account those responsible for violations of international humanitarian law and violations and abuses of human rights, including those involving sexual violence, and to co-operate fully with and provide any necessary assistance to the International Criminal Court and the Prosecutor'.[106]

The Council's approach to peace settlement in Libya views women as vulnerable and in need of protection, specifically within the narrow legal framework of the Rome Statute, and not

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https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf (last accessed 7 January 2019).

[102] Jennifer S. Easterday, 'Peace Agreements as a Framework for *Jus Post Bellum*', in Carsten Stahn *et al.* (eds.), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press, 2014), 379, at 388-389.

[103] UNSC Resolution 2259 (2015), UN Doc. S/RES/2259(2015), Preamble, para. 4.

[104] Libyan Political Agreement, 17 December 2015.

[105] UNSC Resolution 2259 (2015), paras. 1-12, 15.

[106] *Ibid*., paras. 13-14.

more broadly as individuals with full rights, entitlements and protections, including equal representation within the Government of National Accord. Human rights more broadly are seen in an instrumental way as an aspect of peace, not as providing a normative framework within which the peace process in Libya should be undertaken. It is interesting to note that the Security Council does not use its binding powers under Chapter VII of the Charter in the Resolution, even though it reiterates its earlier determination that the 'situation in Libya constitutes a threat to international peace and security'.[107] This is an indication that Article 39 is used in its original sense, whereby it can be not only a source of binding coercive powers, but also of recommendations for settlement after a determination that the situation constitutes a threat to the peace. However, the Council's practice shows a lack of strategy as to the next step to be taken if those recommendations are not followed by the parties. Does the Security Council then try to enforce the peace settlement itself?

11.7. A Return to Pragmatism? R2P and the Failure of Peace-making in Syria

The above analysis has shown that justice and normative development can be funnelled through the Security Council's peace-making function. However, the narrowing consensus amongst the permanent members that first emerged after 9/11 has led to consistent measures being taken primarily against terrorism. A further narrowing of the consensus occurred after the UN Security Council-authorised intervention in Libya in 2011,[108] during which North Atlantic Treaty Organization (NATO) states arguably exceeded the mandate, which led to a pushback against the development of a Responsibility to Protect civilian populations against the commission of core crimes,[109] at least under Chapter VII. This has meant that justice and normative development have again become secondary to pragmatism. There is no avoiding Inis Claude's understanding of the most basic functions of the Security Council as a political peace-making body;[110] they continue as long as the UN survives but, as the Security Council's response to Syria shows, they will not necessarily secure a peaceful settlement.

Despite being the central body for maintaining and restoring international peace and security for over 65 years, the Security Council has shown itself unprepared for bringing peace to a conflict like Syria. Its past successes have been shown to be opportunistic, and have not

[107] *Ibid*., Preamble, para. 24. See UNSC Resolution 2213 (2015), UN Doc. S/RES/2213(2015), Preamble, para. 13, and UNSC Resolution 2238 (2015), UN Doc. S/RES/2238(2015), Preamble, para. 20, for earlier instances.
[108] UNSC Resolution 1973 (2011), UN Doc. S/RES/1973(2011).
[109] The concept of R2P was included in, for example, UN Doc. A/RES/60/1, paras. 138-139.
[110] Claude, 'The Security Council', 70.

provided any sustainable sort of normative framework within which peace-making or peace enforcement or a combination of the two could succeed, especially within fractured states. A brief analysis of its response to Syria shows how, as is often the case, the best chances of peace settlement have developed outside that body and attempts to secure the endorsement of the Council have frequently ended in a veto, as the perennial disagreement about whether peace should be agreed between the parties, or enforced by the Security Council, splits the permanent members.

The Arab Spring, involving popular uprisings against authoritarian rule in North Africa and the Middle East, spread to Syria when, on 26 January 2011, protests against the ruling regime of President Bashir Al-Assad started; by March 2011, security forces were repressing the uprising with force. The Security Council included Syria on its agenda and held a public debate on the situation on 27 April 2011.[111] The UK, France, Germany and Portugal circulated a draft resolution in May 2011 but this was not put to the vote, as some members thought it could imply action.[112] In August 2011, as the violence escalated, the UK circulated a draft resolution that would have imposed targeted sanctions,[113] which was not voted upon, although earlier in the month a Presidential Statement was adopted following a debate in which members condemned the widespread violations of human rights and the use of force against civilians by Syrian authorities.[114]

The failure to adopt measures under Chapter VII did not lead the Security Council to consider the situation to be one that required response under Chapter VI, given that the situation was essentially depicted as an internal one. The above-mentioned Presidential Statement contained a reaffirmation of a 'strong commitment to the sovereignty, independence, and territorial integrity of Syria', and then stressed that the 'only solution to the current crisis in Syria is through an inclusive and Syrian-led political process, with the aim of effectively addressing the legitimate aspirations and concerns of the population which will allow the full exercise of fundamental freedoms for its entire population, including that of expression and peaceful assembly'.[115]

