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A Quest for Legitimacy

Debating UN Security Council Rules on Terrorism and Non-proliferation

Ahrnens, Anette

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A Quest for Legitimacy

Debating UN Security Council Rules on Terrorism and Non-proliferation

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Terrorism and Non-proliferation

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To my parents

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List of acronyms

BWC	Biological Weapons Convention
CD	Conference on Disarmament
CSCE	Conference on Security and Cooperation in Europe
CTC	Counter-Terrorism Committee
CTED	Counter-Terrorism Committee Executive Directorate
CWC	Chemical Weapons Convention
ECFI	European Court of First Instance
EU	European Union
FRY	Federal Republic of Yugoslavia
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
IL	International Law
IR	International Relations
NAM	Non-Aligned Movement
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
OP	Operative Paragraph
PCIJ	Permanent Court of International Justice
PSI	Proliferation Security Initiative
SC	Security Council
SG	Secretary-General
UN	United Nations
UNGA	United Nations General Assembly
US	United States
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution

VCLT	Vienna Convention on the Law of Treaties
WMD	Weapons of Mass Destruction

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Lund, April 2007

Anette Ahrnens

Chapter one

Studying power and international law

"International law is a dialogue of power…"
James Crawford

Friday January 31, 1992, was not just any day at the United Nations (UN) Headquarters along the East River in New York. The fifteen state representatives taking their places for the 3046th meeting around the horse-shoe shaped table in the Security Council Chamber on the second floor were none other than Prime Ministers, Presidents, Ministers for Foreign Affairs and even a King. This historic summit took place in acknowledgement of the "new favourable international circumstances under which the Security Council has begun to fulfil more effectively its primary responsibility for the maintenance of international peace and security" (S/23500). At the same time, the fifteen world leaders concluded that "the international community … faces new challenges in the search for peace", among which they included both "acts of international terrorism" and the "proliferation of all weapons of mass destruction" (S/23500). Most importantly, however, the Security Council (SC) radically expanded its own sphere of competence by declaring that "non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security" (S/23500), which has even been described as a "coup d'état" in relation to the General Assembly (Koskenniemi 2004:209). For the most part of the 1990s, however, and notwithstanding the drastically expanded Council agenda, the Security Council still followed the traditional division of labor between itself and the General Assembly, in which the Assembly deals with general issues in a prospective manner and the Council only acts with regard to specific situations. Yet during the month of September 2001, this would all change.

On September 12, 2001, the day after the most astounding acts of terrorism the world had ever seen, the Security Council expressed its readiness "to take all necessary steps … to combat all forms of terrorism" (S/RES/1368). Sixteen days later, on September 28, 2001, United Nations Security Council Resolution (UNSCR) 1373, was adopted unanimously. It deals, prospectively, with the general issue of terrorism financing and is considered revolutionary in its nature by being both unlimited in time and space as well as backed by the possibility of military sanctions. In other words, it exhibits quasi-legal qualities. At the same time, while the perpetrators on September 11 had caused a catastrophe only using "box cutters, mace and 19 airline tickets" (Bush 2004), former UN Secretary-General (SG) Kofi Annan warned that "[t]he greatest danger arises from a non-State group – or even an individual – acquiring and using a nuclear, biological, or chemical weapon" (Annan 2001). At a ministerial meeting of the Security Council, the Minister for Foreign Affairs of Ukraine, thus stressed that the Security Council further had to "resolve the problems related to the non-proliferation of weapons of mass destruction, their means of delivery and related technologies. All these issues have acquired additional significance in the aftermath of recent events" (S/PV.4413, p. 14). Although agreement took longer to achieve this time, the Security Council unanimously adopted its second resolution of legislative character on April 28, 2004, prohibiting the proliferation of weapons of mass destruction (WMD) to non-state actors (S/RES/1540).

While, so far, only expressed in two major instances, this practice by the UN Security Council (UNSC) has stirred up considerable debate, involving such fundamental issues as the principles for international rule-making, the meaning of sovereignty, the power of the United States and the legitimacy of the Security Council. Illustratively, at a Council meeting in February 2006, following up on the above resolutions, the representative of Brazil stated that, since "9/11", the UN "has been enhancing its activities in the field of counter-terrorism. *This has resulted in a legislative activity that concerns us all*" (S/PV.5375, p. 30, my emphasis). Why has the UNSC engaged in this legislative activity? What are the implications? And why does it concern us all?

* * *

In order to answer questions such as those stated above, it is vital to include perspectives on, and of, both international politics and international law. Hence, this is a doctoral dissertation at the nexus between International Relations (IR)[1] and International Law (IL). Empirically, this study is concerned with the recent tendency toward international law-making by the UN Security Council, while theoretically it strives to connect the respective IR and IL literatures through a focus on the construction of legitimation arguments regarding this tendency. In the remainder of this introductory chapter, I will first present the puzzle, purpose and questions that gave rise to this study. Thereafter I will discuss some methodological considerations and, lastly, the study will be related to previous IR and IL research along with a presentation of its main contributions and an outline of the rest of the chapters.

Puzzle, purpose & questions

The backdrop to this dissertation project is a long-time fascination with the relationship between power[2] and law[3] at the international level. To a large extent, the character of this relationship is also one of the key issues that all IR theorists and international lawyers need to tackle, although some use a different terminology.[4] The fundamental problem can thus be formulated in many ways: Does "Might" make "Right"? Are international institutions an independent or dependent variable in relation to state behavior? What is the source of legal obligation? Unsurprisingly, scholars, even within each discipline, disagree greatly over the answers. For a staunch IR realist like John

[1] Following common practice, the capitalized terms "International Relations", and "International Law" as well as their acronyms, are used to denote the academic disciplines, while "international relations" and "international law" signify the phenomena studied by those scholars.
[2] This author is the first to acknowledge that "power" is one of the most treacherous terms in the social science vocabulary due to its manifold meanings and uses. Yet, notwithstanding the significant power that inheres in legal rules or the shortcomings that result from the following approach, for the purposes of this study, power will at times be used in contrast to law and, in such situations, it should be read as shorthand for "power political" aspects. For a more detailed and inclusive discussion of power, see "Power in anarchy" in chapter three.
[3] The distinguishing features of international law compared to its domestic counterpart will be discussed in chapter two.
[4] Specifically, many IR theorists seem to prefer to talk about "international institutions" in general rather than international law in particular.

Mearsheimer, the answer is self-evident and unchanging: might makes right. In a realist world, institutions, e.g. international law, have no independent effect on state behavior, and only function as instruments, created and shaped by the most powerful actors, in order to maintain or further increase their influence (Mearsheimer 1994/95:7, 13). Against this view stand a range of scholars, from institutionalists to constructivists. Most of them conceptualize institutions as both dependent and independent variables and their conclusion is that rules *can* influence state behavior, but we need to know more about when, where, how and to what extent (Keohane & Martin 1995; Keohane 2002:122). Also international lawyers frequently disagree. While Stephen Toope (2003:315) argues that "[c]ustomary international law, like all law, is relatively autonomous from material power", Goldsmith & Posner (2005:13) assert that "the possibilities for what international law can achieve are limited by the configuration of state interests and the distribution of state power".

This study takes issue with much of the existing literature by rejecting both the artificial opposition between power and law and their alleged confluence. Instead, the relationship is viewed as complex and contradictory, but deeply interdependent. Indeed, at a closer look one inevitably finds that "international law is *both* an instrument of power and an obstacle to its exercise; it is always apology *and* utopia" (Krisch 2005:371, emphasis in original). This is the reason why states find it so attractive to have their preferred policies clothed in the language of legal obligation and, conversely, why they are so anxious to avoid legal obligations on other issues and tend to justify their own violations in terms like "inevitable, exceptional circumstances". In short, if might did fully make right, then all states, irrespective of their size and position, would only be concerned with achieving the former and never the latter, which is clearly not the case in the contemporary era, if it ever was. Nevertheless, in terms of formulating a research puzzle, the biggest problem with the "might makes right" assertion is not that it may be incorrect. On the contrary, if "right" is understood in more pragmatic terms as the prevailing conception of legality rather than the normatively proper thing to do, then might and right have an impressive historical record of empirical co-variation. The problem is rather that it is trite. Few people today would dispute the fact that power is an important factor in international law-making, many times even the decisive

one. Still, most recent attempts at connecting IR and IL perspectives do not explicitly address the political conditions of the emergence of legal rules and how that may be affected by power (Krisch 2005:372). Thus, focusing on *how* might may make right,[5] presents us with both an underdeveloped area of study and an interesting research puzzle. Given that states apply power in their attempts to develop, maintain, and change generally applicable rules (Byers 1999:7) and, equally, that international law derives its influence from the idea that it is ultimately distinguishable from, and indeed superior to, politics (Scott & Ambler 2007:71) – how can the circle be squared? Or, in other words, how can great powers exploit international law while still preserving its integrity and image of objectivity, which is what makes it useful for the great powers in the first place? I argue that the key to that puzzle depends on the construction of legitimacy.

It is the position of this study that all international rule-making involves a quest for legitimacy. Power and law are thus joined by their deep dependence on perceptions of legitimacy among their respective subjects, but differentiated by the sources from which they primarily draw their claims to legitimacy. In other words, I hold that states can present arguments legitimating their actions following either a "political"[6] or a "legal"[7] logic, which are equally valid, yet based on different normative values.[8] Consequently, this study adopts a view of legitimacy[9] in which it has no essential or obvious meaning, but has to be continuously constructed and maintained by those actors and structures it subsequently legitimates *and* constrains, with the pivotal question once more being: *how* is this done? (*cf.* Finnemore 2005:202; Connelly *et al.*

[5] Assuming here of course that not even the most pragmatic version of "right" can be achieved through mere imposition of physical force.
[6] It is with a certain hesitancy that I use the term "political" to describe a specific logic of argumentation, as I have no answer to the obvious question: Is there something that is "apolitical"? For the purposes of this study, however, "political" should be understood in a more mundane manner as referring to the principles and practices commonly associated with political activity.
[7] Equally, the fact that I term one logic "legal" does not imply that the other is illegal, only that the legal logic is concerned with principles and practices commonly associated with a legal process.
[8] The development of this argument will be the focus of chapter four.
[9] This view will also be the focus for a much more detailed discussion in chapter four.

2006:269). Hence, in the words of Martha Finnemore: "As scholars we need to understand this process better. We need to understand what legitimacy claims are accepted, which ones fail, and why" (2005:206). This process is both more interesting and more significant at the cross-roads between two issue-areas, such as rule-making by the UN Security Council. David Caron (1993:588) has written that since the Security Council at times significantly affects international law, it is critical to find out to what extent the Council's actions in this context are accepted by the international community of states and *why*. For the purposes of this study, I interpret "why" as *how*: based on which values, according to which logic, do states legitimate the Council's actions? With the Security Council being situated at the nexus between international law and international politics, its operations (and how they are legitimated) thus "serve to illustrate the broader debate on the interplay between political and legal systems" (Gowlland-Debbas 2000:300).

Additionally, this dissertation project is driven by an interest in the consequences of the collapse of the bipolar balance of power in relation to the relationship between power and international law. Since the end of the Cold War, scholars have debated the nature and the consequences of the relationship between a single predominant state and the system of international law.[10] Although it may be unsurprising that we now witness the emergence of more hierarchical characteristics, also in the international legal order, going from bi- to unipolarity (Krisch 2005:398), it is still consequential, not least in terms of how policies and actions are legitimated. With the initiation of the Cold War the unity of the Allied powers turned into deep ideological conflict, and international legitimacy could thus not be framed in anything but strictly procedural terms. Nevertheless, along with the emerging international consensus around a number of core principles such as self-determination and the prohibition of aggression, arguments were increasingly made that legitimacy should be built on shared substantive values rather than procedural criteria (Hurrell 2005:21). Although promoted during the Cold War as well, these ideas really began to flourish in the late 1980s and early 1990s. For some,

[10] For one of the best and most comprehensive treatments of this issue, see Byers & Nolte 2003.

the emerging harmony of values was seen as the end of an artificial division, whereas others remarked that "we now talk the shared language of legitimacy precisely because political power has enabled such a 'hegemonic discourse' to take place" (Clark 2005:156). However, it can also be argued that the role of international law increases in situations characterized by unipolarity since, in the absence of competing centers of power, it provides the only source of constraint upon the dominant state's behavior (Falk 2005:47). Thus, in the words of David Lake (2003:319): "To conceive of unipolarity as only a particular distribution of capabilities or to ignore the real questions of authority at the heart of the recent conflict with Iraq is to miss perhaps the most important aspect of contemporary international politics." That aspect concerns power – who gets to call the shots? – but, above all, it concerns the construction of international legitimacy or how power becomes legitimate.

Thus, *the overarching purpose* of this dissertation project is to explore how a focus on the construction of legitimacy can contribute to a better understanding of international rule-making at the nexus of international politics and international law. More specifically, *the theoretical aim* is to develop an analytical framework for the purpose of studying actors' legitimation arguments in the context of international rule-making. Additionally, *the empirical aim* of the study is to draw attention to, and advance our understanding of, the recent legislative activity in the UN Security Council, including in relation to the post-Cold War unipolarity.

In line with these purposes, the research questions that have guided this study are:

How can a focus on legitimacy and legitimation arguments contribute to our understanding of international rule-making at the nexus between international politics and international law?

How do states construct their arguments with respect to the legitimacy of the legislative activity by the UN Security Council in relation to resolutions 1373 and 1540 and, based on that, what general implications can be noted for the construction of legitimacy, international rule-making and the influence of the United States in the post-Cold War era?

Delimitations

In an attempt to further clarify the objective of my study, I would just like to briefly state its delimitations, i.e. what I will not do. First, although this dissertation deals with inherently normative matters, it is not normative in the sense that it aspires to offer prescriptions. Instead, the claims to, and challenges of, legitimacy made by states will be treated as empirical data. Second, and related, it is important to note that it is the continuous construction of legitimacy, i.e. the activity of legitimation,[11] that is the focus of this study and not the conceptual history of legitimacy itself. Third, and finally, the purpose of this dissertation is not to analyze the related, but different, issue of state compliance or to examine the position of non-state actors on these issues. Despite the increasing importance of non-state actors in all aspects of international relations, I have chosen to keep a state-centered perspective, as states are still the only actors that are entitled to full participation in the international legal process.

Methodological considerations

The methodological ambition of this study is to advance our theoretical appreciation of the connections between power and international law by synthesizing IR and IL perspectives on legitimacy so that we can better understand issues at the nexus between international politics and international law. In contrast to Martin Hollis and Steve Smith, who make a clear distinction between explaining and understanding and maintain that "there are always two stories to tell" (1990:7), I agree with Alan James (1991:116), who "had always supposed that the social sciences were the meeting point of these two approaches". In the context of the present study, I believe that a better understanding of *how* states legitimate specific actions or policies will allow for more informed reasoning as to *why* they argue the way they do. Ultimately, however, this is not a study where "X" is argued to be the cause of "Y".

[11] For the purposes of this study, legitimation is primarily seen as states' practice of putting forth arguments claiming the legitimacy of a rule/action/body based on one or more elements of legitimacy.

Constructing knowledge

The above position is partly due to the meta-theoretical foundations upon which this study rests, which, in short, include an overall skepticism toward scientific claims to an all-encompassing Truth. While "reality" may certainly exist, it is rather our possibilities to produce unequivocal knowledge about it that I doubt (*cf.* Guzzini 2000:159). Instead I side with those scholars who are occupied with producing and evaluating partial and contingent claims (Finnemore & Sikkink 2001:394). The acknowledgement of the fact that all research involves interpretation and that there is no neutral position from which to gather objective knowledge about the world is often accused of being a slippery slope into the swamp of relativism. In my opinion, however, this need not be the case, since the recognition that observation is theory-laden does not mean that it is determined by theory (Wendt 1995:75). Hence, without taking up too much time and space to stress what is no longer considered controversial, it goes without saying that this study has been inspired by social constructivist beliefs, such as the importance of intersubjective ideational processes that give meaning to social facts like legitimacy, power and law (*cf.* Adler 2002). Indeed, the main focus of this dissertation, the examination of states' arguments in their attempts to claim or challenge legitimacy, would make no sense if concepts like legitimacy were believed to have an identifiable and measurable "core" meaning. In that case, the exercise would rather consist of a determination of who is "right" and who is "wrong". Again, this does not mean that I believe that legitimacy can signify anything and everything. With *social* construction of facts being an inherently intersubjective process, the legitimation arguments must be perceived as persuasive in some sense, or they will fail. In a similar sense, we – as social scientists – may never be able to prove the correctness of our conclusions beyond all doubt, but the principle of intersubjectivity requires us to draw those conclusions in a manner that enables subsequent readers to make their own judgments based on logically and empirically persuasive arguments as to whether a certain conclusion is reasonable or not. In short, I agree with Friedrich Kratochwil (2000:68), who argues that

> the hope for an absolute point of view which would end all debates or dispense with the need to engage in often complicated justifications of one's decision, simply by subsuming it under some universally valid law or by hitting

> upon the single 'right' answer, is indeed as tempting as it is futile. It would be available to us only if we were no longer interested in all those things that are constitutive of law and politics.

Why UNSCR 1373 and UNSCR 1540?

Empirically, and more concretely, this study focuses on two resolutions by the UN Security Council. In light of the theoretical focus on the relationship between international politics and international law, and the dilemma of how "might" may make "right", legislative activity in a political body, such as the Security Council, is quite naturally of great interest. While the Council has displayed impressive creativity since the end of the Cold War in reinterpreting its mandate to include more and more judicial activities for the most part it has stopped short of activities that can be considered legislative. According to Frederic Kirgis (1995:520), legislative acts within international organizations must fulfill three essential criteria: they have to be unilateral in form (meaning that reciprocal and contractual agreements are excluded), they must create or modify a legal norm, and that norm must be general in nature, i.e. it must be directed to indeterminate addressees and capable of repeat application. In other words, a resolution must obligate all member states to take, or refrain from taking, certain actions, which were previously not regulated by international rules, and those obligations must be open-ended and not directed to a specific actor/region/situation.

Furthermore, given the above focus, I am only interested in resolutions that create legally binding obligations, as the majority of the Security Council's resolutions only constitute recommendations. According to Article 25 of the UN Charter, however, states have agreed to "accept and carry out the *decisions* of the Security Council" (my emphasis) and thus a resolution must include the verb "decides". Additionally, through the invocation of chapter VII, which comes into play when the Council has determined that something constitutes a threat to international peace and security (Article 39, Charter of the UN), the Security Council may rely on Article 48, which demands that "action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the

Members of the United Nations". As a final resort, based on Article 42 in chapter VII, the Council may also "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security", meaning that resolutions adopted under chapter VII can, at least theoretically, be enforced. Based on the above characteristics, to date only two resolutions have been adopted that match all of them: resolution 1373, directed against the financing and support of terrorism, and resolution 1540, directed against the proliferation of WMD to non-state actors.[12]

A qualitative study

The fact that this legislative activity by the Security Council has so far only occurred in two instances brings certain methodological implications. First of all, from a practical point of view, it allows me to opt for an intensive, rather than extensive, examination of the material through a qualitative case study and thoroughly analyze the meeting records of all the Security Council debates held so far pertaining to these two resolutions. At the same time, any conclusions drawn from the analysis must be treated with caution and awareness of the limited basis for far-reaching generalizations.[13] Nonetheless, an alternative approach would have been, for example, to make a quantitative content analysis of the Security Council records, where the frequency and type of use of certain terms could have been recorded and statistically displayed. Yet however interesting and valuable such an undertaking would be, a qualitative analysis allows me to also include instances where the meaning of a statement is relevant even though it does not include the specific terms in question. In addition, qualitative case studies are well suited for studies of an exploratory nature, when the purpose is to gain new insights and lay the groundwork for further research (Gerring 2004:349; Wallensteen 1994:12). Finally, it could be debated whether this study is best described as a single case study or whether the two resolutions can be said to constitute two cases. Ultimately, I believe that this is a question of different levels of analysis. Yet, in

[12] There are several other resolutions that exhibit some of the above characteristics as well, for example resolutions 1267 (1999), 1422 (2002), 1566 (2004) and 1624 (2005), but they do not qualify as "legislative" in my view, as it is the combination of all of the above features that constitutes the qualitative difference.

[13] Although in line with the above stated epistemological views, I believe that all conclusions should be treated with a certain amount of sound skepticism.

my opinion, it makes more sense to view the two resolutions as separate cases (or processes), while still belonging to the same class of events (legislative activity by an international organization).

Working with the material

With a focus on *how* states legitimate the Security Council's actions, i.e. on what they base their arguments, this study sets out to do a qualitative textual analysis. For that purpose, as mentioned previously, a framework will be developed,[14] consisting of both legal and political "elements of legitimacy". The elaboration of these elements is inspired by IL and IR literature respectively, as well as an initial survey of the empirical material, in a manner resembling "adaptive theory" (Layder 1998). In adaptive theory, the idea is to generate theoretical models in order to understand the social reality in focus for the research and the models can be generated from both extant theoretical knowledge and empirical data. Then, at some point in the research process, a model emerges and begins to impose an order on the material, while at the same time remaining open to a possible reformulation through new and contradicting findings (Layder 1998:152-153). Another way to describe this process is that the researcher alternates between theory and the empirical material, "whereby both are reinterpreted in the light of each other" (Alvesson & Sköldberg 1994:42).[15] While some purists do not approve of this course of action, it is probably the approach most closely (and honestly) resembling the actual work of all researchers. Furthermore, criticisms carry different weight depending on the theoretical and methodological ambitions. If the goal is to test a number of theoretical hypotheses, then charges of circularity may loom larger. On the other hand, since most cases contain large quantities of data, "within-case" comparison is often possible, and thus it may be "valid to develop a theory from a case and test the theory against additional evidence from the case that was not used to derive the theory" (George & Bennett 2004:111-112). However, since this technique is so ubiquitous and it is difficult to imagine either purely inductive or purely deductive studies, explicitly referring to it may be close to stating the obvious and thus of little

[14] Again, this will be discussed in much more detail in chapter four.
[15] Author's translation.

value. On the other hand, stating the obvious and refraining from reifying the elusive, and indeed illusory, "ideal" of science may also have a value of its own (*cf.* Teorell & Svensson 2007:52, 95-96).

The purpose of the framework, and the analysis itself, is to systematize and thereby clarify the use of legitimation arguments. In order to do that I create an analytic scheme based on two dimensions: "legal – political" and "process – substance". This study can thus be described as an example of an ideational analysis, a methodological approach which has a long history in Swedish Political Science scholarship and which is often used to examine debates (Bergström & Boréus 2005:177). Traditionally, a distinction has been made between so-called "content-oriented" and "functional" ideational analyses, in which the former are described as directed toward testing the logical validity of arguments and the latter as having more of a contextual and explanatory approach (Vedung 1977). The problem with this distinction is that it does not accommodate a descriptive purpose. Yet systematically sorting a material in a way that is not immediately apparent from the material itself is increasingly advocated as a valid scientific undertaking (Beckman, L. 2005:13, 49; Bjereld *et al.* 1999:21). This may also be the best depiction of what is being done in this study.

Sources

Lastly, a discussion of the nature, strengths and weaknesses of the sources is critical for any academic study and especially for one actively using textual analysis. In this case, the texts that make up the main source of primary material are verbatim records of public Security Council meetings, where the two resolutions in focus, or directly related issues, have been discussed. The greatest advantage of these documents is that they are exact renditions of what was actually said during those meetings in the Security Council Chamber. The disadvantage is that all "real" negotiation and decision-making in the Security Council takes place in so-called "informal sessions" where only the Council members are present and no records are kept. However, since the main focus for this study is not how or why the decisions to adopt these resolutions were made, but how member states chose to publicly legitimate them (alternatively to challenge their legitimacy), these meeting records are

still deemed to constitute the best material for this study. Nor is the fact that states' representatives may have ulterior motives for their actions considered a major problem. As one of the research questions of this study concerns the general construction of legitimacy by states in relation to these two resolutions, then it is only official arguments, irrespective of their potential insincerity, that can be relevant. In addition to the Council meeting records, I have used other types of UN documents, such as resolutions and reports; press material, such as briefings and press releases, from both the United Nations Organization and individual member states, primarily the United States; speeches from both member states and UN officials; and newspaper articles as well as articles in scholarly journals and online debate forums.

The empirical material, upon which the analysis in chapters five and six is based, has been systematically collected from the time of the adoption of the resolution in each case, i.e. September 28, 2001, and April 28, 2004, respectively, whereas earlier material has been included if it has been deemed highly relevant for the study. Since both of these resolutions gave rise to reporting regimes that are still ongoing, a more or less arbitrary end-date for the systematic collection of material was, for practical purposes, set at December 31, 2006. Furthermore, in order to facilitate my interpretation of the collected material, I have conducted 26 interviews between September 2005 and June 2006 with representatives from academia, think-tanks, current and former United States (US) State Department employees, current and former UN officials, and other diplomats from Denmark, Germany, the Russian Federation, Sweden and the United States. The interviews, while not themselves part of the empirical material, were made in order to gain contextual knowledge and the interviewees were thus chosen based on their insights into the processes in focus for the study. Hence, they have primarily provided inspiration for new ideas, but also, in some cases, served as tools of verification. In no case, however, has a conclusion been drawn solely based on the information gained through interviews.

Situating the study

As mentioned previously, this study is situated at the nexus of International Relations and International Law, a research position that has experienced a significant renaissance in recent years. While International Law can be considered the "root discipline" of International Relations (Olson & Groom 1991:6), and scholarship explicitly linking politics and law is now accepted practice in both disciplines (Scott 2005:49), it was not always so. Instead the two managed to spend the better part of the 20th century in virtual separation from one another.

Parallel, yet converging, developments

On the IR side, this was largely due to the traditional predominance of the realist perspective, where international law is viewed as peripheral at best. This began to change in the 1980s, however, as political scientists rediscovered international law under the banner of regime theory, and the rapprochement was further reinforced by the work of norm scholars and social constructivists in the 1990s (Raustiala & Slaughter 2002:540). Indeed, after the end of the Cold War scholarly work on the importance of ideas and norms virtually began pouring out (*cf.* Kratochwil 1989; Goldstein & Keohane 1993; Finnemore 1996; Katzenstein 1996; Wendt 1999) and, in European scholarship at least, this was also paralleled by a revival for the English School (Reus-Smit 2002:488). Through the English School's concept of "international society" and the concomitant focus on shared norms, rules and institutions, more connections between IR and IL became noticeable (Buzan 2001:486; Hurrell 2001:492). Still, however, Kal Raustiala and Anne-Marie Slaughter (2002:550) hold that many IR scholars display an insufficient understanding of the difference between legal rules and the broader category of social norms.

From an IL perspective, the separation can be equally blamed on the prevalence of the positivist[16] approach to legal studies. According to its advocates, law and politics are intrinsically and appropriately separate realms of inquiry, and the

[16] In this context, positivism refers to a specific perspective within international legal theory and not the ontological and epistemological ideal in scientific theory.

effects of inter-state power relationships on the development of international law have been glossed over. Their insistence that a legal analysis must only consult the sources of the law and forgo all contextual arguments based on morality or politics has strongly contributed to the image of international law as an objective "rule-book" (Scott 2004:117, 124-125; Arend 2003:25; Byers 1999:39; Steinberg & Zasloff 2006:64). Nonetheless, in recent years so-called Critical Legal Studies scholars, as well as writers from the non-industrialized world and feminist legal scholars, have attempted to expose the myth of the law's objectivity by pointing to the power relationships that have shaped (and continue to shape) international law and the international legal process (*cf.* Koskenniemi 1989; Gathii 2000; Charlesworth *et al.* 1991).

Thus, over the past one or two decades, it has been increasingly recognized that even "pure" political bargaining occurs in the "shadow of the law" (Tallberg & Jönsson 2005:87), shaped by such legal rules as the principle of sovereignty; and that strict international adjudication takes place in the "shadow of politics", as judges typically are alert to the effects of their decisions also outside the immediate legal sphere. To paraphrase Clausewitz, "law is a continuation of political intercourse, with the addition of other means" (Abbott *et al.* 2000:419). Much of the interdisciplinary work that has been made so far has addressed the question that may be the most puzzling for political scientists: compliance (*cf.* Chayes & Chayes 1995; Simmons 1998), but also the renewed interest in sovereignty has been suggested as a fruitful meeting place for IR and IL (*cf.* Bartelson 2006:463-464). In fact, sovereignty has been described as "a dynamic principle of the mutual constitution and mutual containment of law and politics" (Cohen 2004:14). Furthermore, some scholars talk of a growing "juridification" (Blichner & Molander 2005), as most areas of international relations are now regulated by law (Krisch 2003:153) and the fact of "being right", legally, is seen as a power resource alongside guns and butter (Reus-Smit 2004b:2). Indeed, political struggles may take the form of arguments regarding questions of legality (Scott 2004:123). Thus, Shirley Scott (2004:1) argues that "[t]here is now no aspect of world politics that can be fully understood without some knowledge of international law". This development has naturally contributed to the emergence of, as well as an increasing need for, interdisciplinary research efforts (*cf.* Slaughter *et al.*

1998; Brunnée & Toope 2000-2001; Reus-Smit 2004b) and, quite recently, the launching of a journal devoted specifically to such endeavors – the *Journal of International Law & International Relations*.

Related research

Many IR-IL interdisciplinary ventures have been undertaken within, or in relation to, the neoliberal institutionalist tradition in International Relations (Steinberg & Zasloff 2006:82), most prominently the special issue of *International Organization* entitled "Legalization of World Politics" (Goldstein *et al.* 2000). The collaboration between international lawyers and institutionalists is only natural in one sense, as international law is one of the fundamental institutions of the international system. However, it would be regrettable if institutionalism came to represent the entire "legal face" of International Relations, particularly since it has lately been criticized for being too focused on a rationalist-functionalist account of behavior to the detriment of the influence of ideas and norms (*cf.* Abbott 2005:26-27). The authors of the *IO* special issue have also been criticized in general for presenting an unnecessarily narrow depiction of the connections between IR and IL and in particular for excluding a discussion of legitimacy (Finnemore & Toope 2001; Bernstein 2005:152). Indeed, in their analysis the legitimacy of legal rules is simply posited from the outset (Abbott *et al.* 2000:409, fn. 14). This makes it difficult for Goldstein *et al.* to explain exactly why a legal obligation is different, alternatively why it is not always necessary to use the legal framework for rules in order to achieve legitimacy.

Empirically, the increasing significance, legally and politically, of international organizations in general (*cf.* Coicaud & Heiskanen 2001; Barnett & Finnemore 2004; Alvarez 2005) and the practice of the UN Security Council in particular (*cf.* Malone 2004; de Wet 2004; Matheson 2006) have been the focus of several volumes recently, by both IR and IL scholars. Also resolution 1373 and resolution 1540 themselves have been discussed in several articles in scholarly journals (*cf.* Happold 2003; Rosand 2003; Lavalle 2004; Bianchi 2006a; Bianchi 2006b). Yet these articles are virtually only by international legal scholars, publishing in legal journals, although exceptions exist (*cf.* Stiles 2006; Stiles & Thayne 2006). Furthermore, most of them are explicitly focused on either the

decision by the Council to adopt these resolutions or the level of compliance in the subsequent implementation process. To the extent that legitimacy has been explicitly touched upon, it is only "in so far as [it] may have an impact on the effectiveness of the implementation process" (Bianchi 2006b:881).

Contributions of this study

This study thus makes several contributions to existing literature at the nexus between International Relations and International Law. First, connecting IR and IL literatures through a focus on legitimacy and legitimation addresses one of the most significant shortcomings of the interdisciplinary *IO* issue as well as related compliance-oriented work. Not only does this study provide a richer view of the connections between politics and law through legitimation practices, but, implicitly, it also offers some insights as to why states accept certain measures, or at least how they justify that acceptance. Second, while the adoption of a social constructivist take on legitimacy is not unique in itself, it allows this study to show concretely how different elements of legitimacy may be used to compensate for one another. It is suggested that this compensation, and even substitution in some cases, may constitute a possible mechanism for the operation of power within the emergence of international legal rules, a way for "might" to make "right". Last, but perhaps most importantly, this study is the only one to date that has a) taken a general approach to the legislative activity by the UN Security Council and traced the entire processes (so far) surrounding both resolutions, and b) done so from the perspective of legitimacy, or how UN member states choose to legitimate the Council's actions.