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[111] UNSC Official Records, 6524th meeting, 27 April 2011, UN Doc. S/PV.6524.
[112] See Andrew Rettman, 'EU softens Syria resolution in bid for UN support', *EU Observer*, 9 June 2011, https://euobserver.com/foreign/32464 (last accessed 7 January 2019) for the text of a draft resolution, indicating changes from the initial version circulated in May.
[113] 'Syria unrest: US and Europe push for UN sanctions', *BBC News*, 24 August 2011, http://www.bbc.co.uk/news/world-middle-east-14645641 (last accessed 7 January 2019).
[114] *Statement by the President of the Security Council*, 3 August 2011, UN Doc. S/PRST/2011/16, para. 2.
[115] *Ibid*., para. 6.

The failure to fully engage diplomacy at this stage, due to restricted thinking about the limited, inter-state, role of Chapter VI, was only a small factor in the descent of Syria into brutal warfare.[116] However, the narrow choice offered at this stage between Security Council 'action' involving Chapter VII, or inaction due to the certain veto of such preventive or enforcement measures or even ones that advocated a process of political transition of power away from the existing regime,[117] meant a failure by the Security Council as well as a failure to invoke its fall-back function of providing a diplomatic forum to search for a solution – one that might be embodied in a peace agreement, or a Chapter VI resolution, or both.

Peace settlement based on sovereign equality is modelled on settling disputes between states, not settling disputes within states, where only the government is normally the recognised international actor. There are exceptions in international law, for example when the armed group represents a people fighting for self-determination, but that is narrowly defined and does not extend to a people struggling to overthrow an undemocratic regime. Thus the problems of peace-making in Syria include the lack of legal parity between the parties to the

[116] See the debate in UNSC Official Records, 6650th meeting, 9 November 2011, UN Doc. S/PV.6650.

[117] See Russia's veto of a draft – UNSC, *France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: draft resolution*, 4 October 2011, UN Doc. S/2011/612 – which condemned the regime's use of force against civilians, on the basis that the draft threatened further measures under Article 41 if the regime did not desist; vetoes by Russia and China of draft resolution – UNSC, *Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution*, 4 February 2012, UN Doc. S/2012/77 – which supported the Arab League's decision to facilitate a Syrian-led political transition; vetoes by China and Russia of a draft resolution – UNSC, *Albania, Andorra, Australia, Austria, Belgium, Botswana, Bulgaria, Canada, Central African Republic, Chile, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Latvia, Libya, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mexico, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Samoa, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution*, 22 May 2014, UN Doc. S/2014/348 – referring Syria to the ICC; Russia's veto of a draft – UNSC, *Andorra, Australia, Austria, Belgium, Bulgaria, Canada, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Monaco, Morocco, Netherlands, Norway, Poland, Portugal, Qatar, Romania, San Marino, Saudi Arabia, Senegal, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution*, 8 October 2016, UN Doc. S/2016/846 – demanding an end to military flights over Aleppo; Russia and China's vetoes of a draft – UNSC, *Egypt, New Zealand and Spain: draft resolution*, 5 December 2016, UN Doc. S/2016/1026 – which called for a temporary end to all attacks on Aleppo; Russia and China's vetoes of a draft – UNSC, *Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Qatar, Romania, Saudi Arabia, Slovakia, Spain, Sweden, Turkey, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution*, 28 February 2017, UN Doc. S/2017/172 – which would have imposed targeted sanctions; Russia's veto of a draft – UNSC, *France, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution*, 12 April 2017, UN Doc. S/2017/315 – which would have condemned a chemical weapons attack at Khan Shaykhun.

conflict on the one hand, the dependency of any effective peace-making on the Security Council or the agreement of that body to any settlement proposal on the other, and the practical mixture of these two issues with permanent members intervening on both sides. How can the Security Council be a third-party peacemaker when Russia, the US, the UK and France, each holding a veto, are parties to the conflict or conflicts raging inside Syria? The drag factor caused by disagreement among the permanent membership is reflected in the delay in determining that the situation should be characterised as a threat to international peace under Article 39. In Syria, the violence started in 2011, and the Human Rights Council's Independent Commission of Inquiry on Syria found that crimes against humanity were being committed in the country as early as 2011.[118] Despite this finding, the Security Council only managed to agree in 2013 that the use of chemical weapons in Syria constituted a threat to the peace;[119] and only determined that the general 'deteriorating humanitarian situation in Syria constitute[d] a threat to peace and security in the region' in 2014.[120] The complete malleability of the term 'threat to the peace' reflects the practice of the Security Council in its invocation (or not) since the debates over the Spanish Question in 1946.