While more related to the approach taken here than the actual content, it is my hope that this study will also contribute to a greater interest in international legal issues among IR scholars. Some critics argue that interdisciplinary attempts should not be undertaken, since one's knowledge of the "second" discipline can never be as great as that of one's first. In my view, however, the argument that scholars should refrain from venturing out into neighborly disciplines due to the risk of misunderstandings is equal to a self-fulfilling prophecy. If we heed its call then such risks can only multiply, whereas the forbearance with each other in the beginning can lead to a much richer,

theoretically and empirically, understanding of our common interest. The case against interdisciplinarity can also be made based on the allegation that what is gained in scope may be lost in depth and that it is better to do one thing well than two half-measures. Yet the position of this study is that in relation to most world events, any perspective based solely on IR or IL is in itself a half-measure, since it inevitably cannot provide the whole picture. That being said, a reasonable question to ask is: what is actually interdisciplinary research? According to Jan Klabbers (2005:45), all good scholarship "takes insights from elsewhere on board while retaining its own disciplinary character." Hence, it is my ambition to make a contribution to the growing "interdisciplinary" literature through this doctoral dissertation – a product of Political Science and International Relations, yet informed by, and hopefully with relevance for, international legal scholarship.

Outline of the rest of the study

The remainder of this study will begin by contrasting two different perspectives on international rule-making, characterized by equality and hierarchy respectively, which will then serve as a backdrop to the discussion of the different elements of legitimacy in the study's analytical framework. In *chapter two*, the principle of sovereign equality will be discussed as the predominant organizing principle in regulating states' relations in the international legal sphere. For that purpose, the state as a political and legal entity will be discussed along with changes in the understanding of sovereignty. Additionally, sovereign equality will be broken down into three different aspects: formal equality, legislative equality and existential equality, which will then each be related to international legal rule-making. It is argued that it is the legal ideal of equality that gives rise to the importance of legality and justifiability as elements in the legal logic of legitimation. *Chapter three*, on the other hand, focuses on hierarchy as an alternative – yet still legitimate – way of creating rules and order in the international system, and thus points to the importance of consent and efficiency for legitimation according to the political logic. The chapter begins by questioning the traditional IR dichotomy between hierarchy and anarchy and continues to discuss the concept of power and rule-creating institutions, such as great power management and hegemony. Lastly, these two will be related to the development of international law. Then, in *chapter*

four, the two perspectives will be linked in a framework for the analysis of legitimation arguments. It starts out by discussing this study's approach to legitimacy before moving on to the construction of the framework itself. Each element is also discussed in a detailed fashion and related to empirical examples from the practice of the UN Security Council. The empirical part of the study begins in *chapter five*, where Security Council debates concerning resolution 1373 are analyzed according to the four elements of the framework. It starts out, however, with a brief history of the issue of terrorism at the UN and a short characterization of the revolutionary nature of the resolution. *Chapter six* follows more or less the same pattern, focusing on resolution 1540 and the issue of non-proliferation instead. Finally, in *chapter seven*, it is time to revisit the purposes and questions introduced in this chapter, and summarize the findings of the study. Specifically, the potential of legitimacy as a bridge between IR and IL will be discussed, along with the utility of the framework, and the implications of the empirical results relating to the construction of legitimacy, international rule-making and the influence of the United States. Lastly, a few avenues for further exploration will be suggested.

Chapter two

Equality

"No principle of general law is more universally acknowledged
than the perfect equality of nations."
Chief Justice John Marshall, US Supreme Court, 1825

Sovereign equality is the organizing principle of the international legal system. This means that regulation of issues relies on the creation of legal rules in a process where states are treated equally and the substance of the rules is justifiable according to legal principles. The aim of this chapter is therefore to elucidate why *legality* and *justifiability* are central to a legal logic of legitimation through a discussion of the principle of sovereign equality. Which entities are entitled to sovereignty and thereby equality? What does it mean? And how does it affect international rule-making? These are some of the questions that will be touched upon in this chapter, which will begin with a discussion of the concept of the sovereign state and then move on to the state of sovereignty. After that we will focus on the principle of sovereign equality as the foundation for the international legal system. Lastly, different aspects of sovereign equality will be discussed in terms of formal equality, legislative equality and existential equality.

The sovereign state[17]

The sovereign state has traditionally been the main character in most stories about international relations, specifically those by legal positivist and international realist scholars. While it is increasingly challenged by a wide

[17] As is hopefully clear from the heading, this section will focus on state sovereignty, in contrast to, for example, national sovereignty or popular sovereignty, which are outside the scope of this study.

variety of non-state actors (including everything from huge multinational corporations to individuals and from national liberation movements with state ambitions to drug cartels and other associations of organized crime), it has displayed a remarkable resilience and adaptability. Most importantly, however, the salience of the state as the central actor is to a large extent a question of issue-areas. In terms of international law, states are not only the primary subjects, but also still the only holders of full legal personality, i.e. the ability to be vested with rights, powers and obligations (Cassese 2001:46). Additionally, the United Nations is perhaps the prime example of an intergovernmental organization based on state sovereignty, which is why this study, as previously mentioned, is characterized by a state-centric focus.

The state

So, what exactly is a state? Although most people have an intuitive understanding of the term, it is actually one of the most contested concepts in the literatures concerning constitutional law, political science and international relations (Holsti 1996:83). There are no detailed legal rules concerning the creation of states, yet some prerequisites can be inferred from the body of customary international law dealing with basic rights and duties of states. These prerequisites, a territory, a population and an effective governmental structure (Cassese 2001:47-48), are similar to the elements mentioned in most definitions of the state in the political science literature as well.[18] Interestingly, many definitions stress the aspect of territoriality. Robert Gilpin (1981:17), for example, writes that "the essence of the state is its territoriality". Yet, fixed geographical borders around a specified territory is a relatively recent phenomenon (Holsti 1996:43; Jönsson *et al.* 2007:29). Long after the treaties of Westphalia were concluded, rulers attempted to assert political control wherever they could claim genealogical bonds. It was not until the Peace of Utrecht in 1713 that a new principle of territorially bounded sovereign rights emerged (Reus-Smit 2003:619). There are most likely several reasons, both

[18] Building on Max Weber, Joel Migdal (1988:19) defines the state as "an organization, composed of numerous agencies led and coordinated by the state's leadership (executive authority) that has the ability or authority to make and implement the binding rules for all the people as well as the parameters of rule making for other social organizations in a given territory, using force if necessary to have its way."

external and internal, why the modern, territorial, state became the unit of choice, first in Europe and later on a more or less global scale. Externally, the territorial state demonstrated comparative advantages in handling both military and economic relations, whereas its internal abilities to collect taxes and control mechanisms of coercion provided significant support to both war and commercial enterprises (Jönsson *et al.* 2007:73-75; also *cf.* Tilly 1990; 1992).

According to the (Inter-American) Convention on Rights and Duties of States, signed on December 26, 1933, in Montevideo, a "state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states" (Article 1). Although this instrument was only intended to regulate affairs between the twenty state parties, at least the first three elements are now widely considered as part of a legal definition of statehood (*cf.* Malanczuk 1997:75). The last criterion, apart from basic foreign policy capacity, touches upon the difficult issue of recognition. When a new state has come into existence, the other states are faced with the choice of whether or not to recognize its existence, i.e. whether they are willing to deal with the newcomer as a member of the international community of states. It is the meaning of recognition and non-recognition that has given rise to intense theoretical arguments among international lawyers. The proponents of constitutive theory insist that recognition by other states in effect constitutes the new state, whereas advocates of the declaratory approach argue that the existence of a state is a purely factual matter with external recognition merely acknowledging those facts (Malanczuk 1997:82-83).

Today, however, recognition is predominantly viewed as declaratory (Malanczuk 1997:84) and Antonio Cassese writes that "recognition has no legal effect on the international personality of the entity: it does not confer rights, nor does it impose obligations on it" (2001:48). Additionally, the constitutive theory is inconsistent with the fundamental legal principle of sovereign equality in the sense that other states could deny membership in the international legal system to an entity fulfilling all the prerequisites of a state for reasons that may have nothing to do with state capacity (Cassese 2001:49). In practice,

however, the two are not that far apart since even the declaratory approach allows states to decide for themselves when and whether an entity satisfies the criteria for statehood (Malanczuk 1997:84), a dilemma which is aptly illustrated by the status of Taiwan in the contemporary era. Yet, as mentioned above, basic international legal rights and obligations of states apply irrespective of external recognition. Consequently, Article 3 of the Montevideo Convention states that

> [t]he political existence of the state is independent of recognition by the other states. Even before the recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently organise itself as it sees fit … .[19]

The state as sovereign

While non-recognition does not deny a state's factual existence, it does, however, affect significant aspects of that state's sovereignty, or rather its exercise of that sovereignty. According to a standard definition adopted by Hobson and Sharman (2005:65), sovereignty consists of "an internal aspect where a government is the supreme or exclusive authority within specified borders, and an external aspect under which this authority is recognized as such by other juridically equal entities." In relation to the previous discussion then, it is the fulfillment of the internal aspect of sovereignty that determines the state's existence, while recognition of that fact by other states, i.e. external sovereignty, is what bestows the political entity with the status of a sovereign state and enables it to act in the international legal system as such. Or, as Biersteker & Weber (1996:6) put it, "[b]y granting and withholding recognition, international society participates in the social construction of sovereign states".[20]

Furthermore, the recognition of a state's sovereignty, according to Mlada Bukovansky (2002:3, 23), is a sign of its perceived legitimacy among its peers.

[19] This principle can also be found in Article 13 of the Charter of the Organization of American States.
[20] For an excellent discussion of the meaning of recognition from the perspective of international society, see Jönsson & Hall 2005:125-131.

She further argues that legitimacy is the culturally meaningful substance of sovereignty, whereas territory is the material substance. From this follows that the sovereignty of a state is conditioned on the prevailing perceptions of legitimacy, as has been increasingly clear after the end of the Cold War. Traditionally, however, the fundamental importance ascribed to sovereignty in terms of control contributed to a so-called pluralist approach to international law. This entailed that any political entity – be it a kingdom or a republic, an authoritarian regime or a democracy – that established effective control over a specified territory was considered legitimate, at least from an official legal perspective (Malanczuk 1997:79; Crawford & Marks 1999:72). Indeed, Brad Roth (2005:393) still argues that one of the primary implications of sovereignty is the presumptive duty of all sovereign states to respect the outcome of political processes internal to the others. Consequently the international system came to display a tolerance for diversity and a clearly procedural view of legitimacy based on reciprocal rules (Farer 2004:219, fn. 1; Welsh 2004a: 64).

Granted, the boundaries of the legal system's sanctioned pluralism have narrowed progressively in the United Nations era with, for example, fascism and colonialism falling outside the realm of acceptability (Roth 2005:394). Furthermore, in the 1960s, the legal concept of *jus cogens* was developed, in what can be seen as an attempt to increase the coherence and unity of the international legal system (Paulus 2005:297; Cassese 2001:138). According to § 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT), a peremptory norm of general international law (or *jus cogens*) "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". Indeed, peremptory norms exist to protect those values and interests that are considered fundamental to the international community as a whole and are often said to constitute a link between law and morality (Orakhelashvili 2005:62). While controversial at the time of its introduction, the concept of *jus cogens* is now well-entrenched in contemporary international law. Its impact on specific cases is still limited, however, most likely due to the lack of consensus on which norms fulfill the criteria of *jus cogens* (Paulus 2005:330). In other words, while most states now agree on its existence, they still disagree over its specific content. Yet

among the examples mentioned most often are norms prohibiting aggression, colonialism, slavery, genocide and torture but also general rules on the right of self-determination (Cassese 2001:141). The inalienable right of each state to freely choose and develop its political, economic, social and cultural systems without interference by other states has also been emphasized in the General Assembly's *Declaration on Friendly Relations*, both in the context of the principle of non-intervention and as a matter of sovereign equality (Resolution 2625 (XXV), 24 October 1970). This right was also upheld by the International Court of Justice (ICJ) in its decision of the *Nicaragua* Case in 1986, and the Court further concluded that

> adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State (*Nicaragua* Case, ICJ, 1986, § 263).

Despite this fairly widespread consensus, the protection of, as well as limits to, sovereignty in specific circumstances is often the subject of differing interpretations. In fact, Martti Koskenniemi (1989:205) claims that many, if not most, disputes in international relations can be viewed as concerning the extent of state sovereignty, precisely because it has no "natural" extent.

Sovereign states in the post-Cold War era

In the early 1990s, scholars and politicians began to show a renewed interest in sovereignty as well as question many of the old assumptions (Biersteker & Weber 1996:1). This was related to the end of the Cold War, which did not just change the balance of power between the two superpowers, but also, and perhaps more importantly, between their respective value systems. As liberalism rose in prominence, it became clear, however, that it was a label for very different strands of arguments. Gerry Simpson (2001) distinguishes broadly between what he calls a "Charter liberalism" and "anti-plural liberalism", and Georg Sørensen (2006) contrasts "liberalism of restraint" with "liberalism of imposition". The former version in these two pairs stands for a liberalism that prioritizes states and tolerance for international plurality, the latter specifically rejects the principle of sovereign equality – some would

even say sovereignty itself – as it distinguishes among states based on their internal characteristics and sees no fundamental problem with spreading its values, if necessary, by force (Sørensen 2006:261; Simpson 2001:541; Simpson 2004:80). Fundamentally, the issue is whether certain values and principles are truly universal, which is the basis for the growing literature on cosmopolitan democracy (*cf.* Held 1995; Archibugi *et al.* 1998; Kaldor 1999) or, whether liberalism too "is best viewed as an ideology which promotes a certain kind of international political/economic order and the interests of those who prosper within it" (Richardson 2000:32). Yet on some occasions rejection of the claim for the existence of universal values can thus also be made on liberal grounds. The reasoning goes that a defense of external sovereignty against cosmopolitan contentions can be viewed as a liberal argument for freedom insofar as it protects weak states against the otherwise more or less unrestrained use and abuse of power by stronger states in the name of a greater good (Thompson, H. 2006:269). In other words, it is an appeal to reinstate the centrality of procedural legitimacy and a rejection of the alleged consensus around substantive moral values (Hurrell 2005:29).

Still, from the perspective of the only remaining superpower, it is unequivocally clear that "the great struggles of the twentieth century … ended with a decisive victory for the forces of freedom – and *a single sustainable model for national success*" (The White House 2002:1, my emphasis). This is not altogether new. The United States began to experiment with adding democratic governance as a criterion for recognition in relation to a few Central American states already in the 1920s, but it did not become generalized until after the end of the Cold War (Biersteker 2002:163). Furthermore, as a direct result of the events in Eastern Europe, former Soviet Union and former Yugoslavia, the European Community in December 1991 adopted a common position on the recognition and establishment of diplomatic relations with the new states in these areas, in which commitments to democracy, human rights and the guaranteed protection of ethnic minorities were some of the requirements (Malanczuk 1997:89). This development was continued in June 1993, at the Copenhagen European Council meeting, where it was agreed that the associated countries in Eastern and Central Europe were welcome to join the Union on the condition that

> the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union (European Council, *Conclusions of the Presidency*, p. 14).

It is not solely a Western phenomenon either, as illustrated by Article 1 of the Inter-American Democratic Charter, which stipulates that "[t]he peoples of the Americas have a right to democracy" and Article 30 of the Constitutive Act of the African Union, declaring that "[g]overnments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union." From an academic perspective, Thomas Franck (1992) has also advocated a view of democratic governance as a global entitlement in international law.

Thus, as the number of sovereign states has increased, full membership status in the international community seems to have become more restricted (Krisch 2003:145). In other words, there is a movement from the traditional procedural approach to the legitimacy of states toward a view which is no longer indifferent "to the nature, form and operation of political power" (Held 1995:104). Though it is true that the great powers of the time have probably never been completely neutral to the governing system of other states, it as been noted that "the wish of international society to promote the emergence of particular state forms is now expressed more candidly and recurrently than at any earlier historical period" (Clark 2005:161). For example, in January 2006, the United States launched the concept of "transformational diplomacy", which, in the words of Secretary of State Condoleezza Rice, is a "bold diplomacy" with the objective "to build and sustain democratic, well-governed states that will respond to the needs of their people and conduct themselves responsibly in the international system" (Rice 2006).

This concept was also included in the updated version of the US *National Security Strategy*, which states that the United States will "[e]ncourage and reward good government and economic reform, both bilaterally and through the multilateral institutions such as the international financial institutions, the G-8, and the Asia-Pacific Economic Cooperation" (The White House

2006:33-34). While most often seen as a political strategy of dangling carrots, Gathii (2000:2033) criticizes the "Euro-American" approach to international law as overly limited since it excludes this kind of behavior from the norm of non-intervention. For him, there is "no better example of how states lose their legal entitlements, and thus their legitimacy, at the international level than through the relationships they have with international capital" (Gathii 2000:2054). These changes in recognition practices, diplomatic cooperation and economic assistance have important consequences. They signal the beginning of a new, and more substance-oriented, view of what constitutes a legitimate state and they may even change the meaning of sovereignty itself. Therefore we will now leave the discussion on the sovereign state and move on to the state of sovereignty.

The state of sovereignty

Contemporary debates on the state of sovereignty often focus on the impact of globalization and the resulting diminished ability of the state to solve its problems on its own. It has become commonplace to note that state sovereignty is being "undermined", "challenged" or that it "has no descriptive value". The developments most often referred to are the increasingly globalized economy, transnational threats in the form of diseases, pollution and crime, technological advances reducing the constraints of time and space, as well as an expanding role (and scope) of international law and international organizations. Yet, when making these pronouncements it is important to specify what "kind" of sovereignty one is referring to. Although at times treated as such, sovereignty is not a fixed concept with a clear and unchanging meaning (Lake 2003). Indeed, Stephen Krasner (1999:9) argues that sovereignty is commonly used with at least four different meanings, which are neither logically connected, nor co-vary in practice.

Sovereignty as authority or control

Fundamentally, it is a question of distinguishing between authority and control, and most "threats" against sovereignty primarily concern the conception of sovereignty as control.[21] Moreover, with full control over all

[21] Naturally, it is difficult for a state to lose considerable control over its territory

developments in a polity being more or less unimaginable today, sovereignty is most often viewed primarily in terms of supreme authority (*cf.* Hobson & Sharman 2005:67; Lake 2003:304). From that perspective, the conscious and freely accepted delegation of sovereignty to another body, such as an international organization by ratification of its charter, is interpreted as an exercise of sovereignty rather than surrendering it. This was also the position taken by the Permanent Court of International Justice (PCIJ) in the case concerning *The S.S. Wimbledon*, where the Court

> decline[d] to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. … the right of entering into international engagements is an attribute of State sovereignty (*The S.S. Wimbledon* Case, PCIJ, 1923, p. 25).

In Krasner's terms, signing treaties that affect domestic authority structures and opens up for external influence, violate so-called "Westphalian sovereignty" (which refers to the right to exclude other actors), but cannot, if freely entered into, affect the "international legal sovereignty" of a state (Krasner 1999:30-31). In fact, a strictly *de jure* perspective on sovereign independence requires only a legal separation from other states, not a factual independence from outside authority (Fowler & Bunck 1995:50-51). From this perspective, external sovereignty (which largely corresponds to Krasner's international legal and Westphalian sovereignty) is potentially divisible, with a state possessing sole authority to legislate in certain matters, but not in others. Ultimate sovereignty in this context then would be depending on whether a state could reasonably reclaim authority over those issues that are currently decided by other actors (Thompson, H. 2006:255).

Ironically, the United States, while being a leading advocate for qualifying the (Westphalian) sovereignty of other states based on specific governance criteria, shows much less willingness to cede any control over its own policies. Former US Senate majority leader, Robert Dole, insists, for example, that "U.S.

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without it affecting its authority as well. A good example of this is so-called "failed states", which are usually not bestowed with much authority, when they have lost effective control (*cf.* Holsti 1996:119). The two should, however, be kept analytically separate.

sovereignty must be defended, not delegated" (as quoted by Luck 2002:58) and in the 2004 presidential election campaign both George Bush and John Kerry declared that the United States would not give a "blank check" to any organization that could compromise the sovereign right of the United States to decide for itself when to use military force (Welsh 2004b:186). Thus, while membership in the UN constitutes the epitome of their sovereign status for many states, the Americans generally consider it a limitation on the exercise of their full sovereign rights (Franck 1990:9). Pure and unrestrained (Westphalian) sovereignty, however, is a status to which only the greatest powers can aspire, and, in the contemporary era, the United States is probably the only state able to assert an unconditioned form of sovereignty with at least some degree of credibility (Lake 2003:311; Biersteker 2002:164).

Sovereignty as responsibility

Nonetheless, in the post-Cold war era, not just sovereignty as control, but, most importantly, also sovereignty as ultimate authority has been challenged by a new conception of "sovereignty as responsibility". It was made famous by the report, *The Responsibility to Protect* (2001), of the International Commission on Intervention and State Sovereignty (ICISS) and entails that a sovereign state has obligations not just to its own citizens but also to the wider international community (ICISS 2001:13). This view has since received support from many camps, for example, from the High Level Panel on Threats, Challenges and Change, which was convened by former UN Secretary-General Kofi Annan in order to find agreement for the road ahead in the aftermath of the divisive Iraq War. In its report, *A more secure world*, the High-Level Panel writes that

> [w]hatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community (A/59/565, § 29).

Depending on how these obligations are interpreted – abiding by international law or adopting specific policies – sovereignty as responsibility can be interpreted as a logical extension of the long development toward increasing rule of law in international relations or a deeply intrusive and revolutionary idea. Fundamentally, it is of course also a question of what happens if a state

is deemed to have failed in meeting its sovereign responsibilities toward its citizens and/or the international community. And, even more importantly, who is entitled to make such an assessment?

According to the ICISS, if a government is unwilling or unable to protect the safety and lives of its citizens, that responsibility is transferred to the broader community of states (2001:17), and in "extreme and exceptional cases", where there is (ongoing or risk of) "large scale loss of life" and "large scale 'ethnic cleansing'" outside military intervention may be justified (2001:31-32). After the catastrophical failures of the UN in Rwanda and Bosnia during the 1990s, the idea of an international responsibility to protect was welcomed in most quarters. Yet, as a dual concession toward the permanent members of the Security Council, as well as to many developing states, the UN member states participating in the World Summit in 2005 effectively transformed the concept from an international responsibility to a Security Council responsibility to protect[22] through the following formulation:

> we are prepared to take collective action, … *through the Security Council*, in accordance with the Charter, including Chapter VII, on a case-by-case basis …, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (A/RES/60/1, p. 30, my emphasis).

Such a wording most likely alleviated the fears of some developing countries that an expansion of the two established exceptions to the general prohibition on the use of force in Article 2(4), would be abused in the interests of the strong against the weak (Welsh 2004b:186) as well as ensured the five permanent members of the Security Council (P5) of their retained right to choose when, where and how international intervention would take place. Through that modification of the Commission's original notion, the concept's revolutionary aspect is also diminished since the Security Council has from the start had the right to override state sovereignty in matters more or less of

[22] While readily acknowledging the Security Council's primary responsibility for matters concerning international peace and security, the ICISS also contemplates alternatives routes, should the Council fail to act (ICISS 2001:53-55).

its own choosing, which, in recent years, increasingly has included large-scale human rights violations.

The post-Cold War era has also seen developments where groups of states have collectively and freely given up their right to non-intervention in relation to one another concerning specific issues. For example, at the 1992 Helsinki Summit of the Conference on Security and Cooperation in Europe (CSCE), participants recognized that their human rights commitments were matters of direct and legitimate concern to the other participating states and did no longer belong exclusively within the domain of internal affairs (CSCE 1992, § 8). Likewise, the Constitutive Act of the African Union includes a provision on the right of the Union to intervene in a member state "in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity" (Article 4 (h)). These examples, however, do not modify the basic conception of sovereignty as authority since they entail sovereign governments' conscious and voluntary choice to diminish the scope of that same ultimate authority.

Nevertheless, there are other uses of the responsibility notion that are more controversial. In her argument for the related concept of "relational sovereignty", Helen Stacy advocates that not the citizens themselves, but "actors external to the nation-state" assess how well a government is meeting its citizens' needs (2005:396). This external appraisal is, in turn, based on "a standard of governance that a nation's citizens must surely want for themselves, were they only able to effectively have their government supply it to them" (Stacy 2005:400). If these external actors – states or international institutions – find that governments ignore the citizens' putative preferences, intervention for humanitarian or economic purposes is warranted (Stacy 2005:396). Although clearly violating the traditional legal principles of sovereign equality and non-intervention, similar views are increasingly put forth by scholars (*cf.* Tesón 2006) and policy-makers. For example, former US foreign policy architect Richard Haass holds that

> sovereign status is contingent on the fulfillment of certain fundamental obligations, both to its own citizens and to the international community. When a regime fails to live up to these responsibilities or abuses its prerogatives,

> it risks forfeiting its sovereign privileges – including, in extreme cases, its immunity from armed intervention (Haass 2003).

Based on the equality aspect of sovereignty then, international lawyer Georg Nolte (2005:391), warns that "'sovereignty as responsibility' is a highly ambiguous concept", since it can easily be abused as an excuse to use force preemptively or dictate economic and social policies in another country for self-assessed purposes. From a legal perspective, unrestrained action by sovereign states is qualified by the principle of sovereign equality, whose effects we will now examine more closely.

Regulating sovereign equals

The principles of territorial integrity, non-intervention and sovereign equality are often described as the core elements of external sovereignty, and out of these sovereign equality has furthermore been called "the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest" (Cassese 2001:88). While never meant to imply parity in factual circumstances, sovereign equality emerged as a necessary consequence of the development of sovereignty, or rather of the coexistence of several sovereigns. Since each sovereign exercises ultimate authority within a specified territory and recognize no superiors in exercising that authority, then equality is the only principle around which their relations can be regulated (Cosnard 2003:121; Thompson, H. 2006:257), *ergo* sovereign states are equal.

Sovereign equality as rights

The principle of sovereign equality means, for example, that no state can sit in judgment of another state or sign treaties on its behalf, since sovereign states, at least according to the influential view of legal positivism, are only bound by those laws to which they have consented. In short, there can be no formally recognized superiority and subordination among sovereign states – "*par in parem non habet imperium*" (Simpson 2004:28). This view of states as equal is based on the idea of the state as a person. A classic formulation comes from Emmerich de Vattel, who was clearly inspired by the equality thought to exist among men living in a state of nature (Simpson 2004:31-32). In his influential

Law of Nations from 1758, he wrote that "Nations … are naturally equal, and inherit from nature the same obligations and rights. … A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom" (as quoted by Beaulac 2004:155).

In modern times, the principles of sovereign equality has been codified in Article 2(1) of the UN Charter, which states that "[t]he Organization is based on the principle of the Sovereign equality of all its Members" and in the General Assembly's unanimously adopted *Declaration on Friendly Relations* (Resolution 2625 (XXV), 24 October 1970), the principle of sovereign equality was extended to all states. Most recently, in January 2007, the Security Council also adopted a presidential statement, which reaffirmed the Council's "commitment to the principles of sovereign equality, national sovereignty, territorial integrity and political independence of all States" (S/PRST/2007/1). By now, many commentators further argue that it is part of the *jus cogens* norms (Simpson 2004:27). Thus, the principle of sovereign equality is one of the most widely supported legal principles. Most likely, this is because it is a sign of the recognition that the international legal system is founded upon reciprocal rights and duties among its subjects. For example, both the prohibition on the use of force (Article 2(4) of the UN Charter) and the right to self-defense (Article 51) are derived from sovereign equality and the concomitant principle of territorial integrity. These rules, while limiting state action in one sense, do so in order to protect the continued existence of other states (Dupuy 2003:179; Simpson 2004:28-29).

Sovereign equality as a regulation mechanism

Nevertheless, sovereign equality is not just about protecting the individual state. Perhaps even more so, it is a principle for the legal regulation of a system of sovereign states (Simpson 2004:39) and as such it inspires the legal solutions to most problems in international relations, including dispute settlement (Cosnard 2003:121). For example, disputes among states, although manifestly unequal in reality, are, if dealt with in a legal manner, settled through mechanisms which, ostensibly at least, treat all parties as equals. Thus, sovereign equality in this sense is a legal technique "consisting in supposing a fact or situation other than it actually is in order to deduce legal consequences"

(Henri Capitant, as quoted by Dupuy 2003:178). In other words, international law, based on sovereign equality, can be interpreted as a solution to the problem of rule-making among entities recognizing no superior authority (Farer 2004:219), which, in turn, explains some of its peculiar features.

Indeed, there are a number of distinct features of international law, which may seem almost paradoxical from the point of view of municipal law.[23] First of all, the international legal order is a "horizontal structure of coequal authority" (Kaplan & Katzenbach 1961:20). Instead of a central legislative authority, international law is built around the idea of rule-making through consensus and states jointly create the law, for which they are then themselves the principal subjects (Stoll 2003:456). Absent a central enforcement agency as well as international courts with general and compulsory jurisdiction, states also enjoy "auto-interpretation" of legal rules (Cassese 2001:6). This means that they are able to reserve the right to determine for themselves exactly what the rules are and how they apply in a specific situation (Kaplan & Katzenbach 1961:20). It is thus perfectly possible for states to participate in the creation of legal rules only to choose to violate them at a later stage when applied to their own actions (Sevastik 2002:21).

The possibility of law among sovereigns

Based on the so-called "domestic analogy" (the comparison between international and municipal law), there has always been those who have questioned the use of the label "law" to international law (Bull 2002:124) on the grounds that there is no central legislating, law-enforcing or adjudicating authority. Yet, for every argument against the concept of a law among sovereigns, another can usually be found in support. For example, the classic argument that coercive sanctions are necessary for a legal order to exist (*cf.* Kelsen 1952:5), which is disputed on the basis that lack of enforcement at times does not justify international law being ignored or marginalized, just as lack of enforcement at the national level does not allow for "private justice" by individual citizens (Stern 2000:260-261). Likewise, it is accused of setting the cart before the horse when arguing that law is only binding if it can be

[23] The international legal term for domestic or national law.

enforced, when it is more likely so that law is enforced because it is seen as binding (Reus-Smit 2003:596-597).

In short, there are many arguments on this issue, but it all comes down to the following:

> what these [international] rules require is thought and spoken of as obligatory; … there is general pressure for conformity to the rules; … and … [w]hen the rules are disregarded it is not on the footing that they are not binding; instead, efforts are made to conceal the facts (H. L. A. Hart as quoted by Franck 1990:185).

Indeed, a significant measure of international debate is concerned with states justifying their actions based on specific legal rules, alternatively accusing others of acting in violation of such rules, which will become clear in chapters five and six of the present study. Even in situations involving "clear" violations, states tend to claim exceptional circumstances rather than openly admit to violating the law. If law was not perceived as binding, it would also not be seen as such an attractive mode of influence and states would not go to such lengths to avoid legal commitments (Reus-Smit 2003:592, 598; Roberts 2003:95). Thus, on the whole, "states behave *as if* such [international legal] rules existed and obligated" (Franck 1988:758, my emphasis) and that is also the assumption on which this study rests. In conclusion, the relationship between law and social reality has been likened to the one between maps and spatial reality (Gowlland-Debbas 2000:281), meaning that it is neither an exact reflection, nor an imaginary picture. The key question is whether it proves to be a relevant guide to the terrain we are exploring. Does knowledge of international legal theory and concepts facilitate our understanding of international relations today? I argue that it does, and that argument will hopefully be supported by the findings of this study. First, however, the concept of sovereign equality will be broken down into three distinct aspects, in order to get a more precise understanding of how this legal principle affects international relations today.

Varying equalities

Just like the term sovereignty is often used to denote different things, Gerry Simpson (2004:42) argues that sovereign equality consists of three distinct aspects of equality, which he calls formal equality, legislative equality and existential equality. Since they affect – and are affected by – international rule-making in different ways, they will be discussed, in turn, in somewhat detail.

Sovereign equality as formal equality

Formal equality is the most basic conception of sovereign equality and basically only entails that states, although manifestly unequal, should be given equal treatment by the international legal system (Simpson 2004:42; Dupuy 2003:179). At one time, in the 17th and 18th centuries, the sovereign equality of states was literally interpreted to mean that all states possessed the same rights and obligations since these were seen as derived from natural law. Vattel formulated this assumption as "ce qui est permis à l'une [nation] est aussi permis à l'autre"[24] (as quoted by Krisch 2003:138). Since then, however, formal equality has been reinterpreted to mean "equality before the rule, not within the rule" (Cosnard 2003:121). This means that it is a very limited concept of equality and thus fully consistent with significant inequalities in reality. For example, states' right to self-help is fully equal for all in theory, but in practice only available for those with sufficient resources or friends to exercise it (Simpson 2004:47-48).

Still, formal equality does stipulate that any inequalities in formal rights and obligations be accounted for somehow. In other words, unequal rights that are freely accepted by states through their ratification of various treaties, such as the privileged position of the permanent members of the Security Council, are perfectly valid and compatible with the principle of formal equality (Cassese 2001:91). If these exceptions are thus justified by some legal principle and have no effect on the basic principle of equality before the courts, then the limited demands of formal equality are satisfied. In the words of Simpson (2004:44): "Of course, different rules apply to different states.

[24] "that which is permitted for one [nation] is also permitted for another" (Author's translation).

The point is that rules that do apply to the same states should apply equally." Again, however, it must be emphasized that this equality is only a matter of the vindication and exercise of rights in a judicial setting, i.e. before a court of law (Simpson 2004:43).

Indeed, not even in judicial settings are states guaranteed perfect equality in vindicating their rights since the international system lacks courts with universal and compulsory jurisdiction. The International Court of Justice, for example, only has jurisdiction in those cases where the states in question have given their consent. This means that it is not possible for every state to have its case heard, as was the situation for the Federal Republic of Yugoslavia (FRY), which initiated legal proceedings against ten NATO countries, in April 1999, for violating the obligation not to use force. In relation to Spain and the United States,[25] however, the ICJ concluded, that "in the absence of consent", it "manifestly lacks jurisdiction to entertain Yugoslavia's Application" (*Legality of Use of Force* (*Yugoslavia* v. *United States of America*), 2 June 1999, §§ 29, 30). Also in the remaining eight cases, the Court eventually decided that it lacked jurisdiction, but this time on the grounds that FRY was not a member of the United Nations at the time it filed its application to the Court and did not thereby have access to the Court based on Article 35 (1) of its statute. According to a joint declaration by seven of the Court's fifteen judges, however, they found this position "far from self-evident" (Joint Declaration, *Legality of Use of Force* (*Serbia and Montenegro* v. *United Kingdom*), 15 December 2004, § 12). Thus, it may be debatable whether, as Simpson (2004:44, fn. 80) holds, states do receive equal treatment if allowed to have their day in court. Nevertheless, in sum, formal equality is similar to Krasner's basic concept of international legal sovereignty, as it only pertains to states' legal status as sovereigns and is not concerned de facto rights and capacities. Still, with its emphasis on equal legal treatment, it makes it at least more difficult to apply different (legal) standards to states in the same situation.

[25] The United States terminated its acceptance of the compulsory jurisdiction of the International Court of Justice in December 1985, about one year after it lost the jurisdictional stage of the proceedings in the *Nicaragua* Case (Murphy 2004:260).

Sovereign equality as legislative equality

Legislative equality refers first to the equal participation rights that states are accorded by way of their sovereignty in the international law-making process and, second, to their equal right, in line with the legal positivist approach, to be bound only by those legal rules to which they have consented (Simpson 2004:48). To begin with the first aspect, equality in terms of legislative participation rights stems from the fact that states are considered the only actors in the international system with full legal personality and thereby capable to fully participate in the international legal process.[26] This process of international law-making centers primarily around the negotiation of treaties and the making of international custom, which constitute the two most important sources of international law[27] (Cassese 2001:149).

Creating legally binding rules through bi- or multilateral treaties embodies the ideal of legislative equality, since they are created through negotiations among the participating states and only bind those who choose to become parties by signing and ratifying the treaty. Consent to be bound by a treaty can also not be obtained through the threat or use of coercion, as laid down in Article 51 of the VCLT, in which case the consent is without legal effect. Consequently, the entitlements and obligations regulated in the treaty, first of all, affect only states parties to that treaty and second, only in their dealings with each other. In their relations with other states, not parties to the treaty, they too operate under the legal rules as they were before the treaty came into force (Cassese 2001:126). Treaties are also the least ambiguous form of international law, since the norms in question are codified and then consented to through various signature and ratification practices by all states parties. Additionally, the VCLT regulates not only that treaties should be interpreted in good faith, but also how that interpretation should be done, and how treaties may be amended among other things (§§ 31-33 and 39-41 respectively).

[26] For a critique of this see Cutler 2001.

[27] Other sources include general principles of international law, unilateral acts of states creating rules of conduct, which are also considered primary sources. Binding decisions of international organizations and judicial decisions are considered secondary sources as their authority is provided for by rules made from primary sources (Cassese 2001:149).

These characteristics contributed to a vast increase in the popularity of treaties as a mechanism for international rule-making in the latter half of the 20th century. During the period between 1815 and 1945, the great majority of international legal rules was developed through the formation of international custom among the great powers of Europe and thus characterized by Euro-centrism and Western civilization standards (Cassese 2001:23).[28] With the simultaneous enlargement and diversification of the international community of states in the post-World War II era, along with the incursions by international law in previously domestically controlled issue-areas, such as the use of force, environmental protection and human rights, reaching agreement on particular rules became much more difficult (Cassese 2001:124; Roberts 2003:86). Wolfgang Friedmann (1964:60-62) has described it as a move from an "international law of co-existence", which largely entailed a negative code of rules of abstention, to a positive "international law of co-operation". By virtue of the relative clarity of treaties and their emphasis on individual and explicit state consent – in other words, their legislative equality – they became the preferred mode of legislation in these more substantive matters. Indeed, from 1970 to 1997, the number of international treaties more than tripled (Patrick 2002:12).

The actual basis for the treaty system – or the rule which ultimately makes treaties legally binding – the principle of *pacta sunt servanda*,[29] can, however, be found in customary international law (Weeramantry 2000:371). Custom is the oldest source of international law and, according to the ICJ Statute it consists of "evidence of a general practice accepted as law" (Article 38, 1b). Based on this generally accepted definition, custom is considered to have two elements: state practice, which must be general and consistent, and *opinio juris*, which means that the practice must be followed out of a belief of legal obligation (Roberts 2003:81). However, there is no commonly accepted standard of what constitutes general and consistent practice within the international legal community. While it need not be uniform, how many deviators can be tolerated and, perhaps most importantly, which? Does practice only equal actions or

[28] For a different point of view, see Orakhelashvili 2006.
[29] "Agreements must be kept." (Author's translation)

can official statements count as state practice? (Malanczuk 1997:42-43). This situation, along with the fact that customary international law is a slowly, but constantly, evolving source of law make it much less precise than its treaty counterparts. Thus, there is usually room for maneuver in arguing whether a particular customary rule exists (Scott 2004:7) and together these ambiguities make it highly susceptible to manipulation by states.

Furthermore, in contrast to the detailed regulation of the treaty process in the VCLT, there exists no authoritative guide to the process of changing customary international law. In fact, the fluid and evolutionary nature of custom means that a transgression can be viewed either as a violation of the law or as the first step toward its transformation, depending on subsequent developments. Thus, the ICJ has stated that if a state violates custom but

> defends its conduct by appealing to the exceptions or justification contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule (*Nicaragua* Case, ICJ, 1986, § 186).

But, "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend toward a modification of customary international law" (*Nicaragua* Case, ICJ, 1986, § 207). Since the transformative effect depends on the behavior of other states – whether they emulate the new practice or not – customary legal change is a necessarily social process and the aspect of legislative equality is satisfied to the extent that every state has the right to participate in that process. This, however, does not mean that every state is able to influence the outcome to the same degree, but legislative equality is still important in the sense that there is a fundamental difference between the capacity to influence and the right to legislate. As long as certain states do not have the right to legislate over others, the way they exert their influence over the process is theoretically open to challenge from a legal perspective (Reus-Smit 2005:90). Hence, the informal inequalities of influence which exist in any free political system, and which generally work in the favor of the already powerful, do not necessarily violate legislative equality (Simpson 2004:49, 51). Furthermore, such inequalities generally play a larger role in the formation of custom than in the treaty-

making process, lacking institutionalized processes regulating formation, consent and modification (Byers 1999:5). Indeed, in contrast to treaty law, a state is bound by international custom regardless of whether it participated in its formation or not. Historically, however, if a state could show that it had persistently objected to the rule as it was being formed, it was not considered bound by it (Cassese 2001:119, 123). Yet this principle has been weakened by arguments that one or a few recalcitrant states should not be allowed to block the development of a new rule. Additionally, the development of the *jus cogens* category and other universal norms further circumscribe the possibility of the individual state to choose which laws to be bound by (Simpson 2004:51; Weeramantry 2000:357).

Stronger calls for legislative equality, other than equal right to participation in the law-making process, include equality of votes and equality of representation and in its most radical form it would exclude all types of great power privileges within the international legal order (Simpson 2004:48). One of the most famous and relatively successful examples of compromise between great power privilege and legislative equality is of course the establishment of the United Nations, with a small great power (Security) Council and a General Assembly. Yet the democratic decision-making of the General Assembly irritates its largest financial contributor, and in November 2005 then US Ambassador to the UN, John Bolton, told *The Washington Times* that: "We have one-half of one percent of the total [votes], meaning we pay 44 times more than our voting power", continuing that "[m]y priority is to give the United States the kind of influence it should have" (Pisik 2005).

Legislative equality goes to the heart of what most people mean by sovereign equality in the sense that it precludes at least the direct rule of other states through legal instruments (Krisch 2005:377-378). According to Cosnard (2003:119), "a State is sovereign because it is independent from any other State: it is only bound by international law" and, even in relation to international law, "the stress [in state sovereignty] is on the liberty to be bound or not be bound by legal rules". Thus, the demands for legislative equality ensure that neither of the two main sources of international law – treaties and custom – lends itself readily to the imposition of unilateral dictates. This still does not mean

that they are immune to manipulation by states, only that international law, for the most part, makes a most blunt tool of foreign policy. These conditions are obviously more constraining for great powers whose vast resources are less valid within a legal context, which tends to make them frustrated with international law (Krisch 2005:377-378; Krisch 2003:136). Perhaps it is that frustration which is revealed in the US *National Defense Strategy* from 2005, where the following passage can be found among the "vulnerabilities" mentioned:

> Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism (*The National Defense Strategy of the USA*, p. 5).

Accordingly, the United States has increasingly relied on the many alternatives that now exist for the purpose of cooperation and rule-making at the international level, most of which do not have the same high demands for legislative equality and also operate much faster. Indeed, then Under Secretary of State, John Bolton, wrote in an op-ed piece that the Bush administration preferred to take cooperative action with allies "[r]ather than rely on cumbersome treaty-based bureaucracies" (Bolton 2004). This tendency will, if continued, pose a real threat to the aspect of legislative equality, which is built, above all, on inclusion.[30]

Sovereign equality as existential equality

Existential equality, finally, is based on the independence and immunity aspects of external sovereignty and can thus be likened to Krasner's Westphalian sovereignty. It includes states' equal right to territorial integrity, political independence and domestic jurisdiction, i.e. their right to non-intervention, as well as minimal rights of participation in international institutions (Simpson 2004:53-54). Fundamentally, it concerns the basic right to organize their communities on the basis they wish without risking intervention or interference from other states and existential equality is an attempt to protect states from exclusion or stratification within the international community based on their internal characteristics. Thus, it is not just a guarantee of

[30] This tendency will also be discussed further in chapter three.

state autonomy, but also the foundation of pluralism and diversity in the international community. This makes the opposite of an order composed of sovereign equals not merely a material hierarchy, but, ultimately, also a hierarchy of values (Simpson 2004:29, 53).

Paradoxically, as arguments for sovereignty as equality in terms of territorial integrity, non-intervention and the like became increasingly established in 18th century Europe, it was conspicuously absent from relations between Europeans and non-European entities (Thompson, H. 2006:253; Krisch 2005:396; Holsti 2004:154). Indeed, the beginning of the multipolar order in Europe through the rise of the Holy Alliance at the Congress of Vienna simultaneously marked the end of a period of relative legal equality between European and Asian states (Simpson 2004:36). The double standards were defended by racist discourse, which led to a "civilizational league table" ranking communities from the advanced, white Western states at the top, through the "barbaric", "yellow" Eastern states in the middle and the "savage", "black" South at the bottom. Characterizing certain communities as "uncivilized" could then justify rules proscribing intervention in intra-European relations, while prescribing it in relation to other parts of the world (Hobson & Sharman 2005:88). The denial of full membership status in the international community to certain entities – although a central element of existential equality – thus made the emerging rules of sovereign equality less impeding for the great powers at the time. In the current era, we can see a similar tendency to restrict membership in relation to certain states defined as "rogues", with a resultant loosening of the rules of state immunity (Krisch 2003:146, 153). Cosnard (2003:120) warns us, however, for idealizing the system of the past, thinking that states were "more equally sovereign" then than they are now.

While often referred to by policy-makers, but also jurists, and increasingly touted since the end of the Cold War, the term "international community" is highly ambiguous. It is sometimes limited to states, sometimes used more widely and at other times it is simply left unspecified (Kwakwa 2003:28-30). Like most other "imagined" entities, however, "community is in the eye of the beholder" (Koskenniemi 2003:91) and, according to post-modern

perspectives, community is not possible without the exclusion of the "other" (Paulus 2003:75). In the present era, the alleged rise of harmony within the international community has also coincided with the purposeful designation of some countries as "rouges", "pariah states" and "outlaws". These states are depicted as being outside the boundaries of the "international community" and thereby also beyond the limits of the law. This means that they do not exist on the same premises as other states and different rules of engagement apply (Krisch 2005:387; Clark 2005:176). In other words, they do not enjoy the same existential equality as the states "on the inside". When the United States first elaborated its criteria for the classification of a rogue state, it had much less to do with domestic political conditions than with external behavior (Clark 2005:176). But in 1994 then US National Security Adviser Anthony Lake put forth the argument that these (he used the term "backlash") states had some characteristics in common. For one, they were coercive regimes that suppressed basic human rights and promoted radical ideologies. In addition, they shared a siege mentality and, perhaps most tellingly, they exhibited "a chronic inability to engage constructively with the outside world" (Lake 1994:46). Twelve years later, one of Lake's successors and also Secretary of State, Condoleezza Rice, remarked that "[t]he fundamental character of regimes now matters more than the international distribution of power" (Rice 2006).

From the standpoint of sovereign equality, this is problematic enough when only giving rise to consequences in the political sphere, but, increasingly, arguments have been heard for an escalating differentiation also among legal rights and duties based on states' internal characteristics. For example, international lawyers Lee Feinstein and Anne-Marie Slaughter (2004) argue that the problem with, for example, non-proliferation agreements is that they treat North Korea as if it were Norway. The policy of "the democratic exception" is also visible in the recent US-India nuclear cooperation venture, effectively ending India's status as "nuclear pariah" since it exploded its first atomic bomb in 1974 (Levi & Ferguson 2006:3). In defending the American position, US Under Secretary of State, Nicholas Burns, stressed the responsible and democratic nature of the Indian regime, and declared: "We would not

have made this agreement had India been a different kind of country" (Press Briefing in India 2006).

At the bottom of such arguments, there is often the underlying contention that the source also of international legitimacy is domestic constitutionalism and democratic consent by peoples (Hurrell 2005:19). Democracies, therefore, constitute "the core" of the international community with the fullest enjoyment of rights (Clark 2005:159). Based on primarily the increased opportunities for accountability in democratic regimes, Buchanan & Keohane recognize that democracies "may not be morally reliable agents, but *comparatively* they are more reliable than autocracies" (2004:19, emphasis in original). Consequently, more and more calls are heard for a subsidiary decision-making body, solely made up by democracies, that could take over when the fundamentally undemocratic Security Council is blocked by a veto (*cf.* Buchanan & Keohane 2004). In its *National Security Strategy* from 2006, the United States also states its intention to work for the aim of "[e]nhancing the role of democracies and democracy promotion throughout international and multilateral institutions" (The White House 2006:45-46). While an increasing democratization may absolutely be a welcome development from certain standpoints, restricting the membership of the international community, and explicitly privileging democracies over other states, still violates the existential aspect of the sovereign equality. From a more practical point of view, Christian Reus-Smit (2005:82) also points to the difficulty of defining what constitutes a democratic state in a way that is generally acceptable. Additionally, advocating a liberal model for the international community can also be seen as a strategy to strengthen American hegemony (Paulus 2003:75). Indeed, "if the United States is unable to control the General Assembly, it can at least claim to know what the 'international community' desires" (Krisch 2003:143-144). Moreover, the more decisions that are being taken based on "the will of the international community" rather than through traditional legal processes, the more marginalized excluded states will be. Violations of existential equality therefore easily transform into a negative spiral affecting legislative equality as well.

Concluding discussion

This chapter has demonstrated the centrality of sovereignty and the associated principle of equality for international legal rule-making. Only sovereign states are entitled to participation in the international legal process and their sovereignty and thereby participation rights have traditionally been considered as equal from a legal point of view. Yet, the increasing substitution of substantive for procedural criteria in terms of states' recognition practices in the post-Cold War era has significant consequences for which states are perceived as legitimate members in the international community of states. Indeed, it "changes the very definition of what it means to be sovereign" (Biersteker 2002:164). Thus, in relation to the question of which entities are entitled to sovereignty, that number is actually shrinking again after a huge increase during the de-colonization period. More and more voices advocate a view where liberal democracies are the only legitimate states, based on, among other things, popular consent and accountability, and sovereignty is consequently transformed into a responsibility, primarily in relation to the state's own citizens, but in certain versions also to the international community as such.

Yet the principle of sovereign equality, which is obviously fictional in material terms, still functions as a constituent fiction (Dupuy 2003:179). Based on its centrality for the workings of the entire international legal order and its still widespread support, the principle of sovereign equality continues to preclude at least direct rule by one state over others through legal instruments as neither of the two principal sources of international law – treaties and custom – can be created through a unilateral process. However, out of the three aspects of equality discussed above (formal, legislative and existential), only the formal one has escaped recent outright challenges, most likely because its scope is so limited that it is not perceived as particularly demanding. Legislative equality, which in one sense goes the furthest, is questioned based on, for example, monetary contribution, whereas existential equality is opposed from the perspective of democratic legitimacy. The most significant challenge to the principle of sovereign equality, however, is when these developments combine into an overall tendency to move international rule-making into

more informal, political, and more or less exclusive settings, such as the Security Council. Nonetheless, in a legal context, all exceptions to the basic premise of sovereign equality still need to be justified by reference to some other principle in order to be perceived as legitimate. Hence, for legitimation of a rule according to the legal logic, *legality* is the crucial procedural element, whereas *justifiability* is central from a substantive perspective.

Chapter three

Hierarchy

"Hierarchy and the question of who has authority
are the key issues in today's unipolar world."
David A. Lake

If equality can be described as the *leitmotif* of the international legal process, then hierarchy is what reigns in the political sphere. In international politics, there is no problem with ranking and differentiating among states based on their capabilities or other qualities. These disparities in capabilities are further often reflected in the practice of international rule-making, and many hold that hierarchy and great power management are prerequisites of order in the international system. Such a state of affairs is for the most part accepted by the other states based on the great powers' provision of global public goods. Thus, the aim of this chapter is to focus on the role of hierarchy in international political rule-making and thereby highlight the importance of *consent* as a procedural element of legitimacy and *efficiency* as the central substantive element. Some of the questions that will be touched upon include: Is it possible to have hierarchies in anarchy? How can we conceptualize power? How do great powers affect international rule-making? In addressing these questions, this chapter will begin by discussing the state of anarchy, before moving on to the concept of power. After that it will focus on hierarchical orders, notably forms of great power management and hegemony. Lastly, the influence of great powers and hegemons will be related to the process of international rule-making.

Hierarchy in anarchy

From the historical perspective of the English School, the anarchic international system stands out as a rather unusual and fragile structure, almost invariably giving way to hierarchy (Little 2003:458). Conventionally, however, the international system is depicted as characterized by anarchy, in the sense of lacking an authority-based governing structure with a legitimate monopoly on the use of force (Waltz 1979:103-104). Thus, it is fascinating how a concept, which literally then only signifies an absence, has given rise to so many specific predictions about international relations.[31]

Implications of anarchy

According to realist theory, and in contrast to the legal perspective presented in the previous chapter, the logical and inevitable consequence of state sovereignty is not a horizontal system of rule through international law, but a condition of anarchy (Barkin & Cronin 1994:108). Indeed, from a realist perspective, sovereignty is seen as the source of the alleged weakness and ineffectiveness of international law (*cf.* Morgenthau 1959:288). Under conditions of anarchy, states are not only allowed to be the final judges of their own interests, but they are also required to pursue them by their own means (Barkin & Cronin 1994:110), thus leading to a system based on self-help (Waltz 1979:104). This approach began to take root when the inequalities between the entities in the early Westphalian system began to grow and sovereignty increasingly came to be seen as a license for rulers "to do whatever was necessary to ensure the viability of their domains" (Murphy 1996:94). Although sovereignty has been progressively circumscribed, remnants of this position can still be found in state rhetoric, as illustrated here by President George W Bush (2003): "The United States of America has the sovereign authority to use force in assuring its own national security". The Permanent Court of International Justice also stated in its judgment of the *Lotus* case from 1927 that "[r]estrictions upon the independence of States cannot … be presumed" (*The "Lotus"* Case, PCIJ, p. 18).

[31] For a thorough criticism of the notion of an intrinsic "logic of anarchy" see Wendt 1992.

Furthermore, following the neorealist doctrine, an anarchical system based on self-help creates an unavoidable "security dilemma", where states seeking to enhance their own power and security necessarily increase the security of others (Gilpin 1981:94). Thus, Kenneth Waltz (1979:113) has depicted international politics as the opposite of domestic politics, with the former being a struggle for power under anarchy and the latter an authoritative hierarchy regulated by law. The roots of anarchy's alleged chaotic and immoral character go back a long way. In Niccolo Machiavelli's manual for Italian renaissance princes, it is stated that "you will always find that man is evil if he is not by necessity forced to be good" (Machiavelli 1958:119).[32] Even today some scholars, especially proponents of neo-realism, embrace that position to a certain extent. Stephen Krasner (1999:6) argues that while rules are not irrelevant in the international system, its norms will still be less constraining than the norms of domestic political settings; and Robert Gilpin (1984:290) maintains that under conditions of anarchy, order, justice and morality are the exceptions and "the final arbiter of things political is power". Still, most do not view the international system – albeit anarchical – as either completely chaotic, immoral or disorderly. On the contrary, many neo-realist critics have argued that there is a great deal of order in anarchy (Biersteker & Weber 1996:5). Hence, the English School's notion of "the anarchical society" (Bull 2002).

Equally unsustainable is the notion that anarchy is a lack of legitimacy. Since legitimacy is crucial for recognition of state sovereignty, then "mutual recognition of legitimacy is in fact crucial to the constitution of an anarchic states system" (Bukovansky 2002:23). Thus, what seems to be missing, according to most scholars, is *hierarchical* legitimate power, i.e. authority, since sovereignty in a common conception produces relations among states in which "[n]one is entitled to command; none is required to obey" (Waltz 1979:88). However, it is a fallacy of division to presume that because the system, as a whole, is anarchic then all relationships within it must be anarchic as well (Lake 2006:24). On the contrary, many scholars argue that relations of super- and subordination among states, that are nonetheless perceived as

[32] Author's translation.

legitimate, are not only possible but common in the international system (*cf.* Lake 2003, 2006; Onuf & Klink 1989; Hobson & Sharman 2005; Donnelly 2006; Wendt & Friedheim 1996).

Legitimate hierarchy in anarchy

One reason why the concept of hierarchy has not received as much attention within international relations is that IR scholars focus too much on hierarchy as a formal-legal institution and less on hierarchies legitimated through practice. Such hierarchies typically involve a dominant state, A, providing a social order that is, for whatever reason, valued enough by B, so that B consents to recognizing A's order (and commands) as legitimate (Lake 2006:24-25). In this context, it is important to note that for the purposes of this study, hierarchy is viewed as an authoritative rather than coercive relationship. The fact that some states have always been stronger than others and thus been able to, figuratively, twist their arms is therefore beside the point. Instead, hierarchy, following Hobson and Sharman (2005:69-70), is defined as "a relationship between two (or more) actors whereby one is entitled to command and the other is obligated to obey, and this relationship is recognized as right and legitimate by each".[33] Yet hierarchy is best understood as a matter of degree, ranging along a continuum from formal empire (in which case B has surrendered full authority to A) to pure Westphalian sovereignty in Krasner's terms (where all external actors are excluded from wielding authority over a certain territory). In most situations, however, it is a case of the dominant state exercising partial authority, meaning that its demands are recognized as legitimate in certain issue-areas but not in others (Lake 2006:25). For example a dominant state which provides security assistance to a weaker one is granted influence over the latter's security policy (Wendt & Friedheim 1996:249). If a dominant state wields partial authority over multiple subordinate states that situation is most often referred to as hegemony (Lake 2006:25).

[33] Naturally, one can always discuss how such a relationship may become viewed as legitimate by the subordinate state and this dilemma will be touched upon further in the discussions of structural power and hegemony below. Suffice it here to say that it cannot be a relationship based on brute force.

Thus, by looking at practice, instead of just formal-legal arrangements, it becomes clear that hierarchy is fully compatible with anarchy in the international sphere. The central characteristic is that "disparities in capability are reflected, more or less formally, in the decision making of the society of states" (Clark 1989:2). Even Waltz (1979:198) implied as much when he recognized that "in any realm populated by units that are functionally similar but of different capability, those of greatest capability take on special responsibilities". These special responsibilities are exhibited through such institutions as "great power management" and hegemony, which will both be discussed in more detail in the section entitled "A hierarchy of powers", but first it is time to look more closely at the concept of power itself.

Power in anarchy

Hans Morgenthau once wrote that: "International politics, like all politics, is a struggle for power" (1959:25). He could just as well have noted that those who study international politics, like all who study politics, struggle over how to define power. Over the years, this struggle has given rise to fierce debates as well as attempts to outline various numbers of dimensions, or "faces", of power (*cf.* Bachrach & Baratz 1962; Lukes 1974; Digeser 1992). Recently, however, a contribution in the form of a more inclusive approach has been offered by Michael Barnett and Raymond Duvall. They criticize IR scholars for exhibiting an "either-or" attitude in relation to definitions of power, which, they argue, has caused the discipline to gravitate even more toward a realist view of power as the default option (Barnett & Duvall 2005:41). In order to remedy that situation, they constructed a taxonomy of four types of power for the purpose of drawing scholars' attention to the fact that "multiple forms of power are simultaneously present in international politics" (Barnett & Duvall 2005:44). Rather than viewing them as competing alternatives, Barnett and Duvall hold these to be different manifestations of power in international relations.

Their taxonomy is based on two dimensions. First, whether power is seen as effects produced through interaction between specific, previously constituted, actors, or whether it is seen as effects are produced in social relations that

analytically precede actors and thus constitute them as social beings with their respective capacities and interests (Barnett & Duvall 2005:45-46). This dimension thus captures the fundamental distinction between actor-centered and structure-centered views of power, where the former works by pre- or proscribing action and the latter by redefining identities and interests, which indirectly then may lead to a changed course of action (Barnett & Finnemore 2004:164). The second dimension focuses on whether power works through an immediate and often tangible connection or through indirect and diffuse relations, where connections may be detached and mediated or at a physical, temporal or social distance (Barnett & Duvall 2005:47-48). While many IR theorists have tended to view power almost mechanistically, thus giving rise to the famous "billiard-ball" analogy, historical institutionalists and post-modernists draw our attention to the effects of power across time and space through the concepts of "path dependency" and "genealogy" respectively (*cf.* Hall & Taylor 1996; Devetak 2001). This generates four different conceptualizations of power: compulsory, institutional, structural and productive.[34]

Compulsory power

Compulsory power is used to describe power which is exercised through situations of interaction among previously constituted social actors where the connections are direct and specific (Barnett & Duvall 2005:49). This is also the most widely used conceptualization of power in IR theory, at least historically. In its prevalent realist version, compulsory power has more or less been equated with (material) capabilities and for Robert Gilpin, "power refers simply to the military, economic and technological capabilities of states" (1981:13). Such reasoning, however, may be accused of committing the "vehicle fallacy", where power is mistaken for its mode of operation, whether material or immaterial (Lukes 2005:478). Another problem with this "power as resources" approach is the limited fungibility of such resources.

[34] According to the authors, their taxonomy "bears some resemblance to, but is distinct from, the conventional 'four faces' approach to power". Having not been systematically developed, they argue that the "four faces" lack precise common analytical dimensions and therefore tend to blur into one another (Barnett & Duvall 2005:43, fn. 13).

Indeed, what may be an asset in one situation can be a liability in another (Baldwin 2002:179-180; Jönsson 1981:249-251). Increasing awareness of this limitation led scholars to more and more adopt a relational and context-dependent approach to power, along the lines of Robert Dahl's definition: "A has power over B to the extent that he can get B to do something B would not otherwise do" (as quoted by Clegg 1989:51). While not considering resources irrelevant, a relational approach emphasizes that it is only when an actor seeks a transformative effect in relation to others that he/she can be said to have (or not have) power (Reus-Smit 2004a:57). Viewing power in this way, however, commits the "exercise fallacy", which equates power with success in decision-making or coercion, and thus distracts attention away from instances when power operates through abstention, non-intervention or other forms of "non-action" (Lukes 2005:478, 480). This approach is also criticized by Waltz (1979:192) who holds that power is a means with the outcome necessarily being uncertain. Along similar lines, Zartman & Rubin (2000:8) caution that when power is seen as results, B is largely in control of what counts as the power of A. According to Barnett and Duvall (2005:50), however, compulsory power need not be limited to either material resources or intended outcomes, which is also the position of this study.

Institutional power

When effects are produced through interaction, but affect others in indirect ways, Barnett and Duvall talk about "institutional power". Whereas compulsory power deployed by A over B is typically linked to certain "properties" of A (whether material or immaterial), then institutional power cannot be said to be fully controlled by one actor. Instead actors usually benefit by standing in a certain relationship to specific institutions. That does not mean, however, that individual states cannot be instrumental in the creation of institutions, only that once an institution is created it usually has some independence, including from resource-rich actors, and therefore cannot be said to be their property (Barnett & Duvall 2005:51). Still, both decision-making structures, such as the veto of the permanent members in the UN Security Council, and certain institutional positions, such as the European Union (EU) presidency (*cf.* Tallberg 2006), can be used to significantly enhance the influence of particular actors. In short, what distinguishes institutional power from

compulsory power is that power is exercised indirectly where A and B are either spatially or temporally removed from one another, or both (Barnett & Duvall 2005:51). In relation to the present study, institutional power can be understood as residing in international legal rules, which can then be referred to by less resource-rich states for the purpose of influencing the behavior of states with larger capabilities. Indeed, while Under Secretary for Arms Control and International Security, John Bolton once noted that

> it is a big mistake for us to grant any validity to international law even when it may seem in our short-term interests to do so – because over the long term, the goal of those who think that international law really means anything are those who want to constrict the United States (as quoted by Tucker & Hendrickson 2004:23).

Another example of institutional power, however, is when the United States consciously strives to regulate more and more issues through the Security Council, where it enjoys a privileged position compared to most other states. This is also the conception of power that the subsequent empirical analysis will point to most clearly.

Structural power

Structural power focuses on the structures that constitute actors socially and thereby determine their interests and capacities. Structural power typically works by both allotting different capacities to different positions in a system, and by shaping the identities and the subjective perceptions of interests of actors, a consequence of which often is that asymmetrical conditions seem natural (Barnett & Duvall 2005:52-53). This is, for example, the approach taken by Gramscian views of hegemony, which will be discussed further below. While many scholars in this tradition tend to highlight the connection between power and interests, they do not fully agree on the consequences thereof. According to some, power by definition operates against the interests of those to whom it is directed. Indeed, Steven Lukes (1974:34) once used the following definition: "A exercises power over B when A affects B in a manner contrary to B's interests." From this definition it is possible to conclude that if B should not be left worse off, then A cannot be said to have exercised power, which makes little sense. Following the same logic, a doctor would

then arguably not exercise power over his or her patients, or, even more absurdly, he or she would only exercise power in those instances when the cure fails to make the patient better. Recently, however, Lukes (2005:484) has taken back his earlier assertion, by stating that "there is really no reason for supposing that the powerful always threaten, rather than sometimes advance, the interests of others; sometimes, indeed, the use of power can benefit all, albeit usually unequally". Thus, while the workings and effects of power need to be carefully analyzed and better understood, "power cannot be thought of as something malicious that needs to be eradicated" (Strömbom 2007). Indeed, as illustrated by this study, sometimes power is used to force others to take measures that may very well be in their own interests.

Productive power

While similar to structural power in some respects, productive power strives to draw attention away from the structures themselves. Thus, scholars working with this concept are often referred to as post-structuralists. Instead, they tend to focus on how specific relations of super- and subordination are produced and reproduced in order to emphasize how all actors are socially constituted through vast systems of knowledge and meaning. Analyses of productive power are often connected to the work of Foucault and usually concern discourses and how they stabilize meanings in a way that makes certain things seem natural (Barnett & Duvall 2005:55, 57). In International Relations, studies of productive power have drawn attention to the asymmetrical constitution of social capacities for different categories of states such as "Western", "rouges" and "failed states" (Barnett & Duvall 2005:56). In this sense, productive power can be seen as closely associated to violations of states existential equality as discussed in the previous chapter. From another perspective, Michael Hardt and Antonio Negri (2003), make a significant contribution to the increasing empire literature, yet without locating the center of the imperial power in any single state. Instead they focus on the emergence of a new global form of sovereignty, consisting of a series of national and supranational organisms that allegedly exist within the same logic of power, and which they refer to as the empire.