The narrow consensus amongst the permanent membership led to the adoption of a number of resolutions aimed at: stopping the violence through the sending of envoys and the temporary deployment of military observers;[121] requiring the verification and destruction of Syria's chemical weapons arsenal;[122] demanding that all parties allow humanitarian access across conflict lines;[123] deciding under Article 25 of the Charter that the UN and its aid partners could cross Syrian borders without government consent;[124] demanding a cease-fire;[125] and demanding compliance with international humanitarian law;[126] facilitating the evacuation of

[118] Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, 23 November 2011, UN Doc. A/HRC/S-17/2/Add.1, paras. 101-108.
[119] UNSC Resolution 2118 (2013), UN Doc. S/RES/2118(2013), Preamble, para. 13; see also *ibid*., paras. 1-2, 4-5.
[120] UNSC Resolution 2165 (2014), UN Doc. S/RES/2165(2014), Preamble, para. 18.
[121] UNSC Resolution 2042 (2012), UN Doc. S/RES/2042(2012); UNSC Resolution 2043 (2012), UN Doc. S/RES/2043(2012); UNSC Resolution 2059(2012), UN Doc. S/RES/2059(2012).
[122] UNSC Resolution 2118 (2013). See also UNSC Resolution 2209 (2015), UN Doc. S/RES/2209(2015); UNSC Resolution 2235 (2015), UN Doc. S/RES/2235(2015); UNSC Resolution 2319 (2016), UN Doc. S/RES/2319(2016).
[123] UNSC Resolution 2139 (2014), UN Doc. S/RES/2139(2014).
[124] UNSC Resolution 2165(2014). See also UNSC Resolution 2191 (2014), UN Doc. S/RES/2191(2014); UNSC Resolution 2258 (2015), UN Doc. S/RES/2258(2015); UNSC Resolution 2332 (2016), UN Doc. S/RES/2332(2016); UNSC Resolution 2393 (2017), UN Doc. S/RES/2393(2017); UNSC Resolution 2449 (2018), UN Doc. S/RES/2449(2018).
[125] UNSC Resolution 2268 (2016), UN Doc. S/RES/2268(2016); UNSC Resolution 2401 (2018), UN Doc. S/RES/2401(2018).
[126] UNSC Resolution 2393 (2017); UNSC Resolution 2332 (2016).

civilians from eastern Aleppo;[127] as well as counter-terrorist resolutions directed at ISIL and other non-state armed groups based in Syria.[128] However, these resolutions only represent peace-making or peace enforcement in a piecemeal and limited sense.

The resolutions that managed to avoid the vetoes of China and Russia contained attempts to stop the fighting, end the use of chemical weapons, and to secure aid to civilians. These can be categorised only as limited peace-making efforts by the Security Council that did not form part of a more general framework for a comprehensive peace plan endorsed by the permanent members as well as the parties to the conflict, at least until 2015. Despite the adoption of a number of specific resolutions on Syria, the split between the permanent members, into those that support the regime (Russia and, to a lesser extent, China), and those who want its removal (France, the UK and the US), signify that substantial peace-making has little chance of gaining traction. Furthermore, the failure to engage the Syrian regime in negotiations means that the conflict will not stop while that government, with direct military support from Russia from September 2015, believes it can defeat the opposition. That the opposition is divided into groups regarded as acceptable to the US, the UK, France and Saudi Arabia, and others against whom these states were militarily engaging as terrorists (principally ISIL), only served to strengthen this belief.

In these circumstances, effective peace-making seems unlikely, although in December 2015 the Security Council did set out a framework for peace-making in Syria, involving UN-mediated political talks, a national cease-fire, and a two-year period to achieve a political transition.[129] In a March 2017 press statement, in furtherance of this Resolution (2254), the Security Council: supported the efforts of the Secretary-General's Special Envoy to facilitate a lasting political settlement of the Syrian crisis 'through an inclusive and Syrian-led political process that meets the legitimate aspirations of the Syrian people'; welcomed the reopening of talks in Geneva; while reaffirming a commitment to the sovereignty, independence, unity and territorial integrity of Syria.[130] While the adoption of Resolution 2254, and the fact that the Security Council is persisting with it,[131] is to be welcomed, the need for a peace

[127] UNSC Resolution 2328 (2016), UN Doc. S/RES/2328(2016).
[128] UNSC Resolution 2170 (2014), UN Doc. S/RES/2170(2014); UNSC Resolution 2199 (2015), UN Doc. S/RES/2199(2015); UNSC Resolution 2249 (2015).
[129] UNSC Resolution 2254 (2015), UN Doc. S/RES/2254(2015), especially paras. 1-7.
[130] *Security Council Press Statement on Syria*, 10 March 2017, UN Doc. SC/12749, paras. 1-3.
[131] UNSC Resolution 2336 (2016), UN Doc. S/RES/2336(2016), para. 2, welcoming mediation by Turkey and Russia in para. 1.