Yet, in conclusion, and notwithstanding the importance of acknowledging different manifestations of power in international relations, I remain somewhat skeptical to the mission of Barnett & Duvall, at least if it is taken to mean that all analyses should point to all forms of power all the time. Since several of the above conceptions of power rest on very different pre-conceptions of the world and our ability to reason about it, the question is if it is possible for a researcher, colored by his or her own previous knowledge, experience and, indeed, preferences to do them justice all at once. Thus, in line with the focus on rule-making through the Security Council, this study will primarily elucidate instances of institutional power.

A hierarchy of powers

Although the underlying theme of much legal writing is that the progressive development of international law would in and of itself lead to a more orderly world, then, historically at least, the management of the international system has often depended on a recognition of hierarchy and a certain position for the great powers of the time (Hurrell 2000:334). In this section, two distinct forms of hierarchy among states will be discussed, namely so-called great power management and hegemony; the latter will also be related to the current US unipolarity.

Great power management

Throughout the Westphalian state system, a small elite of, at least implicitly, recognized great powers have contributed to international order by balancing power among themselves and by introducing a sense of direction in international relations through the imposition of certain principles and norms on small and middle powers (Simpson 2004:65-66; Bull 2002:200; Donnelly 2006:152). Indeed, along with the balance of power, international law, diplomacy and war, the managerial system of the great powers has been described as one of the fundamental institutions that symbolize the existence of an international society (Bull 2002:71), and, according to E. H. Carr (1981:99), it "constitutes something like a 'law of nature' in international politics". While great powers have always existed then, the term did not become established until the early 19th century, when it was explicitly agreed that the Congress of Vienna in 1815

should be controlled by "the six powers most considerable in population and weight" (Wight 1986:41-42; Simpson 2004:68-69). This particular Concert of Europe lasted for the better part of the 19th century and since then a group of great powers has continued to occupy a position of superiority and authority in every new order that has emerged (Simpson 2004:5). At the Paris Peace Conference in 1919 the status and role of the great powers received legal recognition for the first time, as they were awarded permanent seats on the Council of the League of Nations (Wight 1986:43).

Having superior capabilities is obviously an asset in order to qualify for the status of "great power", but it is not a sufficient, perhaps not even a necessary condition, at least not in the material sense. Important great power qualities include diplomatic experience and cultural acceptability, which can very well compensate for lack of material resources (e.g. Austria in 1815 and Great Britain in 1945). Conversely, a lack of such qualities can severely handicap for would-be great powers (e.g. China in 1945) (Simpson 2004:108). This is because the difference between great powers and other states does not just concern the size of their capabilities, but it involves a functional differentiation as well. Great powers play a socially constituted (unequal) role in international society (Donnelly 2006:153). A crucial condition is therefore an interest "in the generality of international relations" (Simpson 2004:70). Great powers are even sometimes defined as powers "whose interests are as wide as the states-system itself" (Wight 1986:50). Thus, at the Paris Conference a distinction was made between powers with "general interests", i.e. the great powers, and those with "limited interests", i.e. the rest (Wight 1986:43). In more contemporary vernacular, US Secretary of State, Condoleezza Rice (2000:49), once noted that: "Great powers do not just mind their own business."

A further argument for the special role of great powers is that, due to their greater resources, the duty of settling world affairs will largely fall on them and that duty earns them special influence (Wight 1986:44). This argument was also used as a justification for the privileges of the permanent members of the Security Council at the foundational conference of the United Nations in 1945, when US Secretary of State Edward Stettinius reminded the delegates that

> there are at least two conditions essential to the establishment of a world organization which can successfully maintain peace. One of these conditions is that those peace-loving nations which have the military and industrial strength required to prevent or suppress aggression must agree and act together against aggression. … That is why the first step toward the establishment of the world organization was to prepare proposals on which the nations sponsoring this Conference could agree, and this is why in the structure and the powers of the Security Council of the world organization proposed in the Dumbarton Oaks plan, provision was made for this essential agreement and unity of action by the major nations. Without this we cannot hope to build a world organization which will provide security to all nations, large and small (UN 1945, vol. 1, p. 125).

While seldom acting based on purely altruistic motives, great powers do not only have the capabilities to defend the system, but also a stake in it. Thus, for them, international management becomes both "worthwhile and possible" (Waltz 1979:194-195).

Finally, and perhaps most importantly, the special role and responsibilities of great powers exemplify the type of recognized and legitimate hierarchical relationship that was discussed previously. It is a mutually constituted relationship where a putative great power must both choose a more systemic-oriented role and be recognized as having such responsibilities by other relevant actors. It is only through that recognition, which may, however, be the result of both consent and coercion, that not only the rights, but also the identity and authority of the great power as a leader, is constituted (Donnelly 2006:153). In other words, it is not just the identity and the interests of the subordinate state that are affected in a hierarchical relationship, but also those of the dominant state, albeit often asymmetrically. From the dominant state's perspective this may often occur through self-justifying narratives, such as "manifest destiny" and "white man's burden" (Wendt & Friedheim 1996:250). Hobson and Sharman (2005:87) thus argue that a great power is only recognized as one to the extent that it conforms to the norms that define great power status of that particular era. They conclude that imperial ambitions do not necessarily stem from the role itself. Such an approach could perhaps also help explain why the unilateral acts of the United States, although not very different from acts of great powers in all times, have met with such criticism in an era when the norms of multilateral decision-making are stronger than

ever before. Another difference is that, currently, the United States is not just a great power, but has been described as "a power without peer or precedent" (Cox 2002b:263). Since the end of the Cold War, the international system has often been described as one characterized by a huge asymmetry of power, not just between "the West and the rest", but also between the United States and other major powers (cf. Cox 2002a; Ikenberry 2001:9; Lundestad 1999:207), which brings us to a discussion of hierarchy in terms of hegemony.

Hegemony

When the power of a great power is greater, not just than that of any of its rivals, but also than any likely combination of its rivals, it is usually referred to as dominant (Wight 1986:34) and sometimes also as hegemonic. Yet a unipolar structure of capabilities is not considered hegemonic by definition, since predominance, although still being necessary, is not a sufficient condition for hegemony (Cox 1986:223). Like the status of great powers, hegemony is a mutually constituted primacy, and states aspiring to hegemonic status must do something with their material advantage, i.e. be characterized by purpose rather than just power (Simpson 2004:69; Wight 1986:36). Most often then, hegemons create institutions that provide public goods, such as security guarantees and/or openness and stability in the international economic order, that all states may benefit from, beside the hegemon itself (Reus-Smit 2004a:109; Simpson 2004:66). Once established these institutions work to stabilize global politics and increase the likelihood that other states will act according to the norms promoted by the hegemon, defining the range of legitimate behavior. Hegemony thus entails a unipolar structure of influence, not only of capabilities (Wilkinson 1999:142).

The previously influential theory of a dominant state acting as a hegemon, through the provision of public goods and the enforcement of certain norms, and thus contributing to a functioning international order is often referred to as "hegemonic stability theory" (Stein 1984:355). With its almost exclusive focus on material resources in the original version, however (*cf.* Gilpin 1981:30), it ran into problems when it came to explaining the time lag between the decline of the hegemon's capabilities and the decay of its regimes (Keohane 1984:32-39; Kratochwil 1989:61). Thus, since at least the

1980s hegemony has been seen less as a pyramid of resources and more as a socially recognized conjunction of power, institutions and ideas (Cox 1986:224). Indeed, hegemony "signifies the existence of a dominant form of legitimate authority" (Bukovansky 2002:8) and thereby constitutes another example of legitimate hierarchical relationships within anarchy. In contrast to simple dominance, hegemony is dependent on the consent of a large enough proportion of the other states, and, for the purpose of achieving that, some sort of negotiation of interests as well as agreement on the most basic rules of the game are usually required (Bull 2002:221; Knutsen 1999:60; Lebow & Kelly 2001:595). Consequently, the construction of a hegemonic order involves a socialization process of the hegemon's set of ideas, values, norms, and rules by other actors (Cronin 2001:108). If successful, then other states will tend to regard their interests as compatible (if not identical) with those of the hegemon. Such a (perception of) convergence of interests is necessary for a hegemonic order to prevail, since even "the strongest is never strong enough to be always the master" (Rousseau as quoted by Wilkinson 1999:143).

Harmonization of interests is also emphasized by, for example, Antionio Gramsci, stating that "the fact of hegemony presupposes that account be taken of the interests and the tendencies of the groups over which hegemony is to be exercised, and that a certain compromise equilibrium should be formed" (Gramsci 1971:161). Although his own work only dealt with national politics, his thoughts and ideas have been adapted and applied to international relations by Robert Cox, as well as other scholars. Cox converts Gramsci's domestic conception of hegemony into a world order in which the leading state does not directly exploit others and that most states could find compatible with their interests (Cox 1996:136). It would nevertheless be inaccurate to portray Gramscian hegemony as completely consensual. It rather implies a view of hegemony as structural power, where subordinate actors are constituted to view their interests in a certain way. In the same vein, Mlada Bukovansky (2002:45) conceives of hegemony as both a specific power configuration and a shared knowledge structure which serves to reinforce that power configuration. Yet Gramsci also used the Machiavellian image of power as a centaur: half man, half beast – a necessary combination of consent and coercion (Machiavelli 1958:88-89); while hegemony is presented

as consensual power, coercion is always latent (Cox 1996:127). This double-edged view is shared by Nicholas Onuf and Frank Klink (1989:165), who define hegemony as "that instance of hierarchy in which the position of the ranking state is so overwhelming that it can … cast directive-rules in a benign form as mere suggestions, and still have its rule effectuated."

Even well established hegemonic orders are not set in stone, however, and a hegemon wanting to be perceived as legitimate is thereby vulnerable to changing perceptions of legitimacy. Since legitimate power means limited power, a crucial condition for any hierarchy is whether the dominant state is able to credibly commit to refrain from abusing its position. This is often achieved by delegating powers to multilateral institutions as a guarantee for some kind of influence on the part of other states (Lake 2006:27). According to the "rules of the (hegemonic) game", a hegemon is supposed to forego its own short-range interests and act multi- rather than unilaterally (Haas 1983:229). Failure to do so on the part of the hegemon undermines the legitimacy of the hegemonic order and thereby the ultimate source of the hegemon's authority. Yet, from the perspective of the domestic public, superior capabilities often lead to great expectations of immediate action in pursuit of national goals. The tension between greater opportunities and greater constraints, between parochial interest and international responsibility, is sometimes referred to as the paradox of hegemony (Cronin 2001:111-113). Indeed, if great powers and hegemons want to retain their status, they are advised against formalizing and making explicit the full extent of their position, as well as committing "conspicuously disorderly acts themselves" (Bull 2002:221). The importance of these implicit rules of hegemony – at least in the eyes of the rest of the world – is reflected in criticisms of the two George W Bush administrations and has led to a significant debate over the status of the United States as a hegemon or not.

The hegemonic status of the United States

Most commentators agree that the world for the past 15 years has been more or less unipolar, at least in politico-military terms. Yet, there exists a fairly

large controversy over whether it is in addition a hegemonic order, or simply unipolarity without hegemony (Wilkinson 1999:143). Although such debates have been prevalent throughout most of the 20th century, they appear to have been exacerbated even further since the beginning of the 21st. Indeed, "there is probably today no single issue more hotly disputed than the fact or meaning of US hegemony" (Lamy *et al.* 2005:526). Currently, the existence of US hegemony is questioned more in terms of willingness and acceptance than ability. In the first decade of unipolarity the United States was widely perceived as lacking a "grand strategy" for its foreign policy, whereas today it is experiencing some problems with selling its democratization campaign. Additionally, and more seriously, it is often perceived as violating the norms of hegemony discussed (Toope 2003:292).

Indeed, the current Secretary of State, Condoleezza Rice, once derided "the belief that the United States is exercising power legitimately only when it is doing so on behalf of someone or something else" (2000:47). Yet, in consequence, the United States often encounters resistance, even from its allies, when it does try to exercise leadership (Toope 2003:298). A case in point was the division not just in the Security Council, but also among NATO countries, in the run up to the war in Iraq in 2003. Some scholars argue therefore that it is US leadership among the other major powers that is crucially missing. Although it may successfully act as a hegemon at a bilateral or even regional level, its leadership is not recognized by enough secondary powers to count as hegemony at a systemic level (Lebow & Kelly 2001:607; Wilkinson 1999:144-145). Illustratively, in East Asia, one of the key features of US hegemony is that it has relied on bilateral rather than multilateral relationships; a strategy which seems to have only been partially successful. While America is accepted as the hegemonic power in East Asia by some key states, primarily Japan and Australia, others, such as China and India, are more hesitant (Mastanduno 2005:179-180). Additionally, Russian President Vladimir Putin (2007) recently called the unipolar model "unacceptable" in today's world.

Then, there are those who argue that the current hegemony is not so much American as it is Western, in the sense of a liberal ideational structure, including democracy, market economy and human rights (*cf.* Puchala 2005:581). Along the same lines, Bukovansky (2002:46) suggests that a single state on top is perhaps not even a requirement for hegemony. Adopting a more structural or productive approach to power, she argues that it is the hegemonic order that constitutes the hegemonic state rather than the other way around. For the purposes of this study, however, the issue of whether the United States fits the description of a hegemon as outlined above will be treated as an empirical question to be discussed further, recognizing that the answer most likely depends on the issue-area. One area that offers both significant constraints and opportunities is international law, and now it is time to look more closely at the role of great powers and hegemons in international rule-making.

Great power(s) and international rule-making

International legal history can be divided into epochs according to the most influential power at the time. Spain, France and the United Kingdom were not only predominant in the political matters of their day, but they also shaped international law to a far greater degree than most other states could ever hope to do.[35] This asymmetrical influence of great powers stems from at least three different sources: their resources, their interests and their options, which will be discussed in turn. In addition, we will look at the notion of "hegemonic international law", which has experienced a renaissance in the early 21st century

Greater resources and interests

Starting at a very fundamental level, states with greater resources are typically able to exercise a greater influence over international law because it is generally "easier" for them to participate in the law-making process. While all states formally have the same opportunities – thus keeping in line with at least a basic sense of legislative equality – greater powers have greater means to avail themselves of those opportunities. Accordingly, they can enforce claims, impose sanctions and dampen or divert legal criticism to a much greater

[35] For an excellent overview of this point, see Grewe 2000.

extent than most states. Through a large and competent diplomatic corps, they are also able to follow international legal developments across a wide range of issues as well as making their own practice known through public reports and legal yearbooks; thereby having more opportunities to influence the contents of various customary legal concepts (Byers 1999:37; Toope 2003:316). Since the body of international law is in constant evolution, some lawyers have argued that this quantitative aspect may actually be the one that favors resource-rich states the most, since every action by a powerful state, for which it claims legitimacy, has prescriptive implications beyond the particular situation (Sevastik 2002:22; Farer 2003:623; Franck & Weisband 1972:129). In the case of the Security Council the difference in resources becomes marked in the differing staffing capabilities of the different states. With more staff, a state is able to take the initiative on more issues, and thus most resolution drafts are offered by the permanent members, leaving the others to primarily reactive behavior (Caron 1993:564).

Theoretically, however, capabilities can, at least to a certain extent, be outweighed by interest. The development of customary international law has been likened to the gradual formation of a road across vacant land and, in that process, some users' footprints contribute more than others, either because of their weight or because they take that route more frequently (Schachter 1999:202). In other words, in customary international law, the practice of the states' most interested in a particular legal development may in the end carry the same importance as that of the great powers due to its magnitude. The International Court of Justice has even ruled, in the *North Sea Continental Shelf* Cases, that the practice of the most interested – or "specially affected" – states should be given special consideration.[36] While the intention might have been to award influence to the most interested states, regardless of power, in practice it did not make much difference as power and interest often go hand in hand. Furthermore, since the notion of "specially affected" states have never been properly defined, it is often used as a euphemism for "important" or "powerful" states, since the range of their interests make

[36] For a summary of the Court's judgment see www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5.

them "specially affected" by most political and legal developments in the world (Byers 1999:38). Indeed, as was established earlier, great powers are constituted in part on the basis of having general interests.

The doctrine of specially affected state was also appealed to before the ICJ by the United States in the *Legality of the Threat or Use of Nuclear Weapons* Case. In the oral pleadings, the US Counsel held that "customary law prohibiting the use of nuclear weapons could not be created over the objection of States possessing such weapons or those relying upon them for their security" (*Legality of Nuclear Weapons*, ICJ, CR 95/34, p. 63), based on the notion of "specially affected" states. In the end, it was also deemed impossible by the (albeit split) Court to realistically conclude that a rule of customary law had been formed against the will of some of the most powerful states in this highly politicized case (*Legality of Nuclear Weapons*, ICJ, 1996, §§ 64-73). The tendency to equate "specially affected" with powerful was further underlined by the dissenting opinion of then Vice-President of the Court, Judge Schwebel, who wrote:

> This nuclear practice is not a practice of a lone and secondary persistent objector. This is not a practice of a pariah Government crying out in the wilderness of otherwise adverse international opinion. … This is the practice of five of the world's major Powers, of the Permanent Members of the Security Council … that together represent the bulk of the world's military and economic and financial and technological power and a very large proportion of its population (*Legality of Nuclear Weapons*, ICJ, Dissenting Opinion of Vice-President Schwebel).

Consequently, Gerry Simpson (2004:52) regards the doctrine of "specially affected states" to be the most significant way in which great powers are privileged in the law-making process, and some lawyers argue along the same lines that the special capacity of major powers to affect legal developments lies in their ability to block change rather than to impose it (Diehl *et al.* (2003:60).

Greater options

Although great powers undoubtedly have some advantages in the international legal process then, they are still not guaranteed legal influence. Indeed, Christian Reus-Smit has called the extraordinary material preponderance, yet at times

frustrated influence, of the United States, a "central paradox of our time", that "raises profound questions about the nature of power in contemporary global politics" (2004a:2-3). In consequence, the US, as many resource-rich states, may often prefer to use other institutions when dealing with issues that require international coordination. Thus, great powers often try to influence, not only the content of specific rules, but also, and perhaps more importantly, the manner in which different issues are to be regulated (Hurrell 2000:345). Today international rule-making takes place on many different levels of formality, and in many different arenas, and not all forms of law carry the same "costs" for powerful states (Abbott & Snidal 2000). Decision-making in a political body, such as the UN Security Council, is almost by definition less formal than in a judicial setting, and legal principles, such as legislative equality, can more easily be overrun in arenas that are more susceptible for unequal distributions of power (Krisch 2003:136, 156; Krisch 2005:380, 389). Recent years have also witnessed the emergence of the so-called "soft law" concept. "Soft law" refers to rules that are not considered legally binding in the traditional sense, i.e. they do not belong to any of the accepted sources of international law (see chapter two), but may still exercise an influence over state behavior. The concept may include declarations, resolutions by international organizations, guidelines, political or economic "standards" and voluntary codes of conduct. In other words, "soft" legal rules constitute jointly expressed ideals, which may be committing politically or morally, but not legally. Through their vagueness and ambiguous legal status, softer legal rules permit a much wider range of action and are thereby often favored by powerful states (Krisch 2005:396). "Soft law" has thus been criticized for blurring the distinction between law and non-law (Mörth 2004:6), and some critics even talk about the "delegalisation of international law" (Koskenniemi 2004:211).

After a few years of "institutionalism" in the early 1990s, marked by the euphoria over the "new world order", the tendency to go "forum-shopping" has clearly characterized US foreign policy. An oft-quoted phrase that aptly captures the shift is former US Secretary of Defense Donald Rumsfeld's assertion that "the mission determines the coalition, rather than vice versa" (as quoted by Mastanduno 2005:184). While this study focuses on the option

of international rule-making through the UN Security Council resolutions, not even the Security Council is considered flexible enough for US policy needs at times. Former US Ambassador to the UN, John Bolton, explains: "The U.N. is one of many competitors in a marketplace of global problem solving"; if opposed, Washington "may need to find another organization to accomplish our objectives" (Pisik 2005). Even in those cases where the Council is brought in to discuss an issue of vital interest for the US, or one of the other permanent members, the risk always lingers that, if not accommodated, the issue will be taken off the agenda and pursued as originally planned without Council approval, as was the case with Iraq in 2003. Certain activities, which were previously almost exclusively undertaken under UN auspices, are now also becoming increasingly delegated to various alternative international forums. Virtually all the developed states, for example, have shifted the vast majority of their troop contributions to military operations undertaken by ad hoc coalitions or non-Security Council authorized missions (Boulden 2006:414-415).

Another example is non-proliferation activities, which have been more or less stymied in the UN sphere due to the deadlock in both the Conference on Disarmament (CD), which is a multilateral negotiating forum based at the UN Office in Geneva, and the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) regime. Thus, in addition to the non-proliferation initiative in the Security Council, resulting in resolution 1540, the Americans have taken other non-traditional measures as well. On May 31, 2003, for example, President George W Bush announced the Proliferation Security Initiative (PSI), which aims to enhance and expand international efforts "to prevent the flow of WMD, their delivery systems, and related materials on the ground, in the air, and at sea, to and from states and non-state actors of proliferation concern". The PSI is explicitly described as "not an organization … [but] an activity", with the objective to "create a more dynamic, creative, and proactive approach to preventing proliferation". Instead of "joining" an organization, states become participators by formally endorsing the PSI Statement of Interdiction Principles, which specify what action needs to be taken in order to reach the goal of more effectively hindering the proliferation and trafficking of weapons of mass destruction. Interested states are expressly encouraged to

undertake active cooperation rather than ask for an invitation to the meetings which are not supposed to be "an end in themselves" (PSI – FAQ, Fact Sheet, Bureau of Nonproliferation, 26 May 2005). As of late November 2006, more than 80 countries had endorsed the PSI Statement of Interdiction Principles (PSI Participants, Bureau of Nonproliferation, 28 November 2006). Under Secretary of State, Robert Joseph, further describes how the PSI has

> transformed how nations act together against proliferation, harnessing their diplomatic, military, law enforcement and intelligence assets in a multinational yet very flexible, fashion. … PSI is not a treaty-based approach, involving long, ponderous negotiations that yield results only slowly, if at all. Instead, it is a true partnership to act proactively in enforcing national and international legal authorities to deter, disrupt and prevent WMD and missile proliferation (Joseph 2005).

Most importantly, however, the PSI is far from being a single exception to the rule. On the contrary, in its updated *National Security Strategy* from 2006, the United States declares that it will continue to work with its allies in establishing "results-oriented partnerships on the model of the PSI to meet new challenges and opportunities" (The White House 2006:46).

The United States is also working to halt WMD proliferation together with its "great power colleagues" in the Group of 8,[37] and at the 2006 G8 Summit in St Petersburg, the US and Russia jointly announced their decision to launch a Global Initiative to Combat Nuclear Terrorism, for which one of the objectives is full implementation of Security Council resolutions 1540 and 1373. Although presented as "global", the US and Russia later specify their call to "like-minded nations" and declare themselves ready to work with all those "who share [their] views" (Bush and Putin 2006). In addition, at the Kananaskis summit in 2002, all of the G8 countries adopted the G8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction, where they commit to raise up to $ 20 billion over ten years for non-proliferation, disarmament and other nuclear safety projects, initially in Russia (Statement

[37] Traditionally composed of the world's major industrialized democracies (Canada, France, Germany, Italy, Japan, the United Kingdom and the United States), the group now also includes Russia, although some economic meetings are still held only among the "G7".

by G8 Leaders 2002). Like the PSI, the G8 has no headquarters, budget or permanent staff, but works as an informal body for coordination among the member states. Thus, referring to both the PSI and the G8 as alternatives in international non-proliferation efforts, John Bolton wrote that the United States is "no longer lost in endless international negotiations whose point seems to be negotiation rather than decision" (Bolton 2004). In the academic literature, this tendency to use the G8 as a forum for international management of an increasing number of issues,[38] has caused some scholars to speak of the return of great power management through concert diplomacy, with the G8 as a contemporary version of the 19th century Concert of Europe (Donnelly 2006:155; Penttilä 2003:17). Yet, even more attention has recently been given to the notion of hegemonic international law.

Hegemonic international law

Great power management or hegemony and international law are often regarded as irreconcilable, the former premised on hierarchy and the latter on the principle of sovereign equality. Dominant states often find legal rules based on equality as overly restrictive and "unsympathetic" to their special needs and turn to political means instead, whereas the international legal system often is unwilling to take existing power structures and the wider political context into account (Krisch 2005:370). Yet, as we have seen, great powers have a number of advantages in the international legal process and Martti Koskenneimi (2004:198) argues that international law is a process of "articulating political preferences into legal claims that cannot be detached from the conditions of political contestation in which they are made." Accordingly, he views international law as a hegemonic technique rather than the opposite of a hegemonic order. Also other scholars increasingly refer to so-called "hegemonic international law".[39] In contrast to traditional legal rules, which are made as "pacts between equals grounded in reciprocity", hegemonic international law resembles "patron-client relationships" (Alvarez

[38] While set up as a forum to discuss trade and economic matters, the agenda of the G8 has in recent years also included such issues as terrorism, non-proliferation, drugs and crime, climate change and human rights (www.g8.utoronto.ca).
[39] Although all international law is arguably hegemonic (*cf.* Anghie 2005), this concept refers to a more limited practice in which a predominant state significantly influences and changes the legal structure.

2003:873; Krisch 2005:407) and thus seems to work through a "hub-and-spoke" strategy. Although not a new concept (*cf.* Kruszewski 1941), it has experienced somewhat of a renaissance as many of the events of the past 15 years resemble the characteristics of a hegemonic international legal order.

The characteristics of such an order include, for example, situations where the hegemon will promote new laws in accordance with its interests, while simultaneously avoiding treaty constraints on its own behavior. In recent years, this has been exemplified by the US rejection of several of the so-called "landmark treaties" of the 1990s, such as the Kyoto Protocol, the Anti-Personnel Mine Ban Convention and the Rome Statute of the International Criminal Court (ICC) (Vagts 2001:846). Moreover, in the ICC negotiations, the US extracted as many concessions as possible before finally withdrawing, whereby it effectively made law for others while exempting itself (Nolte 2003a). Interestingly, one of the objections of the United States concerned the risk of extradition of its nationals to the ICC, even though the court – as a legal institution – provides guarantees of due process. Yet, at the same time, Washington has no problem with the right of the Security Council to demand the extradition of a country's nationals without any such guarantees (Paulus 2003:85). For international lawyer Anne-Marie Slaughter (2004), this makes it clear that the United States is advocating one set of rules for others and another for itself. This further constitutes a violation of the most basic form of sovereign equality – formal equality – which is supposed to ensure equal treatment by the law.

Moreover, hegemonic international law is not expressed through any abrupt transformations, but rather via the incidental infiltration of concepts and the "flexibilization" of certain rules (Skordas 2003:317). Illustratively, the US *National Security Strategy* of 2002 introduced a greater measure of ambiguity into the law on the use of force by arguing for a more fluid conception of the term "imminent", which is the threshold for legal preemptive self-defense. With the criterion of imminence being determined on a case-by-case basis, the opportunities for the United States and other powerful actors to influence the assessments increase considerably. It is thus only to be expected that, in the future, the criterion of imminence will more likely be regarded

as fulfilled when the US wishes to take military action than when other countries would like to do the same (Byers 2005b:61-62). The war in Iraq in 2003 is another example of how a shift to hegemonic international law "most specifically requires setting aside the norm of nonintervention" (Vagts 2001:845). Constantly under pressure from the predominant state, the law becomes softer, more hierarchical and more fragmented (Krisch 2005:407). Accordingly, speaking of the international security in landscape in early 2007, President Putin states with regret that

> [w]e are seeing a greater and greater disdain for the basic principles of international law. And independent legal norms are, as a matter of fact, coming increasingly closer to one state's legal system. … In international relations we increasingly see the desire to resolve a given question according to so-called issues of political expediency … no one can feel that international law is like a stone wall that will protect them (Putin 2007).

Indeed, even though the doctrine of preventive self-defense largely represents a failure for US law-making, it has affected international law in the sense that nowadays it is much more difficult to find a lawyer who argues that there is no right whatsoever of self-defense until an actual armed attack has occurred. Thus, Byers claims that the "power and influence of the United States is such that, even when it fails in a law-making effort, it still leaves a mark on international rules" (Byers 2005b:61). Also historically, the crucial characteristic of the most influential power of the time was not that it controlled every development in the system, but that it was the one against whose ideas concerning international law all others debated (Krisch 2003:137; Scott 2003:450-451).

Collective hegemonic international law

Although most scholars interested in international organizations tend to view them more or less as "good" and democratic actors (Barnett & Finnemore 2004:172) and as a mitigating force against hegemonic rule, hegemonic law can also be created collectively, which, in fact, makes it more efficient. The UN Security Council, for example, is able to meet American preferences for flexibility and political, rather than legal, negotiation, and, above all, the right of veto ensures that no resolution can be passed against the wishes of the United States. While it is clear that all the P5 in the Security Council possess

a privileged position, UN lingo sometimes also refer to the P3, or even the P1, intending to highlight the influence of the United States on the Council, especially when in conjunction with its Western allies. When the US acts in unity with the United Kingdom and France, their collective capacity to set the agenda and turn some of their own political priorities into "constitutive principles" of the international legal order becomes especially marked (Hurrell 2003:356). In addition to this institutional power exercised by the permanent members, there are also instances of more direct compulsory power. Being at the same time states with substantial resources and influence outside the Council, the P5 have the opportunity of using both carrots and sticks to shape the incentives of the non-permanent members (Caron 1993:563).[40] However, Ambassador Mahbubani, representing Singapore on the Council in 2001 and 2002, still reports that the opinions of the "P1" may many times matter more than those of the P5 collectively (Mahbubani 2004:258). Also by others the United States has been described as "the principal driver of the Council's agenda and decisions, passively and actively" (Malone 2004:8). Thus, for many states the Security Council already represents little more than a multilateral fig-leaf for what in reality amounts to collective hegemonic international law (Alvarez 2004:200).

Acting on its own, there is usually a limit to how much even a hegemon can alter the fundamental rules of international law, but when acting within the Council its freedom of action is practically unrestrained. Or, in other words, while the overt use of compulsory power is likely to be resisted, the more insidious and discrete use of institutional power is easier to achieve and usually produces longer lasting effects. Although traditional UN Security Council resolutions only create legal obligations on a case-by-case basis, they have nonetheless contributed significantly to the progressive development of international law. Moreover, the fact that the law-making capacity of Security Council resolutions is surrounded by ambiguity may serve the hegemon's interests as the vagueness permits a certain deniability, should the new rules prove to be more trouble than they are worth. Aside from the obvious advantage of the

[40] This was, for example, experienced by Yemen who, after voting against resolution 678 authorizing the reversion of the Iraqi invasion of Kuwait, lost $ 70 million in annual aid from the United States (Chesterman 2002:302).

added legitimacy accorded to Council action, changes or clarifications of the law can also be achieved much easier and faster than would have been possible if the hegemon had acted alone (Alvarez 2005:200; Alvarez 2003:881-882; Krisch 2003:156). In other words, the Council's collective legitimization of various operations, policies and rules "is an answer not to the question of what the United Nations can *do* but to the question of how it can be *used*" (Claude 1966:373, emphasis in original).[41]

Nevertheless, although highly influential at times, the United States is far from omnipotent. Thus, while collective action can be used to mask the pursuit of an individual agenda, it also limits such attempts (Caron 1993:560). Even in the smaller and more homogeneous settings, other countries still need to be persuaded to go along (Byers 2005b:59). In other words, despite the fact that the Security Council – with the notable exception of the US failure to secure another resolution on Iraq in 2003 – has been a most faithful ally to the United States in the 21st century, it is not a mere rubber stamp for American foreign policy. In fact, in the evening of the same day that the Council adopted its second US-initiated legislative resolution (UNSCR 1540), American broadcasting network CBS revealed the appalling abuses of prisoners by US soldiers in the Iraqi prison Abu Ghraib in its program *60 minutes II*. That disclosure severely damaged US bargaining power in the Council, which is illustrated by the US failure, a few weeks later, to summon the requisite nine supporting votes in order to pass a resolution granting an exemption from ICC jurisdiction to US citizens, although such an exception had been accepted by the Council twice before (Alvarez 2005:215; Leopold & Arieff 2004). Additionally, the two thematic[42] chapter VII resolutions that have been adopted since, UNSCR 1566 and 1624, have both been initiated by other countries (the Russian Federation and the United Kingdom respectively).

[41] For an argument that the choice of powerful states to channel policies through international organizations does not, in fact, depend on legitimacy, see Thompson, A. 2006.
[42] That is, resolutions addressing a general problematique rather than a specific situation.