agreement on Syria involving the parties, their backers, and other guaranteeing states and organisations, remains all too apparent.[132]

The UN-sponsored talks at Geneva, most recently in December 2017, did not progress to face-to-face negotiations, even though there have been eight rounds of talks between the government and opposition, apparently due mainly to the intransigence of the government. The Russian-backed talks held at Sochi in January 2018 did produce an agreement on a new constitution, but suffered from the absence of much of the opposition – including the Syrian Kurds who were excluded at the insistence of Turkey – as well as Western states.[133] Fighting continued during these talks.

One might speculate as to what the Security Council might have done or could do to bring peace to Syria, using the tools at its disposal under the UN Charter. A lasting cease-fire is crucial, behind which intense diplomacy and pressure is needed to create a window for meaningful negotiations. At best, the Security Council can help establish a cease-fire, with outside states taking a lead from Russia and the US who should remove their military support from the parties. Withdrawal of outside protagonists in a complex war is a necessary first step towards peace, especially by those states that have the responsibility, as part of the UN Security Council, for taking collective measures through that body for restoring international peace and security. Unfortunately, this is not happening – the most recent call for a cease-fire coming from the Security Council in Resolution 2401 of 24 February 2018 looks as if the Council is fulfilling its primary responsibility, in that the resolution is a binding decision demanding a cease-fire,[134] but it was made while Russia continued to provide military support to the regime and the US and its allies were continuing airstrikes in Syria. For a cease-fire to work, all those involved must immediately stop fighting and stop providing support to those fighting. That cease-fire should be enforced by a limited and sharply defined use of Chapter VII to authorise the collective enforcement of a no-fly zone over Syria, apart from agreed areas controlled by ISIL. The no-fly zone should be policed only by members of the P5 – specifically, those involved in the conflict: Russia, the US, France and the UK – given that the no-fly zone authorised over Libya[135] was the least controversial part of the mandate given to NATO members. A no-fly zone would prevent Syrian government planes

[132] See the Geneva peace talks of 2014, 2016, and 2017. Robert S. Ford, 'Keeping Out of Syria: The Least Bad Option' (2017) 96(6) *Foreign Affairs* 16, at 18.
[133] The UN Special Envoy for Syria, Staffan de Mistura, attended the talks at both Sochi and Geneva.
[134] Although the Resolution makes it clear that the cease-fire shall not apply to military operations against ISIL, Al Qaeda and the Al Nusra Front: UNSC Resolution 2401 (2018), para. 2.
[135] UNSC Resolution 1973 (2011), paras. 6-12.

from wreaking indiscriminate violence in their zero-sum pursuit of 'terrorists' which fails to distinguish between armed opposition and civilians who oppose the regime, and it has a chance of forcing the government to the table without that aerial domination and support from Russia. In so doing, the Security Council would start to behave as an independent third-party peacemaker, and limited collective enforcement mechanism, rather than being a loose collection of guns for hire. Targeted economic sanctions, against members of the regime or opposition who undermine peace talks,[136] as well as the present targeted sanctions directed at members of ISIL, Al Nusra and Al Qaeda, would help push both the regime and the opposition towards negotiation.

Given that the Security Council, or at least its permanent members, currently act to fan the flames rather than douse them, through unilateral military measures that are escalatory and immensely dangerous for world peace, initiatives outside that body – through the General Assembly (including the use of the Uniting for Peace resolution[137]), the Secretary-General, the Arab League, or an *ad hoc* arrangement – should be supported. Resolution 2254 does provide some hope that the Security Council still has a peace-making role, but any peace agreement coming from it or outside it should not necessarily require the endorsement of the Security Council; acceptance should come from representatives of the various groups in Syria, as well as those forced to leave.

11.8. What Remains of Security Council Peace-Making?

In situations where the interests of the permanent members are strong, peace-making is restricted. The stronger the interests and the more permanent members involved, the less likely the Council is to be able to secure a peace agreement. However, when the reverse is true, there is evidence that the Security Council can act as a funnel for peace-making and for supporting peace settlements. It is possible that conflicts involving only one permanent member can be usefully brought to the Security Council for peace-making and peace

[136] Targeted UN sanctions are primarily imposed to restore peace, and only secondarily to punish for breaches of international law, see Nigel D. White, 'Autonomous and Collective Sanctions in the International Legal Order' (2018) 27 *Italian Yearbook of International Law* 1.