Concluding discussion

In sum, this chapter has focused on hierarchy and has advanced a view of hierarchy as a socially constituted relationship, based on perceptions of legitimacy from both the dominant and the subordinate state. Viewing hierarchies in this way further presupposes a more complex understanding of power than mere capabilities. For that purpose, I have discussed different manifestations of power following Barnett and Duvall's taxonomy, yet concluded that, within the focus of the present study, the conception of "institutional power" will be highlighted the most. In line with the above reasoning, it was demonstrated that although the great powers of the past have often coincided with the largest victorious powers after a major war, superior resources are not enough. Indeed, they may not even be the most important factor since "great power" (as well as hegemon) is a social status that is bestowed upon a state by other actors and not an automatic label. That status is most often granted based on the dominant state's willingness to take responsibility for upholding an international order that is in the interests of the consenting actors. Here, of course, it is possible to reach different conclusions as to how willingly consent is given and how genuinely those interests are identified, based on different conceptualizations of power. The point is, nevertheless, that hierarchies exist as informally legitimated relationships.

As such, they also affect international rule-making in different ways, most importantly through the extent of their interests and their options to act in various forums and also to influence the manner in which issues are being regulated. Recently, this has given rise to a literature surrounding the concept of hegemonic international law, which refers to a situation in which patron-client relationships of service provision in return for consent to authority have been substituted for the principle of sovereign equality also in legal matters. Hegemonic international law can also be exercised through collective bodies, such as the UN Security Council, in which case it becomes simultaneously more far-reaching and more limited. As we will see in chapters five and six, the United States was able to achieve results through the Council that it could never have managed on its own. Yet even though the US occupies a privileged

position in the Security Council, it still needs to persuade other countries, meaning that its requests are not automatically granted. This was further clearly illustrated by the setbacks experienced by the US in the Council after revelations of abuse at Abu Ghraib. In sum, the most important elements for legitimation according to the political logic are the perceived *efficiency* of the order and the *consent* of the relevant actors.

Chapter four

Logics of legitimation

"Judges and priests and philosophers usually make themselves heard,
but they do not necessarily have the last word;
the process of legitimization is ultimately a political phenomenon."
Inis Claude

In the previous two chapters we have seen how equality and hierarchy both significantly influence and shape international rule-making, albeit to different degrees in different contexts. We have also seen how equality is closely connected to legality and justifiability, whereas hierarchy rests on consent and efficiency. In this chapter these four concepts will be elaborated on as "elements of legitimacy", as well as composite parts of two different, yet equal, "logics of legitimation": one legal and one political. These logics constitute the analytical framework of the study, which will be used to structure the analysis of the debates surrounding the quasi-legislative resolutions 1373 and 1540 in the subsequent two chapters. First, however, there will be a short discussion on the concept of legitimacy itself, followed by a more detailed discussion of the notion of logics of legitimation. After that the elements of the two respective logics will be discussed as well as related to the Security Council.

Legitimacy – a contested concept

Like power, the concept of legitimacy is known for being employed with high frequency and low precision, or, in the words of Edward Luck: "Everyone wants to have it, but there is little agreement on where it comes from, what it looks like, or how more of it can be acquired" (2002:47). Consequently, there are a number of different approaches to the study of legitimacy (Steffek 2003:252). Even limiting the focus by only including studies of international

legitimacy, there are still several perspectives to choose from. For example, there is a more philosophical strand of literature that views legitimacy from a normative perspective and discusses qualities of various governing systems (*cf.* Held 1995, 1997). This approach emphasizes deductively derived standards of legitimacy, against which empirical phenomena may be measured. Then there are those – mainly social scientists – who view legitimacy in a more descriptive manner and refrain from attributing legitimacy to certain values. Instead they ask, from an empirical, inductive perspective, how certain norms come to be accepted as legitimate by international actors (*cf.* Hurd 1999). From a different perspective, there is also the related, but separate, work of international lawyers, concerned with the predominantly legal factors that increase the legitimacy of international rules and act as a "pull to compliance" (*cf.* Franck 1990). Even from a cursory review of the literature it is thus easy to conclude that legitimacy is a highly contested concept. The focus of this dissertation, however, is not on the meaning of the concept of legitimacy *per se*, but, more precisely, how state actors argue for or against the legitimacy of certain actions of the Security Council based on specific elements of legitimacy, i.e. how they construct their legitimation arguments. Yet a brief discussion on my approach to the concept itself is still warranted in order to facilitate the understanding of the rest of the chapter.

Legitimacy as a mediated concept

Following Ian Clark (2005), I adopt a view of legitimacy as an overarching concept, standing in a close, but still separated and, most importantly, hierarchical relationship to the elements on which it is based, but not wholly determined by. This means that I reject the view that portrays legitimacy as a scale of more or less fixed "legitimacy values", to be used as an objective yardstick in the assessment of different policies or systems of governance. Instead, I believe that legitimacy is more usefully viewed as a mediated concept, "a composite of, and accommodation between, a number of other norms, both procedural and substantive" (Clark 2005:207). From this reasoning follows that legitimacy is a social phenomenon rather than the exclusive property of any particular action or actor, which can only be legitimate if regarded as such by other actors in the relevant sphere (Reus-Smit 2005:85; Clark 2005:254; see also Hurd 1999:381). Moreover, and most importantly, although legitimation

arguments are based on specific normative values, legitimacy itself cannot be equated with any one of them. In other words, legitimacy is always more than the sum of its parts (Clark 2005:216). However, with this view of legitimacy it is also possible for different actors to come up with differing constructions of legitimacy (Connelly *et al.* 2006:269) and thus with different conclusions as to whether certain activities are legitimate, or, alternatively, on which bases they are to be considered to be legitimate. Indeed, in a study of rural governance in the UK, Connelly *et al.* (2006:275) found that most cases of "rule breaking" could actually be viewed as perfectly legitimate based on a different logic, or discourse as they put it, i.e. they were in conformity with another legitimacy value.

Legitimacy in relation to its parts

Furthermore, by adopting the above approach to legitimacy, it becomes impossible not only for any one value or principle to be equated with legitimacy, but it also becomes impossible for any one of them to stand in complete opposition to legitimacy. Yet it has become fashionable, among both scholars and policy-makers, to construct a division – even an opposition – between legitimacy and legality (*cf.* Falk 2004, 2005; Chesterman 2002). To a large extent this was probably spurred on by the well-known conclusion from the Independent International Commission on Kosovo that the military intervention by NATO "was legitimate, but not legal" and that "the growing gap between legality and legitimacy" needs to be addressed (Independent International Commission on Kosovo 2000:289, 291). It is significant, however, that none of the central players went along with the proposed distinction. In contrast, those who supported NATO's actions (including the official NATO view, according to which the military action was taken in accordance with international law), sought to legitimate them by arguing for their legality, while those who opposed them sought to deny legitimacy based on illegality (Clark 2005:213-214). In other words, none of them argued that legitimacy should be seen as a substitute for legality. Indeed, legality and legitimacy do not constitute different scales against which international behavior can be assessed. On the contrary, legality is one of the elements that constitute legitimacy. The reason behind such a conceptual confusion then is an exaggerated emphasis on only one of the elements of legitimacy, but,

as an aggregate concept, legitimacy cannot logically be in opposition to one of its parts. As mentioned above, however, different actors' constructions of legitimacy may vary significantly, and the relationships among the different elements, especially between the two logics, may well be antagonistic. In fact, this points to the inherently contested nature of legitimacy, as it often entails a choice between competing values (Clark 2005:208).

Legitimacy as an aspect of power

With that in mind, contests over the definition of legitimacy can also be described as a strategic struggle of power, insofar as legitimacy is a crucial aspect of power (Bukovansky 2002:8; 44). Indeed, power and legitimacy have been described as "fundamentally inseparable ideas" (Clark 2005:227). The need for legitimation only arises in the context of unequal power relations, yet, once obtained, legitimacy stabilizes power as well as makes its use more efficient (Hurrell 2005:16; Claude 1966:368). Legitimacy transforms power into authority, meaning that it transforms a capacity to rule into a right to rule (Onuf & Klink 1989:152). When power is seen as legitimate or authoritative, it faces much less resistance and challenges, and is therefore less costly to uphold than power resting on either carrots or sticks (Reus-Smit 2004a:60). Conversely, the maintenance and change of people's perceptions of legitimacy can never occur in complete independence from the power structures it is intended to legitimate (Beetham 1991:104) and for many political theorists this is why legitimacy cannot be defined in terms of beliefs. They argue that it transforms legitimacy from a question of the characteristics of a system of power into a question of successful public relations strategies (Beetham 1991:8-9). From the point of view of this study, however, the fact that perceptions of legitimacy are constantly subject to manipulation attempts by actors (Luck 2002:48) makes an interesting topic for examination, not dismissal. Indeed, it is only because of their close interrelationship that legitimacy has the ability to constrain, as well as legitimate, power. Ian Clark (2005:21) rhetorically asks "[w]hat sense can we make of legitimacy as a poacher and a gamekeeper? It is effectively both, and that is the reason to take it seriously, not the justification for its neglect." Thus, having established the fundamental approach to legitimacy that will characterize this dissertation, namely as a contested and power-laden

concept, mediating between and reconciling different values, it is now time to turn to the real focus of the study – the practice of legitimation.

Two logics of legitimation

With legitimacy not automatically referring to a specific set of values, a particular outcome cannot by definition be viewed as permanent and is therefore in constant need of maintenance. Additional consequences are, of course, that legitimation arguments can always be challenged as they are constructed in different ways (Connelly *et al.* 2006:270). In the following I will argue, however, that for issues at the nexus of international politics and international law there are primarily two "logics of legitimation" that are of special interest to us: the legal logic, which consists of the legitimacy elements legality and justifiability, and the political logic, which consists of the elements consent and efficiency. In line with the discussion above, I regard these as different, but equally valid, approaches to legitimation that are analytically, if not always empirically, separate. I have chosen to call these approaches "logics" as the term implies a way of reasoning which is internally consistent, but different in relation to other alternatives. Each logic further includes both so-called "input" and "output" legitimacy, as they consist of one process-oriented and one substance-oriented element. Where legality expresses "right process" from a legal perspective, that corresponds to consent in the political logic. Equally, efficiency represents "right outcome" from a political point of view, whereas justifiability focuses on the substance of legal rules. Hence, while all four elements make separate and different contributions to legitimacy, legality and justifiability often support the claims of the other, as do consent and efficiency. For example, a rule that is adopted according to legal process is easier to legitimate, following the legal logic, if its substance is also perceived to have justifiability. However, while the two elements in the same logic most often reinforce one another, it is also quite possible for them to contradict and thereby weaken one another. For example, the element of consent can, if

enacted in the form of a widely inclusive decision-making process, obstruct the efficiency of that process.[43]

Standing on the shoulders of others

As was discussed in the introductory chapter, this analytical framework is not only developed in relation to the empirical material, but is also inspired by the literature, specifically Clark (2005), Hurrell (2005) and Beetham (1991). For Clark, however, the elements of legitimacy (or normative principles as he calls them) consist of legality, morality and his own construction: constitutionality, which denotes something like informal institutional expectations of political behavior (2005:19). Thus, in addition to me not using his constitutionality principle (which I find too vague to be useful), I differ from him in not including the morality aspect. This choice is motivated by the fact that, in this study, I wish to highlight, first, the inherently contested and indeterminate nature of legitimacy, and, second, how that translates into actors following different paths in their legitimation arguments, each building upon its own "logic", without any one of them being intrinsically more "moral" than the other. The way I see it, morality cannot be locked into a specific category, but rather exists on both (or all) sides, operating like a subjective lens through which actors interpret other *inter*subjective[44] factors such as legality and consent. In other words, since all four elements in this study are normative and value-laden concepts, I find it illogical to construct "morality" as a separate element, implicitly arguing then that the others are amoral.

In my choice not to construe morality as a separate element, however, I also differ from Hurrell who includes "shared goals and values" (2005:20) as one of his five elements (or as he calls them: dimensions) of legitimacy. Furthermore, he incorporates "specialised and specialist knowledge" (Hurrell 2005:22), but omits popular consent, which, in my view, gives rise to a more

[43] This was also concluded by Grace Skogstad (2003), in her study of EU regulation of genetically modified organisms, where democratizing strategies brought about outcomes based more on the domestic considerations of the bargaining actors rather than an elite-determined common good.

[44] With intersubjective, I mean a sort of "collective subjectivity", situated somewhere in between the two extremes of complete and unquestionable objective existence and wholly individual subjective perceptions.

elitist, and less inclusive view of legitimacy. Beetham, on the other hand, shares all my elements, but efficiency. Yet, he argues that all three elements (legality, justifiability (in terms of shared beliefs) and consent) must be present in order to achieve full legitimacy (1991:19), whereas my position is that legitimation based on only one element may be fully sufficient, and that, even though they may often work together, conflicts can also occur. The point is that an action or an institution does not necessarily become more legitimate the more elements of legitimacy that can be claimed to support it. This means that instead of Beetham's consequences in the absence of one of his three elements – illegitimacy, legitimacy deficit and delegitimation respectively (1991:20) – I simply see different constructions of legitimacy, based on a different balance between the composite parts.[45]

Nonetheless, the fact that I have focused on legality, justifiability, consent and efficiency, in the form of one legal and one political logic, does not mean that these are the only elements contributing to legitimacy or that they could not be combined differently (or with other elements) to constitute other logics of legitimation. Moreover, it does not mean that all empirical arguments exclusively follow either the legal or the political logic. On the contrary, it is quite possible to mix the two and base a legitimation argument on, for example, consent and justifiability. Indeed, in one sense that is how the process of changing customary international law operates. I argue, however, that the legal logic and the political logic represent two important and interesting approaches and that an analysis using this framework can improve our understanding of matters involving both legal and political aspects. Furthermore, the reason for presenting the elements in the form of two separate logics is that they provide two distinguishable alternatives for legitimation, consisting of both procedural and substantive elements, so that an action, should an actor choose

[45] The number of elements involved in a particular construction of legitimacy may still matter, however, as it may be more difficult to challenge the legitimacy claim of a measure which is taken in accordance with the law, can be justified according to fundamental legal principles, has been consented to and is efficient. My point is only that one does not get closer to the "essence" of legitimacy the more elements that are included and in some situations a single one may be enough. In other words, neither is necessary and each may be sufficient.

to, can be legitimated exclusively from a legal or a political perspective.[46] In a longer perspective, the question of course becomes what the consequences are, if any, of different logics of legitimation. This study aims to take a step in the direction toward answering that question by analyzing legitimation arguments by states based on these two logics and thereby contributing to a better understanding of their use and interrelationship. First, however, they both need to be specified further.

A legal logic of legitimation

Reliance on a legal logic of legitimation implies attributing weight to a legal perspective based on sovereign equality in the context of international rule-making. Arguments can be constructed based on an action/rule/institution having been created through right process, that is, in accordance with international legal rules; or based on it being able to produce the right outcome, that is, a result that can be justified according to fundamental legal principles, or both. In what follows, the specific elements – legality and justifiability – will be elaborated on, and, finally, also related to the UN Security Council.

Legality

Legality is the element establishing "right process" in the legal logic, and that process here refers to decision-making principles characterized by equality rather than hierarchy. According to Abbott *et al.* (2000:409), opting for rules that create legal obligations, rather than just political or moral duties, "bring[s] into play the established norms, procedures, and forms of discourse of the international legal system". This means that arguments resting on brute force, the superiority of material resources or purely national interests are no longer valid. Indeed, all participating states in the international legal process must be treated on the basis of sovereign equality and the process to resolve differences must follow established rules for legal interpretation as laid down in the VCLT or customary international law (Armstrong &

[46] It is important to note that these logics of legitimation can be used to construct arguments in both directions. In other words, it is possible to argue that an action is legitimate based on the presence of specific elements of legitimacy or that it is not legitimate based on the absence, or a different interpretation, of those same elements.

Farrell 2005:10; Toope 2003:306, 316). There exists well-established patterns of argumentation within the legal realm, in which states can express their interests through a common language of claim and counter-claim (Hurrell 2005:25). Friedrich Kratochwil explicates: "When a rule is embedded in the context of international law … governments have to forgo idiosyncratic claims and make arguments based on rules and norms that satisfy at a minimum the condition of universality" (as quoted by Simmons & Martin 2002:198). These claims and counter-claims are then assessed by legally competent actors (e.g. states, judges of international courts and international lawyers) who collectively determine what facts are considered legally relevant and what interpretations are considered to be legally valid. Hence, while norms and rules may always be contested, the procedural and discursive, and above all collective, characteristics of the international legal process still circumscribe subjective interpretations and short-term manipulation and thereby bound state behavior (Byers 1999:205; Keohane 2002:120-121; Raustiala & Slaughter 2002:540). Indeed, Thomas Franck argues legality is the source of a specific form of legitimacy that "has the power to pull toward compliance those who cannot be compelled" (1990:24).

Legality is consequently an important element of legitimacy. Max Weber even called it the most usual basis for legitimacy (1947:131), and many legal scholars (especially in the legal positivist tradition) argue that whatever is defined as legal is, by definition, legitimate (*cf.* Abbott *et al.* 2000:409, fn. 14). But a perfect confluence between the two terms is of equally little use as the constructed opposition between them discussed earlier. With international lawyers themselves often referring to both concepts, which would be unnecessary if they were one and the same, the position of this study is strengthened, namely that legality, albeit important, is still only one element of legitimacy. Equating legality and legitimacy further robs the international legal system of one of its most important avenues for normative change, in the sense that legitimacy can be used as a "vehicle for redefining legality by appeal to *other* norms" (Clark 2005:211, emphasis in original). This is not only well understood, but also commonly practiced by members of the international legal community. In a way, that is exactly how the process of customary legal change operates, with states consciously violating old rules in the hope of

introducing new ones. Their prospect of success depends on whether the new course of action offers a persuasive alternative, based on other elements of legitimacy (Franck 1990:151). In sum, what I mean by legality in this study is *conformity with international legal rules, as determined by a significant majority of the legally relevant actors in the specific situation*.

Justifiability

If legality is concerned with procedural aspects, then justifiability is more substance-oriented, as it refers to the congruence between the object of legitimation and certain fundamental legal principles. Justifiability is important because it highlights the significance of justification[47] and reason-giving for claims to legitimacy in the perspective of international law. Indeed, from this perspective, legitimacy is not just based on what people accept, but what they accept through persuasive reasoning grounded in normative principles (Hurrell 2005:16). This resembles the position taken by moral or political philosophers who argue that rules or governing systems are legitimate to the extent that they are justifiable according to rationally defensible normative principles (Beetham 1991:5). Again, the difference between their position and mine is that I do not view the presence of any of the following principles as an absolute prerequisite for legitimacy. As mentioned before, legitimacy can be construed in various ways and a lack of accordance with one or several legal principles only constitutes a different kind of legitimacy. However, some principles seem to stand out when it comes to legal legitimation attempts, such as clarity or determinacy, coherence with other rules, general applicability and being relatively constant over time (*cf.* Finnemore & Toope 2001:749). Hence, I argue that the presence of the three "c:s": clarity, coherence and consistency is important in order to enhance justifiability.

While constructive ambiguity may be an asset in the process of reaching an agreement, *clarity*, or an agreed-upon process of clarification, makes an important contribution to legitimacy from a legal perspective, since this facilitates reciprocity and thereby encourages rule-conforming behavior as

[47] In this context, it is important to note that although the practice of justification is inherent in all elements of legitimacy, "justifiability" refers to the ability of being justified according to specific legal principles.

both (or all) parties are aware of what is required of them (Franck 1990:57-58). Indeed, in defining "legalization", Goldstein *et al.* included precision as one of their three criteria (2000:387). It is furthermore the specificity generally characterizing international legal rules that explains both why states prefer it as a regulatory instrument at times and go to such lengths to avoid it at other times (Reus-Smit 2003:592). In addition to clarity, legitimacy from a legal perspective can be enhanced by *coherence*. Legal rules are often applied by analogy to a broader normative framework and to past practices; and while some legal argument can usually be made for most positions, it needs to be legally convincing in order to be able to legitimate according to the legal logic (Abbott *et al.* 2000:413; Scott 2004:125; Brunnée & Toope 2004:791). This means that they must be generalizable and impersonal, and employed according to specific methods of argumentation (Toope 2003:306; Steffek 2003:265). Thus, coherence further means that all deviations from consistent treatment of like cases must be derived from and defensible before a general principle, i.e. they must be justifiable in generalizable terms (Franck 1988:750; Franck 1990:144). Finally then, justifiability depends on *consistency*, or treating like cases alike (Alvarez 2005:194), and the protection against arbitrary treatment – or the equality before the law – is sometimes described as the essence of the rule of law (Scott 2004:13). Consistency also concerns the expected relative stability of the international legal system (Byers 1999:49), as the law "cannot reasonably change back and forth on a case by case basis and still be considered law" (Beckman, O. 2005:97). In sum, justifiability will, in this study, be defined as *the possibility to convincingly explain and defend an act, rule or policy in a logical manner based on legal principles, such as clarity, coherence and consistency*.

Security Council applicability

As the Security Council is a political body, yet frequently operating in a legal sphere, legitimation arguments in relation to the Council may draw on elements from both the legal and the political logic. Starting with the legal elements, it is clear that legality plays a fundamental role in the general perception of the Security Council as *the* source of international legitimacy in matters of peace and security, since the mandate of the Council to exercise a "primary responsibility for the maintenance of international peace and

security" (Charter of the UN, Article 24(1)) has been legally established by way of treaty. Indeed, despite persistent complaints about the propriety and viability of the veto and the ensuing double standards (which may create problems for justifiability and efficiency), its unrepresentative nature and the lack of transparency and effective consultation with others (which may create problems for consent), most agree that there is simply no other forum – real or proposed – that is able to compete with the Security Council in this respect (Alvarez 2005:189; Berdal 2003:10). This was also demonstrated by the fact that in the run up to the Iraq War in 2003, many arguments were made on the premise that if the Security Council authorized the operation, i.e. made it legal, then consent from member states would follow (Clark 2005:201). Furthermore, unique enforcement powers have been bestowed upon the Council as a collective body, that since 1945 no longer belong to individual states. Whenever the Security Council invokes chapter VII of the Charter by declaring that a situation constitutes a "threat to the peace, breach of the peace, or act of aggression" (Article 39), it is entitled to use a wide range of measures – including the use of force – to rectify that situation. To use a contemporary example, while individual states cannot legally use self-defense against threats that are not imminent, the Security Council can (White 2004:649; Cassese 2001:281). Hence, in one sense, the Security Council is the only actor that can legally violate international law.

It is less certain, however, if the Security Council can legally make law. Through their ratification of the Charter member states have conferred extraordinary powers to the Council; yet its legislative authority is definitely questionable from a legal perspective. While it is clear that all international organizations may influence international law in significant ways (*cf.* Higgins 1963; Barnett & Finnemore 2004; Alvarez 2005), they are, in contrast to states, not considered to have full legal personality with concomitant legislative prerogatives. Nonetheless, and in stark contrast to other international bodies, the UN Security Council, by virtue of its unique responsibility to uphold international peace and security, has the authority to adopt resolutions that create legally binding, and potentially enforceable, obligations for states. This authority further gives the Council the ability to instantaneously affect the legal landscape unlike both treaties and custom (Ratner 2004:601, 592). As

some such resolutions have ordered the imposition of quasi-judicial sanctions in order to compel a state to take, or refrain from taking, certain actions, the Council has also been accused of acting as a court of law (Svanberg-Torpman 2004:136). However, the authority to create binding and enforceable obligations is legally based through the Charter (*cf.* Articles 25, 39, 42, 48).[48] Yet Security Council resolutions have traditionally not been viewed as applying outside the particular instances of restoration of international peace and security for which they were adopted (Gowlland-Debbas 2000:300) and neither the Charter nor the *travaux préparatoires* reveal any intention of establishing a legislative role for the Security Council (Orakhelashvili 2005:61). Furthermore, due to its limited – and rather unrepresentative – membership, even a Security Council resolution receiving unanimous support must be backed by additional evidence of acceptance by states in order count as *opinio juris* and thereby influence customary international law (Gowlland-Debbas 2000:300; Nolte 2000:325). In other words, creating general legal obligations through Security Council resolutions has never been regarded as a valid alternative route to international law-making, which is why the two resolutions in focus for this study have been questioned on the grounds of their legality.

From the perspective of justifiability, it is much more difficult to legitimate the Security Council's actions. Being a political organ, the Council is not required to decide in accordance with legal principles, in the same way as an international court would be (*cf.* Article 38(1) of the ICJ Statute). The only limitation on the Council's actions is that they must be consistent with the purposes and principles of the Charter (Charter of the UN, Article 24(2)). Thus, Security Council resolutions are more often than not characterized by a good deal of "constructive ambiguity" (as will also become clear in the empirical analysis), which later give rise to implementation difficulties. Furthermore, with its resolutions traditionally only being applicable on a case-by-case basis, they need not be either coherent or consistent. International lawyers have therefore warned for the "many risks involved in developing international law through a process that includes the ad hoc and piecemeal

[48] The capacity of the Security Council to create general legal obligations is also discussed in chapter one, under "Methodological considerations".

reactions of a political organ to particular crises, particularly in respect of the coherence of international law" (Gowlland-Debbas 2000:301).[49] Indeed, the Council has been described as contributing to international law in an "unsystematic" fashion (Gowlland-Debbas 2000:311) and as being "doomed to be inconsistent with its practice" since it "will pick its targets with politics and not law in mind" (Ratner 2004:604).

It is, however, possible for individual member states to bring questions of Charter interpretation before the International Court of Justice (Gowlland-Debbas 2000:308), which Libya did in 1992, in relation to Security Council resolution 748, which imposed economic sanctions on Libya in an effort to compel the country to extradite its citizens who were suspected of being responsible for the Lockerbie bombing. Since then the question of whether UN Security Council resolutions could and should be subject of judicial review has been debated, but not resolved (Alvarez 1996:1; Svanberg-Torpman 2004:91). So far, while the ICJ has not challenged the Security Council's – sometimes innovative – use of its powers, it has been careful not to declare the Council to be the authentic or exclusive interpreter of those same powers, nor to reject its own competence to inquire into the validity of Security Council resolutions (Nolte 2000:316; Gowlland-Debbas 2000:309). An additional trump on the Charter's hand, however, is Article 103, which states that

> [i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, *their obligations under the present Charter shall prevail* (my emphasis).

Nonetheless, both national and regional courts have recently taken up cases which address the relationship between UN Security Council resolutions and *jus cogens* norms, in the context of the adverse human rights effects for the individuals targeted by the sanctions regime established by resolution 1267 against Al-Qaida and the Taliban. In two recent cases before the European Court of First Instance (ECFI) of the European Union, the primacy of

[49] For an argument that even "ad-hocism" may create a pattern, see Österdahl 2005.

resolution 1267 based on Article 103 was upheld. Yet, at the same time, the ECFI did find itself competent to review whether the Council's actions were compatible with *jus cogens* and further observed that, in the case Security Council resolutions do not abide by these norms, they fail to bind member states as such peremptory norms are non-derogable (Biersteker & Eckert 2006:19). It is also evident that member states care about the legality of the Council's actions. At a public meeting of the Security Council in January 2007, Panama emphasized that

> all United Nations decisions – but, in particular – those taken by the Security Council, given their binding nature – must be adopted in strictest conformity with international law. The credibility and legitimacy of its actions and, accordingly, its ability to address current threats to international peace and security will largely depend upon that (S/PV.5538, p. 18).

A political logic of legitimation

In contrast to its legal counterpart, the political logic of legitimation may very well accommodate hierarchical aspects of international rule-making. According to this logic, the procedural element consists of relevant actors giving their consent, whereas the substantive element refers to the efficiency of the outcome. In the remainder of this section, consent and efficiency will be further specified, as well as related to the Security Council.

Consent

Consent represents the procedural aspect of the political logic of legitimation. Thus, "right process" is here equivalent to subjects consenting to a policy, rule or system of governance, rather than having legal conformity as the absolute litmus test. Although seemingly straightforward in its denotation, the understanding of consent (who is to give it and how) has undergone significant changes over time. As a consequence of the so-called "move to institutions" in the 20th century, multilateral decision-making has come to be associated with a certain procedural legitimacy that is simply not attainable for other means (Ruggie 1992:583). This development may therefore partly explain why the United Nations has received a reputation of being "ineffective, but indispensable", as it is seen as being able to confer a "unique legitimacy"

based on its virtually universal membership (Berdal 2003). There is, in other words, a widespread impression that

> [w]hile the voice of the United Nations may not be the authentic voice of mankind, it is clearly the best available facsimile thereof, and statesmen have by general consent treated the United Nations as the most impressive and authoritative instrument for the expression of a global version of the general will (Claude 1966:372).

Multilateralism is more than a numbers game, however, as it entails a qualitative as well as a quantitative aspect (Finnemore 2005:195-196; Ruggie 1992:566). If it were not so, then "coalitions of the willing" would be as acceptable as international organizations. This qualitative distinction then entails a sense of predictability in international relations, and also a measure of great power restraint by agreement to play by the rules (Finnemore 2005:195-196). As mentioned previously, however, multilateral decision-making says nothing about the manner in which consent is achieved. Whereas much IR constructivist work on normative change has tended to view persuasion as something "good", where the force of the better argument changes minds à la Habermas, some scholars have begun to question this approach. Instead they argue that it is the persuasive appeal of one's interlocutor that counts (Checkel 2002:4), or, put more bluntly, that "the stated positions of an actor as powerful as the United States are difficult to overcome in contemporary world politics" (Payne 2001:52). In other words, material resources and power asymmetry often distort the communicative environment so that a rational deliberation is no longer possible.

Furthermore, "[t]he function of collective legitimization is not, in principle, reserved exclusively to the United Nations" (Claude 1966:371), and lately the procedural legitimacy of established institutions – such as the UN – has been severely challenged on the grounds of being undemocratic. The so-called domestic argument maintains that the fact of state consent in legitimation arguments is not valid unless that consent is grounded in domestic democratic procedures, so that the ultimate consent-givers are the people through their freely elected representatives. Consequently, as was mentioned in chapter two, it is argued that it is the international institutions that need consent from

their (democratic) member states, not the policies of the member states that need consent from the international institutions (Hurrell 2005:19; Clark 2005:185-186). Especially in the United States the domestic argument is very popular, and in 2003, then Under Secretary of State, John Bolton, speaking before the Federalist Society, stated that: "Our actions, taken consistently with Constitutional principles, require no separate, external validation to make them legitimate" (Bolton 2003). There is thus an interesting split in the understanding of consent as a legitimation element, which means that it can be used simultaneously by opposing sides. For the purposes of this study, and in order to enable the examination of such opposing uses, consent will be "neutrally" understood as *acceptance by at least a majority of the politically relevant constituencies in the specific situation*.

Efficiency

With efficiency I mean the more substantive element in the political logic and I chose the term since, according to the online Oxford English Dictionary, it stands both for "*fitness* or the power to accomplish … the purpose intended" (my emphasis) and "efficacy". In other words, it is output-oriented not only in terms of effectiveness and efficacy, but also a certain sense of appropriateness (as in adequacy). The intention is to capture the aspect of legitimacy that has more to do with achievements than principles. This is, for example, how great power management has always justified its existence (Hurrell 2005:22), and it is also why slow action or even inaction, from international organizations often gives rise to challenges of their legitimacy. Especially the United States, with its partiality for moral foreign policy objectives, regards the legitimacy of international institutions primarily as a function of their ability to effectively advance particular causes (Luck 2002:55-56). This was also evident, when President Bush addressed the UN General Assembly in September 2002, pointing out that: "The United States helped found the United Nations. We want the United Nations to be effective, and respectful, and successful. … Will the United Nations serve the purpose of its founding, or will it be irrelevant?" (Bush 2002). Thus, a perception of illegitimacy may arise just as easily from not acting (e.g. the failure of the UN to halt the genocide in Rwanda) as being seen as taking the "wrong" actions. Since institutions are created for some

purpose, then, to a certain extent at least, the perceptions of their legitimacy depends on whether that purpose is effectively served (Caron 1993:560).

If multilateralism played a great part in defining the process of consent, then unilateralism may have a similar effect on efficiency. By referring to legitimation arguments based on efficiency, this may also be acceptable in certain circumstances. Or, since all states and governments act unilaterally every day of the week, it does not seem to be the unilateral act per se that raises issues (Sands; Robinson 2002:89-90). Stephen Brooks and William Wohlforth (2005:517) claim that it is instead the consequences of the unilateral act that determines the success of its legitimation. If, in fact, a unilateral act eventually produces a public good, a legitimation argument based solely on efficiency may still be quite successful. Conversely, rules or actions agreed upon in multilateral settings, which fail to produce desired outcomes, may experience increased questioning of its initial claim to legitimacy (Finnemore 2005:199-200). In other words, efficiency may both strengthen and weaken the element of consent. Finally then, efficiency, in this context, will be defined as *the capacity and ability to undertake action, in an efficient and appropriate manner, for the purpose of achieving stated goals.*

Security Council applicability

Also the elements in the political logic figure frequently in arguments concerning the legitimacy of the Security Council, although not always in definite support of the Council. While member states have consented to giving the Security Council primary responsibility over international peace and security through their ratification of the Charter, the number of issues included under that heading has increased enormously, thus placing vast decision-making powers over 192 states in the hands of fifteen. Since the end of the Cold War and the concomitant "unlocking" of the Security Council, the theretofore more or less peripheral body has chosen to interpret its mandate in increasingly broad terms (Nolte 2000:316). Specifically, it is the scope of what can be subsumed under Article 39, which is the "trigger" article for the Security Council's virtually unlimited powers, that has been significantly widened. Absent the shadow of major ideological opposition, the Council has been increasingly willing and able to determine the internal situation in a

country as a threat to the peace based on its potential (or real) international impact. In the 1990s such situations have, for example, included instances of grave violations of human rights or international humanitarian law and to a certain extent also a lack of democratic governance (Roberts 2004:148; de Wet 2004:250; Österdahl 2004:75). Illustratively, 93 percent of all chapter VII resolutions passed between 1946 and 2002 were adopted after the end of the Cold War (Wallensteen & Johansson 2004:19). Many democratic states also feel a growing unease at the thought of an increasingly powerful Security Council being partly controlled by the governments of Russia and China. Nevertheless, while a representational argument presses for an expansion both in membership and representation of the Council, that involves a trade-off in the sense that more members – especially more veto-holding members – will decrease the Council's effectiveness by making it more difficult to reach consensus (Clark 2005:195-196). An element which is posing enough difficulties for the perception of the Council's legitimacy as it is. It is possible, however, to view consent as a prerequisite of efficiency. Ghana, for example, has argued that the Council should

> look for more creative ways of actively engaging and involving in its work … the non-members, which are expected to comply with its binding resolutions and decisions, including the generic legislation of the Council. Such an approach, we believe, will bring more effectiveness and success to the Council's work (S/PV.5615, p. 10).

Turning to the second element, the more or less unlimited powers possessed by the UN Security Council when acting under chapter VII, are the result of the Charter's founding fathers' wish to maximize the efficiency of the Council. Consequently, they deliberately left the terms in Article 39 unspecified so that the Council may have some flexibility in responding to the emergence of new threats (Stromseth 2003:42). Also the very limited nature of accountability available in relation to actions taken by the Security Council stems from the same concern. Automatic judicial review was specifically rejected at the San Francisco Conference, which established the organization of the United Nations, based on the wish by the US and others that the Security Council should not feel restricted by existing law when it acts under chapter VII to respond to threats to international peace and security (Ratner

2004:592; Stromseth 2003:42). Among the new and unforeseen responses being undertaken by the Security Council then, we find, for example, fairly invasive and extensive sanctions regimes, such as those against Iraq and former Yugoslavia; special disarmament and verification commissions, such as United Nations Special Commission and United Nations Monitoring, Verification and Inspection Commission; and the creation of ad hoc criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (Cortright & Lopez 2004:169; Stromseth 2003:42). Whereas a pre-1990s interpretation of the UN Charter would most likely have excluded any possibility that the Security Council had such powers, it is now established practice to regard the list of measures at the Security Council's disposal in Article 41 as non-exhaustive. Furthermore, the Council has increasingly adopted the practice of basing its decisions on chapter VII generally, without citing specific articles, and this creative ambiguity has further widened its scope of action (Türk 2003:52).

Still, even today it is difficult to make a persuasive legitimation argument for the Security Council based on efficiency, and in a very conscious move the United States turned the tables in the legitimacy debate in early 2003, arguing that "[t]his body places itself in danger of irrelevance if it allows Iraq to continue to defy its will without responding effectively and immediately" (Clark 2005:203; Reus-Smit 2004a:53; S/PV.4701, p. 8). This strategy succeeded to a certain extent, as illustrated by the following statement by the Malaysian Foreign Minister, calling for UN re-engagement in Iraq "to restore the confidence of the international community toward the world body" (as quoted by Clark 2005:204). Indeed, there is a strong desire among member states for concrete results by the world organization. According to Slovakia, "[w]ords, statements and proclamations need to be transformed into practical measures, making a real difference on the ground. Otherwise, the entire United Nations system, including the Security Council, will lose its relevance and credibility" (S/PV.5615, p. 6).

Concluding discussion

In sum, this chapter has argued that legitimacy is an overarching and mediated concept, consisting of both legal and political as well as procedural and substantial elements in varying degrees at varying times. From this follows that legitimacy can neither be equated with, nor stand in opposition to, any one of these elements. In addition, legitimacy is viewed as intimately connected to, but independent from, power, which it has the ability to both enhance and constrain. Due to its indeterminate nature, legitimacy is always susceptible to challenge and constantly needs to be maintained, hence the importance of legitimation. In this chapter I have constructed a framework consisting of two, inter-related but still separate, logics of legitimation: one legal and one political. Each logic consists of one procedural element (legality and consent respectively) and one more substance-oriented element (justifiability and efficiency). These logics are different, but equally valid, ways of claiming or challenging the legitimacy of an actor or an action; and they can be used either in reinforcing or opposing ways, based on one or more elements. The crucial point is that since legitimacy can be constructed in different ways, an action or an institution is not necessarily more legitimate the more elements it is based on. It is also important to note that these logics should not be seen as the only conceivable legitimation approaches. However, they do represent two important and interesting paths, which, I argue, can be used to further our understanding of the construction of legitimacy in the increasing number of issues involving both legal and political aspects. Thus, in order to assess its utility in such matters, the framework will now be used to analyze states' legitimation arguments in relation to Security Council resolutions 1373 and 1540 in the following two chapters.

Chapter five

UNSC Resolution 1373

> "The *Security Council*, *Acting* under Chapter VII of the Charter of the United Nations, *Decides* that all States shall: Prevent and suppress the financing of terrorist acts; … Take the necessary steps to prevent the commission of terrorist acts … and ensure that … such terrorist acts are established as serious criminal offences in domestic laws …"

Using the analytical framework developed in the previous chapter, it is now time to examine the empirical material of this study, namely the public Security Council debates concerning Security Council resolutions 1373 and 1540. This chapter will concentrate on the legitimation arguments in relation to UNSCR 1373, which deals with the prevention and suppression of all forms of support of terrorist acts, while UNSCR 1540 will be discussed in chapter six. The aim of the chapter is equally to assess the utility of the analytical framework and to show how state actors have constructed their legitimation arguments. First, however, a brief history of how terrorism has been dealt with in the UN and a discussion of the specific characteristics of the resolution will be provided. Thereafter, the analysis will proceed by focusing on each of the specific elements in the legitimation logics in turn, meaning that the main part of the chapter will be thematically, rather than strictly chronologically, organized. Additionally, the discussion of each element will include arguments that use it to claim legitimacy as well as arguments that use it to challenge the legitimacy of the Security Council's actions. The discussion of each element will end with a short summary and then there will be a concluding discussion at the end of the chapter.

Terrorism and the UN

In the follow-up report to the Millennium Summit, "*In larger freedom*…", UN Secretary-General Kofi Annan calls terrorism "a threat to all that the

United Nations stands for" (A/59/2005, p. 26). One might therefore think that terrorism has been a key issue on the UN agenda for quite some time, but in fact UN activities in relation to terrorism before 9/11 were few and far between (Boulden & Weiss 2004:5). The credit for the first concerted international effort to deal with terrorism further belongs the League of Nations which drafted a Convention for the Prevention and Punishment of Terrorism already in 1937. Although that particular convention never came into existence, it did serve as a point of reference for later discussions among states in different international forums. Interestingly, however, the definition from 1937 largely ignores terrorist acts against civilians (Thakur 2006:181; Rupérez 2006:2). Up until the 1970s, terrorism was furthermore seen as a primarily local phenomenon within UN circles and was treated accordingly, i.e. very little or not at all. But on September 9, 1970, after terrorist groups had begun staging more high-profile aircraft hijackings and kidnappings, the Security Council, being "[g]ravely concerned", unanimously adopted resolution 286, which called on states "to take all possible legal steps to prevent further hijackings or any other interference with international civil air travel" (S/RES/286; Thakur 2006:186; Luck 2004:86).

Following the kidnapping and killing of 11 Israeli athletes during the Olympic Games in Munich in 1972, which polarized the Council and put it into a deadlock, then UN Secretary-General Kurt Waldheim warned that the UN could no longer remain "a mute spectator" and requested the General Assembly to include international terrorism as a new agenda-item. The growing importance of terrorism on the organization's agenda did not, however, translate into a consensus on how it should be addressed or defined (Luck 2004:87; Rupérez 2006:2). For almost twenty years the United Nations dealt with terrorism in the Sixth (Legal) Committee of the General Assembly under the heading "Measures to prevent international terrorism". Throughout that period, however, there was considerable disagreement within the membership on whether the said prevention should occur through dealing with terrorism's manifestations or its root causes (Rupérez 2006:2). Additionally, the lack of agreement on a definition of terrorism held up progress on the legal front. Commonly, the argument goes that one person's terrorist is another person's freedom fighter, and in the 1970s, the Soviet Union also demanded special

consideration for "action by workers to secure their rights against the yoke of exploiters" (as quoted by Franck 1990:86). As defining terrorism has been a chronic headache for the international community, the road taken has been one of sectoral approach. Since the adoption of the Convention on Offences and Certain Other Acts Committed On Board Aircraft in 1963, twelve other legal instruments[50] concerning various aspects of terrorism have been agreed upon, but a comprehensive convention on international terrorism is still lacking.[51]

In the late 1980s and early 1990s, a combination of outside events once more triggered change within the organization, and enabled the Security Council to become more active. First, there was a couple of particularly shocking terrorist acts involving Libyan nationals, and second, the end of the ideological stalemate during the Cold War allowed the Council to interpret its mandate in increasingly broad terms (Rupérez 2006:10; Nolte 2000:316). Consequently, the Security Council passed a resolution under chapter VII on March 31, 1992, where it imposed sanctions on the Libyan Arab Jamahiriya unless it failed to cooperate in bringing the suspects to justice (S/RES/748). Resolution 748 was a far-reaching innovation in the sense that it discarded the option of the country of citizenship itself conducting an investigation and a trial against the suspects, but instead demanded extradition under the threat of continued sanctions (Türk 2003:52). A few years later, as a response to the bombings of American embassies in Kenya and Tanzania in August 1998, the Security Council established a new sanctions regime (which is still in place) against any person or entity related to the Al Qaida network or the Taliban.

[50] These can be found in the UN Treaty Collection at http://untreaty.un.org/English/Terrorism.asp

[51] In its resolution 54/110, adopted on December 9, 1999, the UN General Assembly decided that the Ad Hoc Committee tasked with a elaborating a draft international convention for the suppression of acts of nuclear terrorism should also "consider the elaboration of a comprehensive convention on international terrorism" (OP 12). The outstanding issues primarily revolve around draft articles 2 and 18, which deal with the definition of terrorism and which entities' armed forces are to be excluded from the scope of the convention (Hmoud 2006). For a more detailed discussion and the most recent update, see the Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 (A/62/37).

Under paragraph six, it also established a Committee (at present known as "the 1267 Committee") to follow up on member states' efforts to implement the resolution and report periodically to the Council (S/RES/1267).

In one sense, therefore, resolution 1373 can be viewed as the culmination of a decade-long evolution of the Council's treatment of terrorism on the one hand and its quasi-judicial activities on the other (Türk 2003:53; Svanberg-Torpman 2004:136). Danilo Türk (2003:53) even holds that the Security Council "was prepared for an innovation" in the terrorism area. Nonetheless, while the Council, with the United States as the driving force, became increasingly active as regards terrorism (de Jonge Oudraat 2004:151), it had theretofore only involved itself in specific situations. But on September 12, 2001, the Security Council unequivocally condemned the terrorist attacks in New York, Washington D.C. and Pennsylvania and declared its regard of "such acts, *like any act of international terrorism*, as a threat to international peace and security" (S/RES/1368, my emphasis). This resolution, and the events that gave rise to it, thus opened the door for stronger Security Council involvement and the much more far-reaching resolution, 1373, that was adopted two and a half weeks later.

Characteristics of resolution 1373

The most conspicuous feature of resolution 1373 is that it is "extremely broad", UK Ambassador Sir Jeremy Greenstock continues by explaining:

> States are asked, basically, to do everything possible, in cooperation with others, to make sure that terrorist acts are not committed, to prevent and suppress terrorist acts, to take action against the perpetrators of such acts, to cover the whole area of the financing of terrorist acts in great detail and to refrain from providing any form of support, active or passive, direct or indirect (S/PV.4512 (Resumption 1), p. 13).

It affects not only states' international obligations, but also their domestic legislation and national executive machinery (Thakur 2006:201), thereby going far into what used to be the exclusive prerogatives of sovereign states. In contrast to previous far-reaching resolutions, resolution 1373, although it can certainly be described as precipitated by a certain event, was not

adopted in relation to a specific situation, but rather in response to the global threat of terrorism. Thus, it is an example of the "enactment of sweeping legislation addressed generally to all states outside the context of a particular situation" (Svanberg-Torpman 2004:135). The question of legal obligation is also clear, since the Security Council in this instance both uses the verb "decides" (invoking Article 25) and adopts it under chapter VII (which allows for coercive measures). Indeed, the Council begins 11 out of the 18 directives in the resolution with the verb "decides", thus making them legally binding. Another peculiar characteristic that distinguishes resolution 1373 from previous chapter VII resolutions is that, here, the Council prescribes measures that states are obliged to take to prevent certain situations from arising, rather than imposing sanctions on actors for previous acts that the Council deems as wrongful (Rupérez 2006:14). It should therefore be no surprise that commentators have described resolution 1373 as "revolutionary" (Svanberg-Torpman 2004:126) and report that with it the Council "broke new ground" (Szasz 2002:901).

The common criticism that international law is "not really law", since there is no central enforcement agency, also falls short here, as the Security Council has a legal possibility of backing up its decisions with the threat or use of coercive sanctions (as provided for by Articles 39 and 42 of the UN Charter). Indeed, in operative paragraph 8, the Security Council expresses, "its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter" (S/RES/1373). While "all necessary steps" is not exactly the same as "all necessary means" or "all necessary measures", the Council language previously used to authorize military measures (Stahn 2001:11; *cf.* UNSCR 678), in theory there is an entire range of coercive instruments at the Council's disposal (de Jonge Oudraat 2004:163). The question of whether the expressions "all necessary steps" and "to combat by all means" (which can be found in the preamble) constitute explicit authorization language or not, is, however, an issue where lawyers come to different conclusions (for a debate at the time see ASIL Insights 2001). In other words, this resolution is not only de facto legislative, it may also be coercively enforced, should the

Council so decide. Hence, it has rightly been called "the closest thing we have in international institutional law to real 'law-making'" (Alvarez 2005:196).

Finally, according to Article 29 of the Charter, the Security Council may furthermore "establish such subsidiary organs as it deems necessary for the performance of its functions." Thus, in order to assess states' compliance with their new obligations, the Security Council, took the – not unprecedented, yet still uncommon – step to establish

> a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution (S/RES/1373, OP 6, emphasis in original).

Committees of the Security Council have previously, for the most part, been committees set up to report to the Council on the implementation and effectiveness of different sanctions regimes, such as the 1267 Committee, overseeing the implementation of sanctions against Al-Qaida and the Taliban and associated individuals and entities (www.un.org/Docs/sc/committees/1267Template.htm). However, in consequence to the unusually broad scope of resolution 1373, the Counter-Terrorism Committee (CTC), is unmatched in the breadth and depth of its mandate. Thus, in the words of the representative of Singapore, Mr. Mahbubani, the CTC "is actually *sui generis*. … [and taking] the Council into uncharted territory" (S/PV.4453, p. 25). Despite all of these unique characteristics, resolution 1373, as we shall soon find out, was subject to conspicuously little discussion before its adoption. Since then, however, it has given rise to a long series of regular open meetings in the Security Council at which states have had the opportunity to make their opinions heard on the UN's counterterrorism work in general as well as the follow-up of resolution 1373 in particular. It is to these discussions and how member states base their legitimation arguments on different elements that we now turn.

Legality

Beginning with the procedural element in the legal logic of legitimation, legality is important in the sense that conformity with legal rules is oftentimes seen as a source of legitimacy. In the context of the debates on UNSCR 1373, it has been expressed primarily in relation to the mandate of the Security Council to make law and the conformity of the Security Council's counter-terrorism measures to pre-existing law, specifically human rights law.

The limits of Security Council activities

International cooperation in relation to the general issue of terrorism, such as that called for in resolution 1373, has traditionally been understood as a task of the General Assembly. In addition to traditional practice, this is based on Article 13 (1) of the UN Charter, according to which it is the General Assembly that shall make recommendations for the purpose of, among other things, "promoting international co-operation in the political field and encouraging the progressive development of international law and its codification". The Security Council's involvement through the adoption of a resolution on that topic was thus an innovation in and of itself (Rosand 2003:333). Many member states therefore saw resolution 1373, irrespective of whether they agreed with it in principle, as an imposition by the Security Council on the General Assembly's area of competence. At the first open meeting concerning the topic of terrorism since the adoption of resolution 1373, Mongolia consequently stressed that "the General Assembly … should continue to address the different aspects of terrorism, including the legal, socio-economic and even cultural aspects, all of which remain *outside the Security Council's mandate* and that of resolution 1373 (2001)" (S/PV.4453 (Resumption 1), p. 9-10, my emphasis). Yet the opposite opinion was also represented. The Rio Group[52], for example, endorsed the content of the resolution 1373 as a "firm, necessary and innovative response to the extremely grave criminal acts of 11 September … *in accordance with the Council's own sphere of competence*" (S/PV.4453, p. 10, my emphasis).

[52] A regional grouping established in Rio de Janeiro in 1986 and now comprising the following states as members: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.

From a long-term perspective, much more is at stake than simply marking territories, however. If continued, this practice may threaten the relevance of treaties as the most important source of international legal obligations (Klein 2003:391), which may, in turn, undermine states' right to legislate for themselves, i.e. their legislative equality. This is especially significant for those states that do not possess many power resources other than their status as sovereign states and their associated entitlement to sovereign equality. Thus, many states explicitly sought to deny resolution 1373 an equal legal status to that of regular multilateral conventions and other legal instruments. Cameroon, for example, while even being a member of the Council, stressed the need to expeditiously achieve agreement on a comprehensive convention against terrorism: "As we have emphasized before, only such a convention will be able to fill the current legal vacuum" (S/PV.4512, p. 11, see also Yemen, S/PV.4618 (Resumption 1), p. 3 and Peru, on behalf of the Rio Group, S/PV.4734 (Resumption 1), p. 5).

Furthermore, resolution 1373 is an example of how the Security Council can create instant, legally binding, international obligations that are strongly favored and encouraged by one member state, yet binding for all (Klein 2003:391). In other words, it is an explicit example of how institutional power can be deliberately used, as here by the United States. Yet even the US affirmed the year after, in the General Assembly's annual discussion of agenda item "Measures to Eliminate International Terrorism", that the Sixth Committee "still maintains the primary role in the United Nations system for the negotiation and drafting of international legal instruments concerning terrorism" (USUN Press release # 142-2 (02)). A similar affirmation was repeated the following year, but interestingly, not in 2004, 2005 or 2006 (USUN Press release # 182 (03); USUN Press release # 199 (04); USUN Press release # 182 (05); A/C.6/61/SR.2, p. 12-13). For the states that did not approve of the role of the Security Council as a de facto law-maker, reaching agreement on a comprehensive convention on terrorism was also seen as a way to balance the newly assumed powers of the Council and momentum increased considerably in the negotiations in the fall of 2001. By October 2001, however, negotiations, despite intense efforts, had reached a dead-end,

from which it has not moved significantly since (Hmoud 2006:1035, 1041).[53] Thus, despite the appeals from many member states, most of the UN's counter-terrorism activity since 9/11 has been centered around the Security Council.[54]

The discussions on the limits of the Security Council's powers and mandate in relation to counter-terrorism efforts intensified again in the fall of 2004 after the appalling terrorist attack against a school in Beslan, Russia, which killed over 300 civilians, more than half of whom were children. Following those events, the Russian Federation initiated a draft resolution containing an unambiguous condemnation of terrorism, under whatever circumstances, and also, more controversially, a paragraph attempting to outline a definition of terrorism. The draft was later unanimously adopted by the Security Council on October 8, 2004, as resolution 1566 (Rupérez 2006:18). Resolution 1566 shares many characteristics with resolution 1373. While precipitated by specific events, it deals with terrorism generally and it is also adopted under chapter VII.[55] Once more then, several countries took the opportunity, in an open meeting eleven days later, to emphasize that developing definitions and codifying international norms is the prerogative of the international community as a whole, through the General Assembly or the formation of custom, and that the Security Council – not being a legislative body – should be careful not to overstep its boundaries (*cf.* Switzerland, S/PV.5059, p. 25; Costa Rica, S/PV.5059 (Resumption 1), p. 20). It is also clear that, in spite of the de facto actions taken by the Security Council and the time passed since, the discussion over their propriety continues. On September 28, 2006, the five-year anniversary of the adoption of resolution 1373, the SC President of the month, Ambassador Vassilakis, reminded members that

[53] Nevertheless, in April, 2005, member states finally reached agreement on the International Convention for the Suppression of Acts of Nuclear Terrorism after several years' negotiation efforts (A/59/766). While it was the thirteenth counter-terrorism convention in total, it was the first to be adopted since September 11, 2001.
[54] A prominent exception includes the Global Counter-Terrorism Strategy, which was adopted by the General Assembly on September 8, 2006 (A/RES/60/288).
[55] The reason why it was not selected as an object of examination for this study is that it does not create any legal obligations for the UN membership as a whole, as do UNSCR 1373 and UNSCR 1540.

> we must step up our efforts to conclude the negotiations on a draft comprehensive convention on international terrorism, the adoption of which will provide legal clarity regarding the definition of terrorist acts and will complement the General Assembly's legal framework in the field of counter-terrorism" (S/PV.5538, p. 25).

Another issue that has triggered discussions over the Security Council's ability to impose legal obligations on states is the question of so-called "best practices" in relation to the implementation of resolution 1373. On February 21, 2006, CTC Chairman Ellen Margrethe Løj announced that the CTC was going to update its website with a list of identified best practices to assist states in implementing the resolution (S/PV.5375, p. 4). This caused some states to voice their concerns regarding the use of such examples. Among others, Peru, made it clear that, although supporting the use of best practices, these "would not necessarily create international obligations per se" (S/PV.5375, p. 11). Neighboring Brazil was even more severe in its warnings, stressing that

> the General Assembly is the only organ with universal representation that has the competence to make recommendations with regard to general principles of cooperation in the maintenance of international peace and security. The Committee's work should be in line with that provision, including through the identification of best practices … Best practices are not … treaties. They are neither binding nor mandatory. The Committee should be extremely careful not to stray into areas that belong to the exclusive domain of Member States (S/PV.5375, p. 30).

Again, it is the legislative equality that member states attempt to protect, since the development of so-called best practices does not necessarily follow any formal and inclusive procedures, but are more aptly likened to "soft law" mechanisms, which typically favor the already influential states. Unsurprisingly therefore, the United States, which also happened to be the one to originally suggest the use of best practices, was pleased and, at a later meeting, urged the Committee to go even further. After the CTC had identified such best practices, the US argued it should "endorse or adopt and disseminate those best practices, and *use them to measure States' compliance* with resolution 1373 (2001)" (S/PV.5446, p. 19, my emphasis). On the Committee's web page, however, it is clearly stated that "this directory [of identified best practices] is not to be taken as an obligation". Member states are, however, encouraged to

apply them "in order to maximize their efforts to implement the resolution" (http://www.un.org/sc/ctc/bestpractices.shtml).

The observance of human rights law

The second aspect that came up in terms of legality was whether the Security Council has a responsibility to ensure that human rights laws are not violated in the process of combating terrorism as ordered by resolution 1373. Already from the very beginning, many states brought up the human rights aspect in the fight against terrorism (*cf.* Bangladesh S/PV.4453 (Resumption 1), p. 4; Norway S/PV.4512, p. 9; Peru S/PV.4512 (Resumption 1), p. 7). At an open meeting in January 2002, where non-Council members for the first time had the opportunity to publicly state their views on the resolution, Ireland emphasized "the importance of full respect by all States, at all times, for the full body of international law, including the conventions on human rights" (S/PV.4453, p. 16). Initially, however, the Counter-Terrorism Committee explicitly opposed the inclusion of any human rights perspective in its work. Despite the unusually broad mandate of the Committee, as previously discussed, the CTC's first Chairman, UK Ambassador Jeremy Greenstock, insisted that "[m]onitoring [states'] performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate" (S/PV.4453, p. 5). However, already by April 2002, Chairman Greenstock reported: "As we go forward under the terms of our mandate, the CTC will remain aware of the interaction of its work with human rights concerns" (S/PV.4512, p. 3). As much as this stance was welcomed by many states (*cf.* the EU, S/PV.4561, p. 17), calls for a deeper integration continued, and Mexico explicitly suggested that the inclusion of a human rights expert in the Committee's staff of experts "would enhance the Committee's legitimacy with all nations" (S/PV.4845 (Resumption 1), p. 7). That suggestion was later echoed by the EU, the Rio Group and the Philippines (S/PV.4921, p. 19; S/PV.4921 (Resumption 1), p. 3; S/PV.5006, p. 7).

The requests for the inclusion of a human rights expert in the staff structure were intensified when it became clear that CTC was going to be supported by an Executive Directorate as part of the revitalization process undertaken in

2003-04. Many states requested that a human rights expert be included in the new structure to assist the CTC in the balancing between the protection of human rights and an effective fight against terrorism (*cf.* Canada S/PV.4921 (Resumption 1), p. 12; the EU S/PV.5006, p. 14; the Philippines S/PV.5006, p. 7). From another point of view, however, Israel stated that "the fight against terrorism is itself a fight for the most basic of legal norms and the most basic of human rights: the right to life." Therefore, one "should not allow the law to be used as a political weapon or to wrongly empower those seeking to take life, rather than those seeking to save it" (S/PV.5059 (Resumption 1), p. 5). Eventually, however, it was decided that a human rights expert would be included among the staff of the CTC's support structure that was established in 2005, Counter Terrorism Executive Directorate (CTED), with the primary responsibility to advise the Executive Director on "all aspects of international human rights, humanitarian and refugee law that are relevant to the Committee's mandate" (Rupérez 2006:24-25). This appointment was also warmly welcomed by many countries as they were briefed about it by the CTC Chairman in October 2005 (*cf.* Greece and the Philippines S/PV.5293, pp. 9, 17). In her last Security Council briefing as Chairman of the CTC, on December 20, 2006, Ambassador Løj pointed out that "it has now become routine to include human rights aspects of States' implementation of resolution 1373 (2001) in the work of the Committee" (S/PV.5601, p. 4). However, just a couple of months before that, the Greek delegation expressed the view that, while the CTC had made progress in integrating human rights concerns into its policy, "much remains to be done to better incorporate human rights concerns into its dialogue with Member States" (Greece, S/PV.5538, p. 26).

Although not directly related to the work of the CTC, the issue of human rights and the Security Council's counter-terrorism work has also gained prominence lately through the legal challenges to the Council's "listing" procedures, i.e. how individuals and entities are put on the Consolidated List kept by the 1267 Committee, thus making them subject to targeted sanctions. As discussed in chapter four, both national and regional courts have recently challenged decisions made by the Council for violating the rights of the listed

individuals to a fair trial and effective remedy[56] (S/PV.5446, p. 26). Yet the fundamental question is: what legal boundaries, if any, are there to action taken by the Security Council? This pivotal question has stirred up considerable debate within the Security Council (which, on June 22, 2006, held an open debate on the theme: Strengthening international law, S/PV.5474 and S/PV.5474 (Resumption 1)) as well as among scholars (*cf.* Bianchi 2006a). While it is true that the UN Charter, based on Article 103, occupies a position of primacy among treaties, it is increasingly pointed out that this does not mean that it should be considered superior to rules of customary international law or, especially, *jus cogens* norms (Bianchi 2006a:1061), in which (at least some) human rights are included (Biersteker & Eckert 2006:20).

In an open meeting, Liechtenstein further stated that the human rights work by the UN over the past six decades would suffer severely if the organization was permitted to take actions that would be prohibited if committed by member states (S/PV.5446, p. 31), i.e. if SC actions were not compatible with existing international law. Indeed, international lawyer Vera Gowlland-Debbas (2000:310) argues that, especially in view of the increasing legal consequences of the Security Council's actions, the notion that its powers could not be subjected to third party scrutiny, be it judicial or political, is contrary to the implicit rules of the international legal system. Nevertheless, after a long and difficult negotiation process, the Security Council on December 19, 2006, adopted resolution 1730, which sets up a focal point in the Secretariat where those on the "List" can request and justify de-listing. Yet even now it is the Committee members, i.e. the Security Council members, who make the decisions to de-list, meaning that there is still no independent review of Security Council decisions (S/RES/1730). Several countries would have liked greater progress, but the 1267 Committee Chairman, Ambassador Mayoral, explained that member states had to be "realistic" and that "while the individuals who are on the List are in a certain way stigmatized and isolated … the main problem is that individuals who will, or are about to, commit terrorist acts are not yet on the List" (S/PV.5601, p. 5-6).

[56] This question is treated more extensively in the Watson Institute Report, *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (Biersteker & Eckert 2006), sponsored by the governments of Switzerland, Germany and Sweden.

In sum, it can be concluded that the legality element has figured relatively much in states legitimation arguments, specifically in terms of what the Security Council can and cannot do. Some member states disapproved of resolution 1373 right from the start on the grounds that it was seen as an imposition by the Council on the competence of the General Assembly. Consequently, however binding obligations it created, resolution 1373 was not viewed as having the same legal status as traditional legal instruments. The question of the Security Council's mandate was later brought up again in relation to its recommendations of best practices, which some states objected to. It is thus clear that at least some boundaries for Council action are desired member states and in the case of human rights the initial negative attitude of the CTC was subsequently changed. Still, however, the relationship between chapter VII resolutions and norms of *jus cogens* character has not been resolved.

Justifiability

Turning to the substantive element in the legal logic, justifiability has – in the context of the debates on resolution 1373 – mainly concerned clarity, or rather the lack of clarity, in relation to the definition of terrorism, the mandate of the CTC and the consequences of non-compliance. The principles of consistency and coherence have also been present in the discussions, albeit to a lesser extent.

The meaning of terrorism

In operative paragraph 2(e) of resolution 1373, the Security Council decides that all states shall "ensure that … terrorist acts are established as serious criminal offences in domestic laws and regulations" (S/RES/1373), yet nowhere does the resolution offer a definition of such acts. The result is a situation where each state is free to define "terrorist acts" according to its own preferences, as is illustrated by the following example:

> Since the resolution did not define terrorism, Syria has based its report on its obligations under the 1998 Arab Convention on the Suppression of Terrorism, which clearly distinguished between terrorism and legitimate struggle against foreign occupation (S/PV.4453, p. 9).

Nor is it exclusively the Middle Eastern and Arab countries that take this position against terrorism, as demonstrated by this statement on behalf of the African Union:

> For the organization that I represent, most of whose members achieved independence after a long national liberation struggle, it is intolerable that populations struggling for their independence against the occupation of their national territories and against the denial of their human rights should be confused with terrorists (S/PV.4618 (Resumption 2), p. 14; see also Venezuela, S/PV.5538, p. 26).

It has also been suggested that this wide latitude of action may help to explain the warm welcome of the resolution in some quarters (Rosand 2003:339). Indeed, in a study of member states' implementation of Security Council counter-terrorism resolutions, Andrea Bianchi (2006a:1051) noted that "the notion of terrorism in domestic criminal law seems to be the object of a fairly lax interpretation in several states." Yet a situation that could theoretically lead to 192 different definitions of terrorism, all of them being duly punished as required by resolution 1373 (OP 2 (e)), severely weakens the justifiability of such actions on the basis of both clarity, consistency and coherence. The importance of clarity in legal arguments has also been pointed out in Security Council discussions, for example by Switzerland, which argued that the principle of legality in criminal law required "the clear and precise formulation of laws" (S/PV.5059, p. 25). Thus, most states seem to prefer a single, agreed-upon, definition, as expressed by the Minister for Foreign Affairs of Mali: "we need to arrive as soon as possible at a precise definition of international terrorism in all its forms and manifestations" (S/PV.4413, p. 17). Ever since November, 2001, calls for a definition of terrorism were heard – by different states – at virtually every meeting of the Security Council pertaining to the implementation of resolution 1373. But so far to no avail.