[137] UNGA Resolution 377 (V): *Uniting for Peace*, 3 November 1950, UN Doc. A/RES/377(V), Part A(A), para. 1 provides that 'if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security', the General Assembly 'shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including … the use of armed force when necessary'. See also 'Syria: western nations seek to bypass Russian veto at UN', *Guardian*, 24 April 2018, https://www.theguardian.com/world/2018/apr/24/syria-western-nations-may-seek-to-bypass-russian-veto-at-un (last accessed 7 January 2019).

settlement support if the permanent member involved seeks the help of the Council and there are no conflicting interests.

France became militarily involved in Mali in 2013, when it launched attacks on several armed groups, assisted by Chadian and other African troops. The rebels were a mixture of terrorist organisations and a secular Tuareg group, and a rapidly deteriorating situation was made worse by a military coup. This led to a French military intervention before an African force authorised by the UN Security Council was ready to deploy.[138] The fact that the Security Council already had buy-in – and that the military response was in the main to counter terrorism – meant that the UNSC was able to adopt a further resolution authorising a UN Mission in Mali (MINUSMA) to use all necessary means to help the Malian authorities stabilise key areas to protect Malian civilians under threat of imminent violence,[139] operating alongside French troops also authorised to take necessary measures to intervene in support of MINUSMA if the latter was 'under imminent and serious threat'.[140] The use of a peace enforcement operation involving a permanent member (in this case France) supporting a peacekeeping operation is a model that has previously been used in the US-supported UNOSOM II operation in Somalia in the early 1990s,[141] but as that example shows, these type of complex operations are not guaranteed success.[142]

In the case of Mali, MINUSMA's mandate was later extended to include support for the implementation of the 2015 Agreement on Peace and Reconciliation.[143] Resolution 2227, which was adopted under Chapter VII of the Charter, only 'urge[d]' the Malian government and opposition to fulfil their commitments under the Agreement.[144] It did, however, contain a 'demand' that all armed groups cease hostilities and give up their arms.[145] The Council expressed its readiness to consider targeted sanctions against those who obstructed the

[138] UNSC Resolution 2085 (2012), UN Doc. S/RES/2085(2012).
[139] UNSC Resolution 2100 (2013), UN Doc. S/RES/2100(2013).
[140] *Ibid.*, para. 18.
[141] Paul D. Williams, 'United Nations Operation in Somalia II (UNOSOM II)', in Koops *et al.*, 'United Nations Peacekeeping Operations', 429, at 435.
[142] But see the more successful UK support for UNAMSIL, tasked with supporting the implementation of the 1999 Lomé Peace Agreement: Funmi Olonisakin, 'United Nations Mission in Sierra Leone (UNAMSIL)', in Koops *et al.*, 'United Nations Peacekeeping Operations', 629, at 635.
[143] UNSC Resolution 2227 (2015), UN Doc. S/RES/2227(2015), para. 14(b); Accord Pour la Paix et la Reconciliation au Mali - Issu du Processus d'Alger, 20 June 2015.
[144] *Ibid.*, para. 1.
[145] *Ibid.*, para. 4.

agreement, and authorised MINUSMA 'to take all necessary measures to carry out its mandate, within its capabilities and its areas of deployment'.[146]

By endorsing and supporting peace agreements,[147] questions arise as to the effects of such in terms of Security Council action (or lack thereof) going forward. Does the Council have a duty to then act in support of the agreement (in the form of sanctions, peacekeeping, etc.)? Is the Security Council constrained in any way by its endorsement? On Mali, Resolution 2227 did contain some elements of enforcement, including by peacekeeping and French forces, and the threat of targeted sanctions in the case of non-compliance. That said, the fact that the resolution does not appear binding on the parties to the agreement (as indicated by the use of the term 'urges'[148]) suggests that the Council is wary of creating additional obligations beyond those agreed to by the parties to the peace agreement. The Resolution appeared to be a recommendation for settlement pursuant to Article 39 of the UN Charter,[149] in effect rediscovering that under-used element of Article 39, adapting it to intra-state conflicts and backing it up with robust peacekeeping – combined with peace enforcement, where necessary – as well as non-forcible measures under Article 41 of the Charter.