The Counter-Terrorism Committee has explicitly refused to take on the task, insisting that "[i]t is not the business of the Committee to solve definitional problems" (Chairman Greenstock, S/PV.4512 (Resumption 1), p. 14). Interestingly, the Chairman attempts to legitimate this position to rectify the lack of clarity by reference to another element, namely legality. Ambassador Greenstock thus declared that the CTC "will not trespass onto areas of

competence of other parts of the United Nations system" and, consequently, "is not going to define terrorism in a legal sense" (S/PV.4453, p.5). Yet at his last Security Council debate as CTC Chairman, Ambassador Greenstock noted that it would "also help – there is no getting away from this … to have a definition of terrorism from the General Assembly" (S/PV.4734 (Resumption 1), p. 18). While agreement in the Assembly is still lacking, the Security Council itself ventured an attempt at outlining a definition of terrorism in operative paragraph 3 of resolution 1566. This move was considered very controversial, however, and, at the meeting at which the resolution was adopted, Brazil emphasized that operative paragraph (OP) 3 "reflects compromise language that contains a clear political message, but it is not an attempt to define the concept of terrorism" (S/PV.5053, p. 7). Thus, on this issue, we can see how different elements – in this case even within the same logic – may contradict one another. Where some arguments stress justifiability through clarity, they are contradicted by others, drawing on legality and the importance not to overstep one's mandate. It may be argued, however, that if the Committee had only been up to the task, its mandate is hard to exceed, an issue to which we will now turn.

The mandate of the CTC

Another example of the lack of clarity surrounding this process is the mandate of the Counter-Terrorism Committee. Both initially, and along the way, there was some confusion as to what the CTC should actually do and how. The different interpretations and suggestions ranged from the CTC as "a rapid response-body of the United Nations in the area of terrorist activities" (Belarus, S/PV.4453 (Resumption 1), p.5) to a forum that could be used "to gather experiences that would facilitate progress toward the elaboration of new concepts of security that are more in tune with the problems of the twenty-first century" (Chile, S/PV.4512, p. 20). For many states, however, the number one priority was to ensure that the CTC did not develop into a censoring body (see e.g. Mauritius, S/PV.4453 (Resumption 1), p. 29 and the statement on behalf of the Rio Group, S/PV.4618 (Resumption 1), p. 16). Indeed, Syria even conditioned its cooperation with the CTC on that understanding (S/PV.4453, p. 9). Also permanent members, such as Russia, while enjoying the protection of the veto, were anxious to emphasize that

> the Counter-Terrorism Committee should in no way function as a repressive body. It was never contemplated in this way. The main task of the Committee lies in compiling and analyzing … and to submit appropriate recommendations. An important function of the Committee will also be to give the necessary advisory and technical assistance to States … (S/PV.4453 (Resumption 1), p. 7).

These comments, while repeated at regular intervals over the years, became prevalent once more in relation to the establishment of the Committee's support structure, the CTED. Brazil, along with several other member states, stressed that the reform should be "strictly of a procedural and operational nature" (Brazil S/PV.4921, p. 10) and that the same restrictions that apply to the CTC also, by extension, apply to the CTED (S/PV.5006, p. 12). However, even though the mandate "would remain unchanged" (UK S/PV.4921, p. 9) and that the Committee pledged to "implement that mandate [of the resolution] – nothing less and nothing more than that mandate" (Chairman Greenstock, S/PV.4512 (Resumption 1), p. 13), the question is how many real constraints it poses. As Ambassador Greenstock noted himself, resolution 1373 has a "very broad scope" (S/PV.4512 (Resumption 1), p. 13), meaning that the Committee "has been given a very powerful mandate" (Singapore, S/PV.4453, p. 25), which might be quite difficult to exceed, even given a very broad range of activities.

One activity that has been debated extensively among member states is whether the Counter-Terrorism Committee should engage in creating a general list of terrorist organizations, similar to the list of individuals and entities belonging to, and associated with, Al-Qaida and the Taliban that is kept by the 1267 Committee. A proposal to that effect was made by Spanish Foreign Minister José Aznar in May 2003 (S/PV.4752, p. 3), but, in the absence of an internationally agreed definition of terrorism, UK Ambassador (and former CTC Chairman) Jeremy Greenstock advised against such a move (S/PV.4752, p. 6). Other states, however, did not see such a definition as a prerequisite (*cf.* Colombia, S/PV.4792, p. 27). For others yet again, including Mexico, it was primarily a question of mandates, and since the CTC was not established as a proper sanctions body, but was more oriented toward cooperation and facilitating assistance, then it was clear that "the Committee established under

resolution 1267 (1999) is the sole body authorized to keep lists" (S/PV.4792, p. 15). Nevertheless, after the attacks in Beslan in 2004, some countries seemed to have changed their minds and the possibility of creating a list as a means of identifying terrorists was brought up again, this time in more positive terms (*cf.* the Russian Federation, S/PV.5053, p. 3; Spain, S/PV.5053, p. 5; Germany, S/PV.5053, p. 6). US Ambassador John Danforth even stated confidently to reporters that he thought such a list would be created (USUN Press release # 186 (04)). Only a week and a half later, however, both Security Council members and non-members once more expressed their skepticism toward a move in that direction (S/PV.5059 *passim*). In the end, the working group established by resolution 1566 in order to consider the issue, did not recommend creating a list of known terrorist individuals and entities apart from that kept by the 1267 Committee (Rupérez 2006:19). Over time, many human rights-minded states had also become increasingly uncomfortable with the idea of subjecting individuals to targeted sanctions without a guarantee of "due process"-standards (as was discussed in the previous section).

The consequences of non-compliance

A third major ambiguity in resolution 1373 is how cases of non-compliance are to be handled. Although mandated to monitor states' compliance, even the CTC did not seem to have a clear idea of what to do if such compliance is lacking, as is clear from the following quote:

> What action will be taken if a State is not compliant? That has not yet happened, and we will address if and when it does happen. … *I do not think that we have to tie ourselves down by trying to answer that question until we meet it.* If we do, the Committee will discuss it. We are working by consensus, so within the Committee we are not going to solve any contentious or highly political and sensitive issues. We have already said as a Committee that we will, if necessary, bring such issues, if they affect our mandate, back to the Security Council itself (Chairman Greenstock, S/PV.4512 (Resumption 1), p. 13, my emphasis).

At other times, the Chairman has expressed rather contradicting views on the matter, such as when he said that "if we have to, at the end of the day, there is a bit of a stick to wave" (S/PV.4512, p. 25), only to reassure member states two months later that "[t]he CTC is not a law-enforcement agency,

nor is it working on specific cases" (S/PV.4561, p. 3). It is thus clear that the Committee is looking to preserve as much freedom of action as possible for any unforeseen situations, but when pressured about the nature of the Committee, the Chairman finally described it as

> a fitness trainer. A fitness trainer is, in many respects, your friend, because he is aiming to do you good; and in some respects he is your enemy because he is hurting you. … The important thing about the Counter-Terrorism Committee is that it is acting on doctor's orders. … It is your choice, Member States, whether you respond to the programme, but your doctor has laid out the prescription (S/PV.4561, p. 20).

What is especially noteworthy about this is the implicit magisterial attitude of the Committee and the Council toward UN member states. It is clear that states are not trusted to recognize by themselves the best course of action in regard to certain issues. Even though the Chairman points out that it is the choice of the member states whether to follow the recommendations or not, they are not (at least not more than 15 of them) involved in formulating those recommendations, which clearly amounts to a lack of legislative equality. Unlike a fitness trainer also, the Security Council's advice was not freely sought by member states, nor is it as specific as one could expect a doctor's orders to be, meaning that the determination of non-compliance would most likely lack in justifiability. With sovereignty (including a right to non-intervention) increasingly being conceived in terms of responsibility, a lack of clarity in the definition of non-compliance makes it easier to violate states' existential equality as well. In order to somewhat remedy that situation, best practices in implementation were brought up as a means of providing clarity and transparency on what it takes to implement resolution 1373 (Chairman Løj, S/PV.5229, p. 4). As was discussed in the previous section, however, legitimation claims based on justifiability through the specificity of such recommendations may be opposed by arguments based on legality.

With this ambiguity both over what constitutes non-compliance and what consequences should ensue, any actions taken in this regard will, at least in the foreseeable future, most likely take place in bi- or plurilateral contexts. The European Union, for example, has stated that it

> cannot remain indifferent if some States do not comply with the obligations established by resolution 1373 (2001). The importance that the Union attaches to combating terrorism will naturally be reflected in its relations with those States, including the in the context of current agreements with them (S/PV.4453, p. 12).

Following the bombings in Madrid on March 11, 2004, the European Union further issued a *Declaration on Combating Terrorism*, which provides for the inclusion of "effective counter-terrorism clauses in all agreements with third countries" (*European Declaration on Combating Terrorism*, p. 14). In a partially de-classified document, it is revealed that the standard counter-terrorism clause, as agreed by the Committee of the EU member states' Permanent Representatives in Brussels in 2002, requires, among other things, "full implementation of Resolution 1373" (Council of the European Union, *EU Counter-Terrorism Clauses: assessment*, p. 14). Again, however, it is not stated what full implementation is taken to mean.

There is also a non-negligible risk that resolution 1373 may give rise to situations in which states claim their right to act in self-defense against non-compliants, an interpretation which may be legally possible according to some international lawyers (*cf.* Stahn 2001). During his chairmanship, Ambassador Greenstock furthermore all but invited such behavior when he posed the question: "If one's neighbour has not met the standards that resolution 1373 (2001) is setting, is that a danger to one?" (S/PV.4453, p. 24). This is also directly related to the increasingly prevalent view of sovereignty as responsibility, which was discussed in chapter two. According to Georg Nolte, if sovereignty "is a responsibility to control one's own territory, then other states can more easily justify their right to use force preemptively on this territory for the purpose of fighting terrorism" (Nolte 2005:391). This may have especially severe consequences for so-called "weak" and "failed" states, where the official government does not always possess control over the entire territory. Alternatively, one can also view the designation of certain states as "failed states" as a way of facilitating violations of their sovereignty and existential equality. In Michael Byers words then, the point

> is not that the resolution *should* be read as authorising the use of force – indeed, in my view it does not – but that it *could* provide the US with an at-least-tenable

> argument whenever and wherever it decides, for political reasons, that force is necessary to 'prevent the commission of terrorist acts' (Byers 2002:402, emphasis in original).

Still, Byers argues that the actual use of such arguments may be prevented by fears that such a precedent will strengthen the case for subsequent claims by, for example, Russia and China, which may not be in Washington's interests (Byers 2002:403). Thus, formal equality and the legal principles of consistency and coherence may, to a certain extent, compensate for a lack of clarity.

Indeed, the P5 are split on the issue of whether resolution 1373 gives rise to self-defense claims. While China has clearly stated that "the Counter-Terrorism Committee is the only body mandated by Member States to monitor the implementation of resolution 1373 (2001) and to make decisive judgments on the status of its implementation on the basis of national reports" (S/PV.4453, p. 18), the United States and Russia disagree. Both hold that the Security Council does not have exclusive authority to determine non-compliance with its resolutions and have further announced that they understand non-compliance with resolution 1373 as allowing for self-defense. President Putin has even stated in a letter to the Security Council and the Organization on Security and Cooperation in Europe, that Russia may be forced to use its inalienable right of self-defense on the basis of Georgian violations of resolution 1373 (de Jonge Oudraat 2004:160, 163, 165). Even though the resort to acts in self-defense is theoretically open to all states, it is only those states with sufficient military capabilities that can avail themselves of that right in practice. Indeed, Stephen Brooks and William Wohlforth (2005:518) assert that resolution 1373 "was widely seen as an effort to revise accepted customary international law in a manner that advantages the United States". Thus it can be described as another instance of institutional power, yet it does not violate the formal equality of states.

Most importantly, a resolution proclaiming an open-ended threat, like UNSCR 1373, can always be pulled out of the closet when political circumstances are different. The United States has also explicitly stated that "[i]t is important to remember that resolution 1373 (2001) and the Committee established to

monitor it have no time limits. They will continue until the Security Council is satisfied with the implementation of the resolution" (S/PV.4561, p. 6). And the Security Council is not satisfied, if one of its veto-holding members is not satisfied. This type of situation has been referred to by David Caron (1993:577-578) as "the reverse veto", by which he means the ability of the permanent members to block the termination or modification of an action that the Security Council has previously authorized. In other words, any one of the permanent members can – theoretically at least – force an action or an authorization to continue indefinitely. Indeed, in the words of then US Permanent Representative, Ambassador Negroponte, UNSCR 1373 is "one of those resolutions that we're going to work with for a long time to come" (USUN Press Release # 131 (01)). The existence of the reverse veto thus makes the initial decision all the more important (Caron 1993:582), something which was perhaps not sufficiently considered in this case as we shall see later.

Consistency and coherence

An important part of justifiability is the perception that the action in need of legitimation affects all in a consistent and coherent manner. In relation to the discussions on the implementation of UNSCR 1373, it is clear that member states are wary to support the fight against terrorism if it is seen as too much of an exclusively American project. On February 21, 2006, China made an unusually long and passionate statement, in which its representative stated:

> If one pays attention only to combating terrorist individuals or entities endangering one's own country while turning a deaf ear to the legitimate demands of other countries or even blocking other countries' efforts, or if one is focused only on combating individuals or entities currently plotting terrorist attacks while showing leniency toward, or even deliberately shielding, terrorist forces which lie low and conceal their true colours, then there is little hope that international anti-terrorism cooperation can develop smoothly and continue in the future. Only when countries regard terrorist forces threatening other countries as their own enemies and join hands with other countries in effectively combating such forces will all the gaps in the international struggle against terrorism be filled (S/PV.5375, p. 12).

The principle of coherence has also caused problems for the Bush administration in relation to the presence of a certain Luis Posada Carriles

in a Texan prison. Posada is suspected of exploding a bomb on a Cuban aircraft en route from Barbados to Cuba in 1976, killing 73 people, and both Cuba and Venezuela have requested his extradition. They have also brought up the situation in the context of the Security Council counter-terrorism debates on numerous occasions (*cf.* S/PV.5293; S/PV.5375; S/PV.5446; S/PV.5538). While Cuba and Venezuela have declared Posada a terrorist based on his suspected involvement in the bombing, he is a "freedom fighter", resisting Castro's communist rule, in the eyes of many Cuban-Americans, who constitute a significant US voting bloc (Lazcano 2006). Currently, Posada is kept on illegal immigration charges, but since he has not been declared a terrorist by the United States, a Texan magistrate has recommended that he be set free. While the United States does not want to release a terrorism suspect, it has also been reluctant to extradite him to two regimes so blatantly opposed to the Bush administration and that, according to Posada's own testimony, may torture him (Roig-Franzia 2006). Nevertheless, Peter Kornbluh, senior researcher at the National Security Archives, has called this "a litmus test for President Bush's declaration that no nation can be allowed to harbor terrorists" (Boadle 2006).

Underlying the principles of consistency and coherence is, of course, the principle of equality, and the importance still attached to it by many states. At the end of his country's two-year term on the Security Council, Ambassador Baja of the Philippines also remarked that the unequal power structure characterizing the Security Council creates perceptions within the international community that it is incapable of acting in an objective, consistent and credible manner. He concluded: "Security Council actions must therefore not only be transparent and accountable, but must be seen and heard to be so by the international community" (S/PV.5332, p. 6). In this context, perception goes a long way and for many member states it was very important that the experts appointed to the CTC, as in most other UN issues, be appointed on an "equitable geographical basis". At the first open meeting in January 2002, non-Council member Belarus declared that

> the value and authority of the Committee's conclusions on the reports will be greatly enhanced if those experts who have a key role in the review are appointed in a manner that ensures equitable geographical representation

> and the representation of the world's main legal systems. We hope that these principles will be given greater attention in the subsequent appointment of experts (S/PV.4453 (Resumption 1), p.5).

Many other states have made statements along similar lines, including permanent members France and the Russian Federation (S/PV.4512, p. 7; S/PV.4512, p. 17).

These concerns were later awakened again in the context of the revitalization process of the CTC and the establishment of the CTED. In that context, many states requested that staffing be based, aside from competence requirements, on geographical representation and diversity of background (*cf.* India (S/PV.4921, p. 21). Consequently, OP 4 of resolution 1535, establishing the CTED, stipulates that the personnel "would be international civil servants subject to Article 100 of the Charter [which states that they are not to receive instructions from any government or any authority outside the organization], securing the highest standards of efficiency, competence and integrity and paying due regard to the importance of recruiting the staff on as wide a geographical basis as possible" (S/RES/1535). While some countries may have had particularistic motives in mind, such as Pakistan, which later urged the Directorate to "particularly seek out experts from the Islamic countries" (S/PV.5059, p. 12), the Philippines emphasized that the Committee ought to pay due regard to the principles of gender equity and geographic balance on the basis that "a representative pool of experts in the CTED will provide a greater measure of legitimacy and a solid source of intimate knowledge of all areas of the world" (S/PV.5113, p. 9).

In sum, it can be concluded that the most important issues concerning justifiability have been in relation to clarity, or rather the lack of clarity as regards the definition of terrorism, the mandate of the Committee and the definition as well as consequences of non-compliance. While theoretically reinforcing one another, it has also been shown that justifiability and legality can sometimes come into conflict. In other words, the lack of clarity was argued to be legitimate by CTC Chairman Greenstock based on strict legality, whereas criticisms against best practices based on legality were met with

defense arguments based on clarity. Furthermore, the legitimacy of 1373 was challenged based on a perceived lack of consistency and coherence in the designation and treatment of terrorists as well as an equitable representation among the CTC's experts.

Consent

Turning to the political logic then, legitimation focuses much more on what is accepted than what is legal. Indeed, with consent being the procedural element of the political logic, thus corresponding to legality, it is often viewed as an appropriate substitute for questionable legality – and so also in the case of UNSCR 1373, however reluctantly after a while. The arguments pertaining to this element have been most salient in terms of the following themes: exceptional circumstances, participation and ownership.

Exceptional circumstances

The magnitude of the terrorist acts that took place on September 11, 2001, was unprecedented and most of the world instantly expressed sympathy for America and its wish to take action (Thakur 2006:182). Accordingly, at the adoption of resolution 1368 the day after the attacks, all Security Council members took the floor to explain their vote and practically all of them also affirmed the necessity of solidarity with the United States at this time. Most of them further declared the terrorist acts "an attack not only against this country but also against the community of civilized peoples, the values of humanity and a future of peace", as phrased by the representative of Colombia (S/PV.4370, p. 6). It was thus a most sympathetic and accommodating environment, in which to introduce a resolution to combat terrorism. Indeed, as the United States presented its draft proposal to the other four permanent members on September 26, and held informal consultations with all Council members the day after (Talmon 2005:187), there were allegedly no changes made to the language of the original US draft (Lavalle 2004:425). Little more than 48 hours after the draft was first introduced, a unanimous Security Council adopted resolution 1373 at 10 pm on 28 September 2001. Purportedly, some UN diplomats, having been personally affected by the attacks, had also urged

their governments to adopt the strongest language possible (Stiles & Thayne 2006:157).

In this extremely short negotiation process by Council standards, no non-Council members were consulted and no state took the floor to explain its vote at the adoption of resolution 1373 (Talmon 2005:187). Later, the *Financial Times* reported: "Diplomats who drafted the text, which was passed surprisingly quickly, now admit that they did not take into consideration all the possible consequences of the resolution" (as quoted by Byers 2002:403). In situations of extreme urgency, which is how this one was framed, the advantages of the permanent members in terms of staff and other resources also become more marked (Caron 1993:564). Indeed, according to some commentators, the United States "exploited the unusual circumstances surrounding the attack on the World Trade Center and the Pentagon" to open the door for a wider range of action to eventually be regarded as legitimate (Brooks & Wohlforth 2005:518). In one sense, it can be likened to the adoption of the new US domestic legislation, the USA PATRIOT Act, about a month later. According to a study made by Kam Wong, "9/11" caused panic in the nation, especially in the capital, and Congress "was ready to do something, anything to improve upon homeland security preparedness and National defense posture" (Wong 2006:108).

Along similar lines, in the Security Council most states formulated their support of the unusual resolution as a consequence of a situation with unique characteristics, demanding an unorthodox response. For example, Ukraine argued already the day after the attacks that "new definitions, terms and strategies have to be developed for the new realities" (S/PV.4370, p. 4). Most member states were thus ready to accept untraditional measures, and many of them, Council members and non-members alike, warmly welcomed resolution 1373, which caused the Chairman of the Counter-Terrorism Committee to remark:

> I have been very struck by the responsiveness of the membership to the outreach programme of the counter-terrorism Committee. […] They have come to the meetings that we have had on these items, not with complaints about the Security Council – *which they might well have had, given the unique nature,*

> *I think, of resolution 1373 (2001)* – but in order to bring out the questions they have in their minds about the substance of what we are doing (S/PV.4432, p.5, my emphasis).

Illustratively, at an open meeting on January 18, 2002, 23 non-members requested to speak, yet no one expressed regrets about what the Council had done (S/PV.4453; S/PV.4453 (Resumption 1)). On the contrary, and in stark contrast to those states who still expressed some hesitation concerning the Security Council invading General Assembly territory (as was discussed under "Legality"), some states applauded the innovativeness of the Council. Indicating the potential of the element of consent to act as a vehicle for legal change, the representative of Singapore explained it in the following way:

> [S]ince 11 September, we have, of course, now taken on new responsibilities, and the traditional definitions of 'threats to international peace and security' no longer hold. Whereas terrorism was previously an item discussed in the Sixth Committee of the General Assembly, it is now a major agenda item of this Council (S/PV.4453, p. 25).

The phase of unquestioning support for all the Council's anti-terrorism measures did not last very long, however. Already by January 2003, the Security Council decided to hold a meeting at the ministerial level intended to "maintain and strengthen the mobilization of all against terrorism" (S/PV.4688, p. 2), and, on July 20, 2005, the Australian Ambassador reminisced that "in the terrible days immediately after 11 September 2001, we were seized with a grim determination … I would argue that in many respects, that momentum has indeed been lost" (S/PV.5229 (Resumption 1), p. 14). Instead of references to the exceptional circumstances and unconditional support of for the United States, consent-based legitimation arguments over time began to focus more on issues of participation and ownership.

Participation

Since the Security Council was moving into unchartered territory through the establishment of the Counter-Terrorism Committee with its exceptionally broad mandate, consent was perceived as very important in order to claim procedural legitimacy. The decisions of the Committee were therefore to be

made by consensus. Indeed, according to the guidelines for the conduct of the Committee's work

> [i]f consensus cannot be reached on a particular issue, the Chairman will undertake such further consultations as may facilitate agreement. If, after these consultations, consensus still cannot be reached, the matter will be submitted to the Security Council (S/AC.40/2001/CRP.1).

In addition to substituting for legality, consent can be used to compensate for a lack of justifiability in the sense that ambiguous, inconsistent and incoherent policies may still be deemed legitimate if based on overall consent. CTC Chairman Greenstock also emphasized that all matters concerning the (lack of) definition of terrorism would be handled through consensus decision-making: "We work by consensus and we will regard an act of terrorism, if it is necessary to do so, as one which all 15 of us will agree is an act of terrorism" (S/PV.4512 (Resumption 1), p. 14). The problem is, however, that the Committee is only made up of 15 states, which is why many non-Council (and thereby non-Committee) members argued that "[b]ecause of its nature and universal membership, the General Assembly has a special role to play" (Mongolia, S/PV.4453 (Resumption 1), p. 9-10).

In the context of the adoption of UNSCR 1566 in the fall of 2004, some member states also began to question the practice of adopting what may be called thematic chapter VII resolutions on the grounds of legislative equality. Brazil, for example, asserted that "the current practice of the Council is one of excessive resort to the use of Chapter VII" (S/PV.5059, p. 11). Specifically, Brazil objected to the use of an operative paragraph of a chapter VII resolution to encourage states to conclude negotiations on the two draft terrorism conventions then being before the General Assembly. As the Brazilian representative put it: "In our view, no constraints should be imposed on States' freedom to negotiate the terms of international conventions" (S/PV.5053, p. 7). After the adoption of resolution 1566 Bangladesh described the next open meeting in the Council as taking place "against the backdrop of the trend toward circumventing multilateralism in international affairs, particularly in the maintenance of peace and security" (S/PV.5059 (Resumption 1), p. 3). At that meeting, many states also joined

ranks with Germany, which had previously expressed its opinion that while supporting the resolution in general, it would have preferred an open public debate on the draft resolution before its adoption (S/PV.5053, p. 6, see also Liechtenstein, S/PV.5059, p. 22). Explicitly recognizing the inter-relationship between the elements in the political logic of legitimation – consent and efficiency – Liechtenstein appealed for more opportunities for involvement by non-members in the Council's counter-terrorism work, arguing that the implementation would then "undoubtedly be more successful" (S/PV.5229 (Resumption 1), p. 8). Also Pakistan, which after two years on the Council had to give up its non-permanent seat, put forward similar arguments and suggested that the Security Council should open up the membership of its sub-committees dealing with terrorism to states other than just the Council members through an electoral process. According to Pakistan, that would "promote inclusiveness, provide alternative perspectives and views and enhance transparency and accountability in the work of the three Committees" (S/PV.5293, p. 35).

Indeed, in order to achieve genuine consent, at least a minimum of transparency and openness in decision-making processes is necessary. Accordingly, transparency is included among the guiding principles for the work of the Counter-Terrorism Committee. Although the Committee meets in closed sessions, the work guidelines instruct the Chairman to "hold regular briefings of Member States and of the media to explain and publicise the work of the Committee" (S/AC.40/2001/CRP.1). The CTC's first chairman, Ambassador Greenstock also worked hard to ensure maximum transparency, and in its first three months of the Committee's existence he briefed the UN membership on nine occasions and also met with regional groups at several occasions (S/PV.4453, p. 4). From the member states' perspective this was very welcome, and the representative of Singapore noted that "[i]n maintaining transparency through frequent consultations with non-member States, the Counter-Terrorism Committee plays a crucial part in ensuring that our struggle against terrorism enjoys the full support of Member States" (S/PV.4453, p. 27). Also from the view of the resolution's sponsor – the United States – the CTC is a

> good example of a practical, comprehensive and operational method for incorporating all Member States into a process of decision-making and implementation stemming from a Security Council resolution. It is also, I think, a prime example of the Council's flexibility and creativity and ability to adapt to new circumstances (USUN Press Release # 138 (02)).

The usefulness of and appreciation for the periodic open meetings discussing the Committee's work and the implementation of resolution 1373 are also regularly commented upon by Member States, especially, and evidently, by non-Council members (see e.g. the statement of Japan, S/PV.5006, p. 19 and the Netherlands, on behalf of the EU, S/PV.5006, p. 13), and again the potentially reinforcing relationship to efficiency is recognized. In the words of Norway's Ambassador, Mr. Strømmen: "Sir Jeremy's active efforts at transparency have created the climate of trust needed for the Committee to be able to monitor Member States' implementation of resolution 1373 (2001) in the most efficient manner possible" (S/PV.4453, p. 28). Even the US, which tends to be skeptical to large meetings on the count of reduced efficiency, has come to appreciate the quarterly open meetings as they "help ensure that counter-terrorism remains at the top of the Council's and the broader United Nations agenda" (US, S/PV.5059, p. 19).

Ownership

Another factor affecting consent is what may be referred to as "ownership": member states need to feel as though they have some influence over the process. Yet, as the gruesome images of falling skyscrapers slowly began to fade and decisions appeared to be taken in a rather exclusive process, the initially high rates of support rapidly decreased. Hence, around the two-year anniversary of the CTC its second Chairman, Ambassador Arias of Spain, initiated a revitalization process (S/PV.4845, p. 3-4). Several member states also took the opportunity to stress the need to use the revitalization of the Committee to further increase its legitimacy and the "sense of ownership" among other UN Member States (*cf.* Brazil, S/PV.5006, p. 12). The most tangible result of that process was the establishment of the CTED, which in contrast to the Committee, was established with a so-called "sunset clause", meaning that its mandate – if not renewed – would automatically end on December 31, 2007. This procedure, along with the decision to undertake a

comprehensive review of the new body by the end of 2005, was accordingly welcomed by several member states, as it brought back a sense of control over developments (*cf.* Japan S/PV.4921, p. 25; Angola S/PV.4921, p. 12; Indonesia S/PV.4921 (Resumption 1), p. 11). Interestingly, however, the problem of decreasing consent was partly framed as one of unsuccessful communication. Accordingly, the CTED would be equipped with a Public Information and Communications Officer who would be responsible for implementing a proactive communications policy (S/2004/642, enclosure, p. 6). In that communications strategy one can later read that the purpose is to "inform non-Committee members, promote transparency and 'demystify' issues surrounding the Committee's work". While the chief target audience is UN Member States which are not members of the Committee, the strategy further states that "ultimately all segments of the general public should be reached" (*Communicating the work of the CTC*, p. 2).

Simultaneously, it was also clear that member states were having problems fulfilling their obligations under the resolution. Among the things that were mentioned the most was the issue of so-called "reporting fatigue". This term had begun to be used in relation to the sometimes burdensome reporting requirements of the different subcommittees of the Council (Pakistan, S/PV.4845 (Resumption 1), p. 4) and allegedly resulted from a situation in which states "are called upon to present reports in a seemingly never-ending process, with each report raising additional questions calling for further reports of ever-increasing complexity" (Angola, S/PV.5059, p. 18). Most importantly, reporting fatigue, it was feared, was a problem with much higher stakes than tardy country reports; it was a sign of decreasing perceptions of legitimacy among member states. As expressed by the representative of the Philippines: "When 71 of 191 members are lagging behind in complying with Council-imposed deadlines, we should ask why. … do States have issues with the legitimacy of the methods of the CTC such that they are now deciding to ignore them?" (S/PV.5006, p. 7). Illustratively, the representative of Samoa, speaking on behalf of the Pacific Island Forum, complained how

> new standards are introduced with very little consultation or opportunities for us to provide input. As a result, they seldom reflect, or make allowances for,

> the challenges many of us face in implementing them. To be frank, this is a source of frustration" (S/PV.5293, p. 24).

Participation and ownership thus affect not only consent, but also efficiency.

In sum, it seems clear that legitimation based on consent to a large extent built on other states' strong feelings of sympathy and solidarity with the United States, at least initially. UNSCR 1373 was thus warmly welcomed and many states also applauded the innovativeness of the Security Council. In the CTC consent was also used to rebut challenges based on justifiability, as it was decided that all decisions would be made by consensus. Drawing attention to the potential reinforcement effects between the two elements in the political logic, many member states further requested increased participation and ownership in the process based on their positive outcomes for the efficiency of the implementation of resolution 1373. Yet perhaps due to the big role that the tragic events of September 11 played for states' consent early in the process, the use of consent as the primary basis for legitimation arguments significantly decreased over time.

Efficiency

While consent spells out "right process", then legitimation according to the political logic is also significantly affected by the outcome of that process. Logically, a policy that is perceived to be successful will be more easily accepted. Discussions, pertaining to this issue, have centered around the efficiency, the effectiveness and the appropriateness of the Security Council's actions in relation to resolution 1373.

Efficient law-making

As discussed in the previous section, the atmosphere in the wake of the terrorist attacks on September 11 was characterized by extreme urgency and a strong desire to act. According to President Bush (2001), the war on terrorism would be fought "on a variety of fronts, in different ways". One such way was to "starve the terrorists of funding" by freezing their assets and prohibit financial transactions with identified terrorists. Thus, on September 24, 2001, President Bush issued an executive order on terrorism financing for

that purpose. In his remarks to the press, he further noted that the United States had signed, but not ratified, the international Convention on Terrorism Financing and he now asked the US Senate to do so (Bush 2001). The United States was far from the only one in this position, however. In fact, at that time, nearly two years after it was adopted by the General Assembly, a mere four countries[57] had ratified the convention and the prospect of its entering into force thus seemed fairly distant.[58] Yet by drafting a legally binding Security Council resolution – based on, but not identical with, the Convention text – the United States could make its preferred provisions of the Convention immediately and automatically binding on all UN member states. This did not only eliminate the waiting period until the requisite number of countries had ratified the Convention so that it could enter into force, but it also eliminated the risk that some states would not adhere to these provisions (de Jonge Oudraat 2004:161; Alvarez 2005:196; Alvarez 2003:875). In other words, this was an ideal way to maximize both speed and scope (Klein 2003:388).