Looking at the follow-up resolutions on Mali, it can be seen that the Security Council does reinforce its endorsement of the peace agreement. However, a perceived increase in the coercive nature of the peace operation revealed disagreements as to the nature of peacekeeping. In 2016, the Security Council extended MINUSMA's mandate and strengthened the force. It repeated its authorisation to the peacekeeping force to take necessary measures in active defence of its mandate – which included supporting the parties in implementing the 2015 peace agreement, protecting civilians and countering asymmetric threats posed by continuing attacks by terrorist organisations – as well as its authorisation to French forces to use necessary measures to support MINUSMA. It continued to threaten non-

[146] *Ibid*., para. 13.
[147] On the effects of UNSC endorsement on peace agreements themselves, see Chapter 7 by Jonathan Worboys and Laura Edwards in this volume.
[148] See Security Council Report, 'Security Council Action Under Chapter VII: Myths and Realities', 23 June 2008, https://www.securitycouncilreport.org/wp-content/uploads/Research%20Report%20Chapter%20VII%2023%20June%2008.pdf (last accessed 7 January 2019), 9, noting that 'it can be clearly established that by using "urges" … the paragraph is intended to be exhortatory and not binding'.
[149] Article 39 provides that '[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression *and shall make recommendations*, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security' (emphasis added).

forcible measures against those that undermined the peace process.[150] A number of members expressed their belief that this demonstrated that the Security Council was fulfilling its responsibility for peace and security,[151] while others warned against the misinterpretation of some of the vague language of the Resolution that might undermine the principles of peacekeeping.[152]

A similar resolution, renewing MINUSMA's mandate, was adopted in 2017, with the addition of greater support to Malian government forces, support for upcoming elections and a constitutional referendum, and a direction to the Secretary-General to develop a mission-wide strategic plan for the implementation of MINUSMA's mandate.[153] Although unanimity was maintained in adopting the Resolution, there was criticism of the inability of peacekeeping forces to deliver mandates because of undeclared national restrictions, the absence of effective UN command and control, failures to obey orders, refusal to protect civilians and a lack of necessary equipment.[154] This was followed by a separate Chapter VII resolution imposing targeted sanctions against actors undermining the peace process in Mali (based on information gathered by a panel of experts), to be implemented by a Committee of the Security Council.[155]

In 2018, MINUSMA's renewal included support for the upcoming Presidential elections as well as for achieving a 'Pact for Peace' between the government of Mali and the UN, as recommended by the Secretary-General,[156] in order to 'accelerate the implementation of the Agreement, contribute to the stabilization of Mali and strengthen the coherence of international efforts in Mali, with the support of MINUSMA'.[157] The Council offered encouragement for the Pact being based on 'agreed-upon benchmarks related to governance, rule of law and implementation of the Agreement', especially its key provisions on 'decentralisation, inclusive and consensual reform of the security sector, national reconciliation measures and socioeconomic development'.[158] In his report, the Secretary-General related the findings of his strategic review team to the effect that there had not been enough meaningful progress in the three-year period since the peace agreement, even to the

[150] UNSC Resolution 2295 (2016), UN Doc. S/RES/2295(2016), paras. 14-28, 35, 4.
[151] See e.g. France and US in UNSC Official Records, 7727th meeting, 29 June 2016, UN Doc. S/PV.7727.
[152] See e.g. Russia and Uruguay in *ibid*.
[153] UNSC Resolution 2364 (2017), UN Doc. S/RES/2364(2017), paras. 20(a), 48.
[154] See Uruguay's comments in UNSC Official Records, 7991st meeting, 29 June 2017, UN Doc. S/PV.7991.
[155] UNSC Resolution 2374 (2017), UN Doc. S/RES/2374(2017).
[156] *Situation in Mali: Report of the Secretary-General*, 6 June 2018, UN Doc. S/2018/541, para. 64.
[157] UNSC Resolution 2423 (2018), UN Doc. S/RES/2423(2018), para. 5.
[158] *Ibid*.

extent that the 'presence of the State' had declined due to 'insufficient ownership of the Agreement by the Malian people', including a failure to engage women in the peace process, 'trust deficits between the signatory parties and an uneven political will'.[159] Nonetheless, the review team concluded that the 'Agreement remained a valid framework for engagement with the parties to the peace process, and that its implementation must be leveraged and accompanied by broader political efforts by Malian, regional and international actors'.[160] The report indicated that MINUSMA had a key political (as well as military) role in promoting a common vision in support of the peace process and supporting national dialogue to foster ownership of the Agreement. A Pact for Peace would facilitate this, containing clear benchmarks to measure the success of the Mission's assistance in promoting good governance and political reforms.[161]

The change of emphasis towards MINUSMA having a broader political role seems to be an attempt to make the Mission central to achieving peace, instead of letting it stagnate into a force that is primarily concerned with consolidating military objectives. This reflects concerns expressed in the Security Council about the need to avoid an indefinite deployment,[162] as turned out to be the case with a number of UN peacekeeping missions deployed on an ongoing basis in African countries. In these deployments, UN forces have become embroiled in ongoing conflicts and – although their mandates are linked to the peace process and the implementation of peace agreements – they have become to a certain extent part of the host state's militarisation, thereby undermining progress towards peace as well as the UN's ability to act as an impartial peace-maker. These massive ongoing peacekeeping and peace-making efforts show that the Security Council has become inimically involved in trying to achieve both security on the ground for civilians and, more broadly, a peaceful political space, and in supporting the implementation of the peace agreement by the parties. Although not expressed in terms of a binding obligation on the Security Council, its practice indicates a commitment to secure legitimate and enduring peaceful settlement in these countries. It has been committed to peacekeeping and securing a peaceful settlement in the Democratic Republic of the Congo (DRC) since 1999, Darfur since 2007 and South Sudan since 2011. It has tried to influence the direction of the peace processes in these countries not

[159] UN Doc. S/2018/541, para. 54.
[160] *Ibid.*
[161] *Ibid.*, para. 64.
[162] See the United States' comments in UNSC Official Records, 8298th meeting, 28 June 2018, UN Doc. S/PV.8298.

only through supporting dialogue but also through increasingly coercive mandates,[163] and the addition of non-forcible measures targeted against those actors who undermine the peace.[164] At least in Mali, the UN is becoming more involved in the political process as well as providing an ongoing and proactive military presence. The drive towards measurable benchmarks against which to judge both the effectiveness of forces and the implementation of the peace agreement will potentially help the UN move from its current role of shoring up beleaguered governments within faltering peace processes towards implementation of the agreement and the achievement of an enduring peace. After all, the limitations of this current role are apparent in each of the other three examples cited above. The Security Council has called for greater political engagement by the Secretary-General in the DRC, and urged him to develop an exit strategy for the UN;[165] in Darfur, the Council has indicated a phased withdrawal of the force, even though progress in the implementation of the Doha Document for Peace in Darfur has been slow;[166] while in South Sudan, the 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan remains unimplemented despite the continued deployment and support of a UN mission.[167]

In the geopolitical spaces left by the permanent members, there is scope for UN peace-making efforts centring upon the Security Council supporting the implementation of peace agreements, by providing peacekeeping forces and taking other concrete measures, adjusting mandates to reflect changing conditions, and through the Secretary-General, both as commander-in-chief of peacekeeping forces and through his role as chef diplomat.[168] Indeed, the Security Council, invariably acting under Chapter VII, but holding off from enforcing the peace, has become inimically involved in peace processes in a number of countries, a sample of which has been discussed above. The approach taken combines (1) consensual peace-making in the form of supporting peace agreements signed by the parties; and (2) more coercive pressure, but through mandates delivered largely by peacekeeping forces who are exhorted in all relevant mandating resolutions to respect the basic principles of peacekeeping,

[163] See e.g. UNSC Resolution 2098 (2013), UN Doc. S/RES/2098(2013) on the creation of a Force Intervention Brigade in the DRC.
[164] See e.g. UNSC Resolution 2206 (2015), UN Doc. S/RES/2206(2015) on South Sudan.
[165] UNSC Resolution 2409 (2018), UN Doc. S/RES/2409(2018), paras. 2, 56.
[166] UNSC Resolution 2429 (2018), UN Doc. S/RES/2429(2018), paras. 2, 5.
[167] UNSC Resolution 2406 (2018), UN Doc. S/RES/2406(2018), para. 4, condemning 'the lack of progress in implementing key provisions of the Agreement'.
[168] See James Traub, 'The Secretary-General's Political Space', in Simon Chesterman (ed.), *Secretary or General? The UN Secretary-General in World Politics* (Cambridge: Cambridge University Press, 2007), 185, at 187, for a discussion of the 'Peking Formula' developed by Dag Hammarskjöld, 'which stipulated that the Secretary-General had an affirmative obligation, and not merely a right, to act when peace and security were threatened'.

namely consent, impartiality and the use of force only in self-defence and in defence of the mandate.[169] By relying on peacekeeping forces as a central component in the peace process, albeit one that is empowered to use greater levels of force than foreseen in the original conception of peacekeeping, the Security Council has to work within an essentially consensual framework that has traditionally underpinned peace-making. The resulting ongoing commitments lead to pressure to succeed or withdraw on top of underlying disagreements about the nature and function of peacekeeping. Hopefully, the development of more measurable standards to assess the progress of missions and forces will help move peace processes forward towards the successful implementation of peace agreements,[170] but the underlying tensions between the permanent members will always raise the prospect that the mission stagnates and/or its mandate may not be renewed.

11.9. Conclusion: Can the Security Council 'Make' Peace?

The Security Council can only 'make' peace in a fully executive way in a limited set of circumstances, principally when it exerts governmental control over a territory. So far, this has only occurred in East Timor and Kosovo in 1999, which represent tiny pieces in the jigsaw of states, requiring the controversial exercise of powers under Chapter VII,[171] not Chapter VI or recommendations under Article 39, where the powers of the Security Council in peace-making lie. The utilisation of Chapter VII coercive powers does not produce consensual peace agreements, but imposed settlements that will not last without a constant paternalist UN-mandated presence.[172]

This chapter has demonstrated that the partial centralisation of peace-making in the Security Council has led to that function varying from the formal exercise of executive powers with limited success in the early years of the UN, when optimism about the continuation of the wartime unity of purpose persisted; through a period of Cold War pragmatic peace-making, when the Security Council acted as a meeting place for states to undertake traditional

[169] See e.g. UNSC Resolution 2423 (2018), Preamble, para. 3. On the operation of (and challenges posed by) these principles, see also Chapter 13 by Scott Sheeran and Catherine Kent in this volume.
[170] Alex J. Bellamy, 'Unity of Effort in UN Peacekeeping', in Anna Powles *et al.* (eds.), *United Nations Peacekeeping Challenge* (London: Routledge, 2015), 17. See also *Report of the High Level Independent Panel on Peace Operations on Uniting our Strengths for Peace: Politics, Partnership and* People, UN Doc. A/70/95, S/2015/446, 17 June 2015.
[171] Michael J. Matheson, 'United Nations Governance in Postconflict Societies' (2001) 95 *American Journal of International Law* 76.
[172] For a full analysis, see Michael W. Doyle and Nicholas Sambanis, *Making War and Building Peace: United Nations Peace Operations* (Princeton, NJ: Princeton University Press, 2006). See also Chapter 7 by Jonathan Worboys and Laura Edwards and Chapter 20 by Marcelo Kohen and Mamadou Hébié in this volume, discussing the limitations of what the Security Council can legally impose on the parties to a dispute.

diplomacy, occasionally reflected in a compromise Chapter VI resolution; and then through a period of post-Cold War ideological expansion of the purposes of peace-making to include democracy and the liberal state in peace agreements and settlements, more fundamentally to start to address inequalities and other post-conflict injustices.

Lasting peace cannot be enforced in a brutal way that eventually leads to the extinction of any armed opposition, since that destroys the state itself. Effectively Syria, Russia, Turkey and Iran are engaged in a form of peace enforcement in Syria by systematically crushing the armed opposition but, in so doing, they are destroying Syria, committing international crimes, and thereby sowing the seeds of future cycles of violence. On the other hand, the case of Libya shows that international intervention to remove a brutal regime without any clear post-conflict plan produces a dystopian space filled with violence. In Syria, establishing and enforcing a cease-fire (by removing military support for the parties and by establishing no-fly zones), and pressing for and facilitating a Syrian-led peace plan, should be the aims of the permanent members and the Security Council.

The full return to pragmatism in the post-Libyan period (from 2011) should not disguise the fact that pragmatism always remains the Security Council's fallback position. The other clear finding of this chapter is that all of this expansion and contraction of the peace-making function has occurred without any significant normative development of the concept of peace-making itself. Where peace-making is possible, the ongoing African conflicts examined in this chapter show that the Security Council does stick to its task and will work to agree change to its missions and forces that are aimed at making progress towards implementation of the peace settlement agreed by the parties. Yet at the same time, the Council has struggled to provide clear plans and targets due to underlying tensions about the nature of peacekeeping and peace-making in intra-state situations. It must not be forgotten, however, that the Council has successfully supported peace processes in Namibia, Mozambique, El Salvador, Nicaragua, Guatemala, Cambodia and other states in the immediate post-Cold War period, showing that effective peace-making is possible where the geopolitical context leads to both opportunities for peace and a deep consensus in the Security Council. But the narrowing of that consensus after 9/11, Iraq (2003) and Libya (2011) has resulted in a lack of peace-making leadership from the Security Council.

While by no means determinate in bringing about peace settlements, the following normative developments would assist in strengthening peace-making in law and in practice: the

exposition of peace-making and peacekeeping norms and processes for intra-state situations; the incorporation of gender and, more broadly, human rights issues into wider law-making on peace and security; an understanding of the relationship between peace-making and the shaping of peace agreements and their content; and clarification of the relationships, competences and powers that are in play within the different functions of peace-making, peacekeeping, peacebuilding and peace enforcement.

Of all the functions of the Security Council, peace-making is the most fundamental, yet it is the one that is the least developed legally, and the most abused politically. The UN should heed the words of its most dynamic Secretary-General, Dag Hammarskjöld, who saw the UN as a 'dynamic instrument of Governments through which they … should … try to develop forms of executive action, undertaken on behalf of all the Members and aiming at forestalling conflicts and resolving them … by appropriate diplomatic or political means in a spirit of objectivity and in implementation of the principles and purposes of the Charter'.[173] This represents a good starting point for a normative framework to govern peace-making by the Security Council.

[173] *Introduction to the Annual Report of the Secretary-General on the Work of the Organization*, 16 June 1960-15 June 1961, UN Doc. A/4800/Add.1.