While much of resolution 1373 did in fact build on so-called "previously agreed language", there was no longer a choice for member states whether they wanted to accept those obligations. The legislative equality that traditionally characterizes treaty law was thus brusquely shoved to the side. Furthermore, US Ambassador to the UN, Mr. Negroponte revealed a few weeks later that, apart from key provisions from the Convention on Terrorism Financing, "Security Council Resolution 1373 built on the President's own executive order regarding terrorist financing" (USUN Press Release # 147 (01)). In other words, the United States used the institutional power of its privileged position within the UN Security Council in a highly instrumental manner in order to universalize some of its own domestic legal rules. Indeed, "the promotion of US interests internationally often means concretely the promotion of US legal standards" (Klein 2003:369). The US official characterization of the proposed draft also changed significantly after it had been adopted. While still in consultations

[57] Botswana, Sri Lanka, the United Kingdom and Uzbekistan.
[58] According to Article 26 of the Convention, it shall enter into force 30 days after the 22nd state has ratified it. This happened on April 10, 2002, but the United States did not become a State Party to the Convention until June 26, 2002 (A/RES/54/109; Happold 2003:594; www.un.org/sc/ctc/law.shtml).

with the other Council members on September 27, Ambassador Negroponte emphasized that "the resolution draws heavily upon past precedents" (USUN Press Release # 129 (01)), whereas he only the next day happily conceded that "I think this is an unprecedented Resolution" (USUN Press Release # 131 (01)). In terms of speed, Mr. Negroponte also remarked to the press on the day before the adoption that the United States had "stressed the urgency of getting this done" and that he was "encouraged by the initial reactions" from other Council members (USUN Press Release # 129 (01)). The perceived sense of urgency was apparently also the reason why an attempt to define terrorism was never made in the resolution, since the US wanted to avoid the intractable debates over different definitions (Happold 2003:594; Rosand 2003:334). Yet the United States was not alone in its appreciation for efficient law-making. When addressing the General Assembly that year, then UN Secretary-General Kofi Annan also praised the Security Council "for acting so swiftly to enshrine in law the first steps needed to carry this fight forward with new vigour and determination" (Annan 2001).

Effective implementation

In a meeting on December, 20, 2006, the outgoing Chairman of the CTC, Ambassador Løj, declared that "[t]he measuring stick for evaluating effectiveness [is] the degree to which Member States implement the resolution" (S/PV.5601, p. 3), and, at first, the implementation record of resolution 1373 was as exceptional as its form. Although not all member states had submitted the required reports on their implementation of the resolution's provisions within the established time limit of 90 days, the CTC had still received 123 reports by January 18, 2002 (S/PV.4453, p. 4). That number impressed many and the Rio Group described the response as "unprecedented" (S/PV.4453, p. 11). The number of reports coming in was also slowly but steadily increasing and one year after its establishment the CTC had received reports from all but 16 member states (S/PV.4618, p. 5). The representative of Singapore then declared that "one year ago, the challenge … looked insurmountable. Hence, by all measures, the Committee has done extremely well over the past year, given the resources and time constraints it faces" (S/PV.4618, p. 15). Then Security Council member Ireland added: "Today's debate is an opportunity

to say 'thank you and well done' to the CTC, to its Chairman, to the experts advising the CTC and to the Secretariat" (S/PV.4618, p. 19).

As shown earlier, the initial enthusiasm wore off after a while, which also affected implementation, and at a high-level meeting of the Security Council in January 2003, CTC Chairman Greenstock concluded that "the Security Council's work on counter-terrorism needed to be stepped up a gear" (S/PV.4688, p. 3). Over a year after the original deadline, thirteen states had still not submitted a first report on the measures they had taken to implement the resolution (S/PV.4688, p. 3). The CTC Chairman declared that "whatever the underlying reasons, they are failing in their responsibilities as Members of the United Nations", and stressed that "it must be clear that any non-reporting State will be held to be non-compliant with resolution 1373 (2001)" (S/PV.4688, p. 3-4). Later, he also urged the Council to "decide what further action to take in this regard" and "what action to take, if any, with respect to the 51 States that have not yet met the deadline set by the CTC for subsequent reports" (S/PV.4734, p. 3). Yet from what is available in open sources it does not seem as though the Security Council took any action in relation to these non-compliant, and late-reporting, states. A possible interpretation is that the lack of clarity in regard to both the definition and consequences of non-compliance also affected states' incentives to implement the resolution in another example of the intimate connections between the two logics of legitimation.

The slow(ing) implementation of resolution 1373 frustrated the United States, which held that the CTC's work "must translate into on-the-ground results", if the Committee were to "remain credible" (S/PV.4734, p. 8). Finally then, on May 22, 2003, when Sao Tome and Principe submitted its report to the Counter-Terrorism Committee, the CTC had achieved the unprecedented feat of getting all United Nations member states to implement, in some way at least, a Security Council resolution (www.un.org/sc/ctc/countryreports.shtml). Yet the reporting requirements of states were far from over. With the initial round of reports being completed, the CTC began to engage in more technical detail with states through follow-up questions and the number of late reporters increased by 33 % in just three months, from 36 in July (S/PV.4792,

p. 4), to 48 in October 2003 (S/PV.4845, p. 3). Consequently, at the October meeting, the CTC's new chairman, Ambassador Arias of Spain, informed that he would submit a report to the Security Council on the problems experienced by Member States in their efforts to implement resolution 1373 as well as the problems encountered by the Committee in carrying out its duties under the present circumstances, in order for the Council to consider possible measures to improve the situation (S/PV.4845, p. 3-4).

Testifying to the importance of efficiency for the overall perception of legitimacy, this information was warmly welcomed and supported by many states, and France declared: "What is at stake here is the credibility of all of the actions undertaken by the Security Council in the priority area of combating terrorism" (S/PV.4845 (Resumption 1), p. 3). At a later meeting, Chairman Arias added that "without serious revitalization, the Committee *and the United Nations* run the risk, in the medium term, of becoming ineffective" (S/PV.4921 (Resumption 1), p. 13, my emphasis). The number of late reporters continued to rise, however, and by June 2004, it was up to 71 states, only to increase to 78 by September (S/PV.5006, p. 2-3; S/PV.5059, p. 3). Chile noted with regret that the figure reflected "an increase of practically 10 per cent compared with the previous quarter" (S/PV.5059, p. 6) and Romania that this now constituted over a third of United Nations Member States" (S/PV.5059, p. 15). A few months later, the Philippines also warned that "[i]f the matter is not resolved, at stake will be the effectiveness of the CTC in the short term and, in the longer term and more critically, the credibility of the Security Council" (S/PV.5113, p. 9). In other words, it is clear that just as the Security Council's counter-terrorism work may benefit from the legitimacy of the United Nations as a whole, a lack of success in that area can affect the entire organization.

Yet perhaps there can be such a thing as being too efficient also. The representative of Pakistan announced on January 18, 2002, that

> a crackdown has begun on groups engaged in fomenting violence and militancy. The Government intends to pursue this campaign to purge our society of obscurantism and violence. Members will agree that *the measures Pakistan is taking go well beyond the requirements of resolution 1373* and underscore

> our firm commitment to purge our society of obscurantism and violence (S/PV.4453, p. 30, my emphasis).

A year later the Secretary-General also warned that one could note "an increasing use of what I call the 'T word' – terrorism – to demonize political opponents, to throttle freedom of speech and the press and to delegitimize legitimate political grievances" (S/PV.4688, p. 3; see also Bianchi 2006a:1051). As discussed in previous sections, over time more and more states began to question some of the Security Council's counter-terrorism measures using arguments based on legality and justifiability, but for others (some of which having domestic insurgency problems of their own) effective results was still the overriding priority. Uganda, for example, found resolution 1373 to be "limited in scope" (S/PV.5059 (Resumption 1), p. 6). Also according to the United States, it was clear that, on this issue, efficiency trumped other elements, as is demonstrated by the following quote:

> Effective counter-terrorism imposes burdens … and those burdens are the fault of the terrorists, not of counter-terrorism. … [Thus we] must not undermine sound, lawful counter-terrorism measures with specious arguments about their collateral impact (S/PV.5229, p. 9).

This reasoning makes it clear, not only how elements of the two logics may come in conflict at times, but also how legitimation arguments can be constructed almost solely on one element that is deemed especially important under certain circumstances.

Indeed, the priority that issues of international terrorism has received in recent years is remarkable. As the representative of Malaysia put it, "[r]aising national capabilities … [to fight terrorism] requires *permanently changing the priorities of the international community*" (S/PV.5059 (Resumption 1), p. 9, my emphasis). This is also a stated goal of the United States. In its *National Security Strategy* of 2002, it is described how the US has decided to "wage a war of ideas to win the battle against international terrorism … to make clear that all acts of terrorism are illegitimate so that terrorism will be viewed in the same light as slavery, piracy, or genocide" (The White House 2002:12). Perhaps it is also the intangible, rather than the concrete, results of resolution 1373 that are the most remarkable. In the words of Ambassador Greenstock, the CTC

has created "an almost universal awareness of the threat of terrorism as a particularly hideous form of violent crime" and a recognition on the part of governments that "the world has changed forever" (S/PV.4734, p. 4). Thus, summarizing the first four and a half years of the Security Council's counter-terrorism work, CTED Executive Director Javier Rupérez (2006:14) said: "It is clear that resolution 1373 (2001) has contributed to the development of an environment in which *no one dares any longer to question* the obligation of all States to cooperate in the effort to isolate terrorists and terrorism" (my emphasis).

Appropriate methods

Finally, there is the question of the appropriateness of the implementation process in relation to the desired outcome. Ever since the adoption of resolution 1373 some member states had wanted the Committee to do more in terms of ensuring proper implementation. The United States held, for example, that the CTC needed to concern itself with whether states were actually doing what they reported to be doing, suggesting site visits as a possible means for verification (S/PV.4734, p. 8). Also Mexico stated that "the ability of the United Nations and of the Security Council to ensure the implementation of their own resolutions must be maintained" (S/PV.4512, p. 13). A few states therefore saw the revitalization process of the CTC in 2003-04 as a chance to modify and extend the mandate of the Committee. In this context, Israel also argued that the CTC should abandon its practice of consensus decision-making, and allow for decisions to be made by a – relative or absolute – majority. Being a chapter VII resolution, this would enable the Committee to better serve the cause of UNSCR 1373 (S/PV.4921 (Resumption 1), p. 7). But the Israeli position met resistance from most quarters. In the words of South Africa: "The Committee's practice of promoting cooperation and dialogue among sovereign and equal Member States is … commendable and should continue to inform the Committee's work" (S/PV.4921 (Resumption 1), p. 8; see also the statement of China S/PV.4921, p. 14). In the end, the outcome of the revitalization process was almost exclusively procedural, with the exception of the following preambular paragraph: "*Recognizing also* the need for the Committee, where appropriate, to visit States, with the consent of the State concerned" (S/RES/1535, preamble, emphasis in original). This

was based on the wishes of most states that the CTC do more than sit in New York and read reports and write letters. With the inclusion of the condition of consent, the initiative did not run into opposition from anyone.

Furthermore, as discussed above but also pertaining to appropriate implementation, over time it was increasingly recognized that the reporting requirements imposed an at times significant burden on states. Thus, in paragraph 90 of the World Summit Outcome adopted in September 2005, member states

> encourage the Security Council to consider ways to strengthen its monitoring and enforcement role in counter-terrorism, including *by consolidating State reporting requirements*, taking into account and respecting, the different mandates of its counter-terrorism subsidiary bodies (A/RES/60/1, my emphasis).

A few months later, CTC Chairman Løj, was happy to announce that the Committee was taking concrete steps to revise its reporting procedures. Hence, it would no longer – as an automatic response – forward a request for more information to Member States, but consider such requests carefully, taking into account, among other things, the resources required to prepare further reports (S/PV.5375, p. 3-4). The news of a revised reporting regime was also duly welcomed by member states (*cf.* Peru, S/PV.5375, p. 11; France, S/PV.5375, p. 15; and Austria for the EU, S/PV.5375, p. 26). In her last briefing as CTC Chairman Ambassador Løj further acknowledged that one of biggest challenges had been "to get away from the seemingly endless reporting and towards a stronger focus on implementation. The reality was that Member States felt less inclined to work with the Committee because it … appeared as if providing information led only to requests for more information" (S/PV.5601, p. 3).

As can be imagined, the burden of the reporting requirements was especially heavy for developing countries, and they were often over-represented among the late-reporters. According to members of the African regional group, however, failure to submit reports on time was not due to indifference or lack of interest. Instead, it was suggested as more symptomatic of differing priority structures. Notwithstanding the American ideational campaign

against terrorism discussed above, for countries with limited means priority was often given to other issues than combating terrorism (Congo, S/PV.5538, p. 16). These differing perspectives also became clear in different states' view of the main function of the CTC; was it monitoring states' implementation efforts or facilitating assistance to countries in need? With some countries, such as Brazil, preferring a focus on the latter (*cf.* S/PV.5375, p. 30), the US maintained that "work to facilitate technical assistance must occur in the context of monitoring States' implementation of their binding obligations under resolution 1373 (2001)" (S/PV.5375, p. 24). The Americans even continued at the next Council briefing, reiterating that "[f]acilitating technical assistance must not become an end in itself for the CTC" (S/PV.5446, p. 19). Indeed, the US representative claimed that if states "have received technical assistance but still have not met their obligations, the CTC must take action to ensure that they do so" (S/PV.5446, p. 19). Thus, from the American point of view, the use of best practices by the CTC represented a way to ease the burden for states in their implementation efforts. After intense promotion efforts in 2005, the US succeeded in achieving the inclusion of the use of best practices in the resolution adopted at the Security Council summit on the occasion of the World Summit in New York. In OP 6, the Council directs the CTC to "[w]ork with Member States to help build capacity, *including through spreading best legal practice*" (S/RES/1624, my emphasis). While undoubtedly, a useful assistance in implementation efforts, best practices can also be viewed as yet another instance of institutional power, which works to enhance the influence of those states with superior legal expertise and resources. Indeed, international lawyer José Alvarez (2005:202) does not even hesitate to call the subsidiary counter-terrorism bodies of the Security Council "hegemonic instruments" that "seek to export U.S. counter-terrorism laws".

In sum, it has been shown that efficiency also played a significant part in the debates on resolution 1373. Indeed, the Security Council was initially praised in many quarters for acting so quickly and resolutely through the adoption of resolution 1373. Later in the process, legitimation arguments were at times solely based on efficiency, as even consent began to decrease with time. Yet the successive slow-down in the implementation process after a while gave rise to arguments challenging the Security Council's actions based on efficiency.

As in the case of legal legitimation, the elements within the same logic also came into conflict, as the reporting requirements which existed to increase the efficiency of the resolution further negatively affected the element of consent.

Concluding discussion

In conclusion, this chapter has – on a general level – demonstrated the utility of the analytical framework as well as the relevance of all four elements in the legitimation logics in the Security Council debates concerning resolution 1373. While the use(s) of each individual element has been discussed and summarized above, I will here discuss how they interact and vary in importance over time as well as other implications for international rule-making and the influence of the United States. Most importantly, it is notable how the arguments for the legitimacy of the Security Council's actions on procedural grounds rest almost exclusively on the political element of consent. Indeed, even if the Security Council is going beyond traditional conceptions of its mandate through the adoption of resolution 1373, many states not only consent to, but also welcome, this innovativeness. Still, however, legality is used throughout the process in arguments challenging the legitimacy of the Council's actions and may be interpreted as successful to the extent that this practice has, so far, only occurred in two instances. Additionally, demands for greater conformity with existing international law has had significant effects on the human rights aspects of the work of the Security Council and the Counter-Terrorism Committee.

From the perspective of output legitimacy, the predominance of the political logic in legitimation arguments is also evident. Resolution 1373 is seen as an ideal way to maximize the efficiency of the counter-terrorism measures through both speed and scope. Indeed, when the other elements – including consent – are increasingly used to challenge the legitimacy of the Council's actions, legitimation arguments are at times based on efficiency alone, making the case that fighting terrorism efficiently supersedes all other concerns. Justifiability was most prevalent early in the process, when the lack of clarity was criticized by most member states, but subsided over time as member

states' fears were not realized. It should be noted, however, that this is an open-ended resolution, which means that this aspect may regain its significance down the road. The issue of non-compliance, for example, may come back to haunt Council members in the future.

There were also interesting interaction effects among the different elements and logics. In the legal logic, there was an obvious trade-off between the calls for justifiability through greater clarity and legal rules concerning who had the authority to provide such definitional clarity. From the opposite direction, it was also argued that best practices – although criticized based on legality – could contribute to a greater clarity on what was required in order to comply with the resolution. Also in the political logic, the elements of consent and efficiency were shown to have close connections. In the beginning, they positively reinforced each other with high levels of consent yielding high levels of compliance, but as time passed diminishing consent coincided with diminishing perceptions of efficiency; though it is difficult to say which led to which. Just as it is possible to argue that consent is required for efficient implementation, it can also be posited that it was the expected efficiency of a Security Council resolution, which, in the agitated atmosphere in the wake of September 11, brought about the high levels of consent. Additionally, one can interpret the fading consent as the result of a greater awareness of the legal implications of the Security Council's activities. Whereas efficiency was initially prioritized over both legality and justifiability by creating the greatest possible leeway for the Council to combat terrorism, human rights concerns and questions of the relationship between chapter VII resolutions and norms of *jus cogens* character were increasingly voiced in the end.

Resolution 1373 is furthermore an obvious example of the exercise of so-called institutional power and, one could also argue, hegemonic international law. Since the most significant results of this process may indeed be the intangible ones, such as changed frames of reference and priority structures, the influence of the United States on the international struggle against terrorism is both deep (into the domestic practices of sovereign states), wide (applying to 191 other states) and most likely long-term. By creating legal obligations by way of thematic chapter VII resolutions instead of multilateral

treaty negotiations, the legislative equality of member states is clearly violated and, as implied by the medical analogy, so is their existential equality. It is evident that some issues have become (considered) too important to allow individual states to choose their own approach in dealing with them.

Chapter six

UNSC Resolution 1540

> "*The Security Council* … *Acting* under Chapter VII … *Decides that* all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and … adopt and enforce appropriate effective laws … and enforce effective measures to establish domestic controls to prevent the proliferation"

Turning to the Security Council debates concerning resolution 1540, the aim of this chapter, like the previous one, is equally to assess the utility of the analytical framework and to analyze the legitimation arguments made by states. Since the topic of this resolution concerns non-proliferation of weapons of mass destruction, the chapter will start with a brief history of the issue of non-proliferation as it has been dealt with in the United Nations. A summary of the distinctive characteristics of the resolution as well as its adoption and implementation processes is also provided before the conceptual analysis begins. As in chapter five, the discussion will focus on one element of legitimacy at a time, thereby foregoing a strict chronological account, and, again, both supporting and challenging arguments will be included under each sub-heading. The chapter will end with a concluding discussion, and here inferences will also be made in relation to the findings of the previous chapter.

Non-proliferation and the UN

The elimination and later also non-proliferation of weapons "adaptable to mass destruction" have been on the UN agenda since 1946 (A/61/1, p. 21). Indeed, the development and first use of the atomic bomb coincided with the organization's birth, and the first General Assembly resolution, 1(I), established a commission in order to deal with the new problems facing the international

community after the discovery of atomic energy. Since then the UN has worked actively both with disarmament and non-proliferation, mainly through the First Committee of the General Assembly, the Conference on Disarmament, and of course the Department of Disarmament Affairs within the Secretariat. The CD, and its predecessors, have negotiated some of the most important arms limitation and disarmament agreements such as the Treaty on the Non-Proliferation of Nuclear Weapons, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC), and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC). However, a weakness common to all of these instruments, and indeed all traditional treaty law, is that they do not explicitly address the activities of non-state actors. Meanwhile, awareness of the potential threat of weapons of mass destruction ending up in the hands of terrorists grew exponentially after the shocking events of September 11, 2001.

While the Security Council had declared, already in 1992, that "[t]he proliferation of all weapons of mass destruction constitutes a threat to international peace and security" (S/23500), it continued to play, as in the case of terrorism, if not a marginal, then at least only a supporting, role to the General Assembly over the decade to come. It was not until 2003 that concrete action began being taken on the part of the Council. At the high-level meeting of the Security Council on combating terrorism, on 20 January 2003, the Secretary-General, as well as most other states, stressed the need to strengthen efforts to prevent the proliferation of weapons of mass destruction (S/PV.4688, p. 2, see also Bulgaria, S/PV.4688, p. 10; Spain, S/PV.4688, p. 17 and Syria, S/PV.4688, p. 23). This call was then repeated by several states at Security Council meetings on terrorism in February (S/PV.4710), April (S/PV.4734) and May (S/PV.4752). Yet, the first concrete initiative was seemingly taken once more by the United States, with the support of the United Kingdom. At least in the view of the Americans themselves, the United States "spearheaded efforts to persuade the United Nations Security Council to become more active in combating WMD proliferation" (Rademaker 2006).

In late May 2003, President Bush launched the Proliferation Security Initiative, which was intended to contribute to non-proliferation primarily through the interdiction of suspected WMD shipments (PSI – FAQ, Bureau of Nonproliferation, 26 May 2005). In the beginning, however, only eleven states joined the PSI and, addressing the UN General Assembly on September 23, 2003, President Bush explained: "Because proliferators will use any route or channel that is open to them, we need the broadest possible cooperation to stop them." He continued:

> Today I ask the U.N. Security Council to adopt a new anti-proliferation resolution. This resolution should call on all members of the U.N. to criminalize the proliferation of weapons – weapons of mass destruction, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own borders (USUN Press Release # 146 (03)).

Bush's call was supported by UK Secretary of State for Foreign and Commonwealth Affairs, Jack Straw, when he addressed the Assembly two days later: "We all know that proliferation is one of the greatest threats we face. Much good work is being done by UN agencies, particularly the IAEA. But the Security Council itself has not addressed this issue for ten years. It is time that it did" (Straw 2003). Hence, on April 28, 2004, albeit after an unusually long and complicated negotiation process, another general chapter VII resolution laying down legally binding obligations on member states was adopted by the Security Council, although this time concerning non-proliferation. While significant enough in its own right, UNSCR 1540 notably confirms the words of Paul Szasz (2002:905) after the adoption of resolution 1373: "Now that this door has been opened […] it seems likely to constitute a precedent for further legislative activities."

Characteristics of resolution 1540

In short, resolution 1540 requires all states to refrain from providing any form of support to non-state actors for obtaining and using nuclear, chemical and biological weapons, and their means of delivery, as well as to adopt and enforce national laws to that effect. It also obligates states to establish and enforce effective domestic controls over such weapons and their means of delivery,

including controls over related materials (S/RES/1540). Like its predecessor, it is legally binding for all UN member states, adopted under chapter VII, and unlimited in both time and space. In addition, it also creates a subsidiary body – the 1540 Committee – consisting of all the Council members, which is to report to the Council on the implementation of the resolution. For that purpose member states are called upon to present national reports to the Committee within six months. Despite many similarities, however, there were differences as well. In contrast to the CTC, for example, the 1540 Committee was established "for a period of no longer than two years" (S/RES/1540, OP 4), even though the resolution itself is unlimited in time. Furthermore, if resolution 1373 was passed quickly while states – still almost in a state of shock after 9/11 – were not fully aware of the implications of their actions, resolution 1540 was preceded by almost seven months of negotiations, as diplomats this time knew precisely what they were doing. The negotiating history of resolution 1540 is also significant, because the "formally closed but informally and intentionally porous nature of the negotiations" (Datan 2005:2[59]), enabled the participation of more states than just the Council members in the process.

Negotiations began in October 2003 when a first draft resolution was circulated among the five permanent members. This was followed by successive drafts in December, January and February, sometimes as often as every three or four days. Until March 2004, however, negotiations were formally kept among the P5, although early drafts had already spread to wider circles (Datan 2005:4). Another peculiarity of the negotiation process was that, unlike normal Security Council practice, an open debate was held on April 22, 2004, on the draft resolution of April 15,[60] where members and non-Council members alike could publicly state their opinions on the text at hand before action was being taken. There can also be no doubt about the keen interest in this issue as more than a quarter of the UN membership, including Ireland on behalf

[59] As page-numbers are lacking in the document, the author has used the page-numbers (1-13) of the printed document.
[60] This draft is slightly different from the text that was adopted by the Security Council six days later, thus indicating that negotiations and resulting amendments continued throughout the entire process.

of the EU and Malaysia on behalf of the Non-Aligned Movement, availed themselves of the opportunity to voice their opinions on the matter and the draft resolution at hand. Most importantly, however, resolution 1540 does not, like its predecessor, build on existing multilateral instruments, since the issue that the United States and the other sponsors specifically sought to address was not previously covered by international legal agreements. Thus, in this case the Security Council was creating entirely new international legal obligations for all states, and at a press conference German Ambassador Pleuger happily described resolution 1540 as the first major step toward having the Security Council legislate for the rest of the United Nations' membership (Press Briefing 2004). Hence, it is possible to argue that resolution 1540 goes further than resolution 1373, as it is imposing obligations that were altogether new; yet, at the same time, it is more inclusive and multilateral as regards the way in which it was adopted.

Legality

The second time around, with the process being much longer, more inclusive and, not least, more conscious, issues concerning the legality of the Security Council's actions were hotly and explicitly debated among member states. In substantive terms, the discussions focused once more on the limits of Security Council activities as well as on the conformity between quasi-legislative resolutions and respect for state sovereignty and sovereign equality.

The limits of Security Council activities

At the open debate on April 22, many – if not most – states emphasized their view of resolution 1540 as a necessary, but still sub-optimal, measure for the purpose of regulating this issue and consequently called for a speedy initiation of negotiations in traditional forums to improve existing regimes or, if necessarily, create a new one (see e.g. the statements of Algeria, China, New Zealand, Switzerland S/PV.4950, p. 5, 6, 21and 29 respectively, as well as Malaysia, on behalf of the Non-Aligned Movement (NAM), S/PV.4950 (Resumption 1), p. 4). Despite being a Council member, and thereby in a position of some influence, Pakistan was one of the resolution's strongest critics, and stated:

> Pakistan believes that the first question is whether the Security Council has the right to assume the role of prescribing legislative action by Member States. The existing treaties … can be improved, if and where necessary, through negotiations among sovereign and equal States (S/PV.4950, p. 15).

Echoing the calls for the negotiation of a proper international convention that were made in relation to the adoption of resolution 1373 as well, the Egyptian representative held that "consideration by the Council of this issue should be on a temporary basis and for a specific, limited time until an internationally ratified agreement can be concluded" (S/PV.4950 (Resumption 1), p. 2). With member states being more aware this time, they were also more forthright in their criticisms, asserting that "clearly, the Charter does not give it [the Security Council] a mandate to legislate on behalf of the international community" (Algeria, S/PV.4950, p. 5). Nepal was even sharper, warning that this practice of the Security Council was "likely to undermine the intergovernmental treaty-making process" (S/PV.4950 (Resumption 1), p. 14). Indeed, some international lawyers believe that, if the requirements of resolutions 1373 and 1540 are met with compliance, they are likely to affect international customary law as well (Alvarez 2005:198). Pakistan and other states thus stressed that the Council – composed of only 15 states – is not a representative body (S/PV.4956, p. 3) and therefore not able – single-handedly – to reflect general state practice and *opinio juris*, which are required for the formation of international custom. Were that development to occur, however, then the permanent members would exercise a veto also over the customary legal process (Byers 1999:42).[61]

Despite the strong feelings of many countries that this was just a stop-gap measure, there is nothing in the text indicating such an understanding. Accordingly, Algeria, speaking at the adoption of resolution 1540, stated its regret over the lack of a call for "the early conclusion of a binding international legal instrument on weapons of mass destruction and non-State actors" (S/PV.4956, p. 7). In other words, it is clear that member states, irrespective of the actual binding force Security Council resolutions do not view them

[61] Arguably, they already do possess an informal veto over the customary process, see the discussion on specially affected states in chapter three, but their influence would still increase significantly.

as having the same legal status as international legal conventions. This may also be a consequence of the concomitant difference in legislative equality between a Security Council resolution and an international treaty. Even though this process was characterized by unusual outreach and inclusion by Council standards, once the text was adopted states had no choice but to abide by it. As in the discussions on resolution 1373, several countries also expressed concern regarding the different spheres of competence and differing mandates of the Security Council and the General Assembly, arguing that "what we are discussing here today belongs in the General Assembly" (Namibia, S/PV.4950 (Resumption 1), p. 17). This reservation appeared to be deeply held by several states, as Brazil, two years later, motivated its wish to avoid an extension of the Committee's mandate by stating that "it deals with areas within the competence of the General Assembly" (S/PV.5375, p. 30). Finally, the criticisms against the Security Council for going beyond the limits of its mandate were not just related to procedural matters. India, for example, held that the Security Council had left its area of responsibility and that "export controls are not an issue on which the Security Council should prescribe norms" (S/PV.4950, p. 24). As was discussed in chapter four, however, over the past 15 years the range of tools which the Council has applied in order to international peace and security has been continuously widening.

The observance of state sovereignty and sovereign equality

The legality of the Security Council's quasi-legislative activities was also extensively discussed in terms of respect for state sovereignty. The question was raised, for example, how specific the Council could or should be in placing obligations on states. For Brazil, it was essential that the Security Council "take into account the independence of national congresses in the exercise of their law-making power" and therefore not use language requiring all states to adopt specific laws (S/PV.4950, p. 4). In response to this, the French Ambassador explained that the Council merely set the goals, leaving each state free to decide the specific penalties, regulations and practical measures to be adopted (S/PV.4950, p. 8). Additionally, however, the language in OP 2 was revised, and in its final version the paragraph reads: "… all States, *in accordance with their national procedures*, shall adopt and enforce appropriate

effective laws …" (S/RES/1540, my emphasis). More than two years later, France returned to this issue, emphasizing that "[w]here there is no treaty … it [resolution 1540] does not lay down the law but asks States to fully shoulder their responsibilities" (France, S/PV.5538, p. 9). To the extent that sovereignty is increasingly conditioned on the fulfillment of obligations to the international community as discussed in chapter two, however, the effects for states independence may still be equally, or even more, serious.

Another concern in this area was whether the resolution could force states to join – or abide by – treaties they had not signed or ratified. For obvious reasons, this question was particularly sensitive for India and Pakistan. Again, the French ambassador clarified that resolution 1540 "does not compel any State to abide by the rules of instruments to which some States have chosen not to accede" (S/PV.4950, p. 8). Preserving the legislative equality, which entitles sovereign states to freely decide whether or not to adhere to specific obligations, was also emphasized by many states (*cf.* Indonesia S/PV.4950, p. 31). India thus declared emphatically:

> For our part, we shall not accept any interpretation of the draft resolution that imposes obligations arising from treaties that India has not signed or ratified, consistent with the fundamental principles of international law and the law of treaties (S/PV.4950, p. 24).

Accordingly, in the final version of the text, the preambular paragraph which affirms the importance of implementing multilateral treaties dealing with non-proliferation is only directed to state parties to those treaties. Thus, it does not include any obligation to support or join treaties, which some states may have chosen to abstain from (S/RES/1540). On the one hand, this can be interpreted as the Security Council taking a step back compared to previous practice, where it simply generalized certain treaty obligations through resolution 1373. On the other hand, since it now arguably has the ability to do so, then it is quite possible that some key obligations of non-proliferation treaties will still be generalized in the future, if resolution 1540 is not seen as enough.

A final concern brought up by member states regarding the manner in which these obligations were created was the necessity of acting under chapter VII. For Nepal, it was "completely incomprehensible" why the Security Council needed to adopt resolution 1540 under chapter VII of the Charter. The Nepalese representative thus speculated as to the possibility that the Council wanted to "keep the option open of using the present draft resolution to impose its will on Member States which could compromise their sovereign rights" (S/PV.4950 (Resumption 1), p. 14). Most likely, the main concern of Nepal here is the right of non-intervention, which can indeed be superseded by "enforcement under Chapter VII" (Article 2(7) of the UN Charter). Again, the sponsors attempted to defend their choice, arguing that the intention of using chapter VII was "to make it *unequivocally* legally binding for all United Nations Members and to send a strong political message" (Spain, S/PV.4950, p. 7, my emphasis). Countering this argument, many states referred to Article 25 of the UN Charter which stipulates that all decisions by the Security Council shall be accepted and carried out by member states, in other words making the decision of the Security Council the crucial condition and not the use of chapter VII. As long as the Security Council makes a decision, it is therefore unnecessary, according to these states, to adopt a resolution under chapter VII if the sole purpose is to make it legally binding (*cf.* Brazil, S/PV.4950, p. 4; Algeria S/PV.4950, p. 5; Malaysia on behalf of NAM, S/PV.4950 (Resumption 1), p. 4). New Zealand, however, takes an unexpected position on this issue; while being critical of the resolution in general, it supports the use of chapter VII, arguing that "if the Council is going to plug this gap, it must be plugged tightly. Anything less would undermine the credibility of the Council's actions" (S/PV.4950, p. 21).

In sum, it can be concluded that legality was prevalent in states' arguments challenging the legitimacy of the Security Council's adoption of resolution 1540. It was explicitly stated in the debate preceding the adoption that these measures should only be seen as temporary and a certain disappointment was also expressed that this understanding was not included in the text of the resolution itself. Most importantly, member states argued that the Security Council has no mandate to legislate and expressed serious qualms about the consequences for the process of international law-making. In addition,

member states questioned the need for chapter VII in order to create binding obligations and some suspected ulterior motives behind the sponsors' approach. Member states' concern over a perceived lack of legality did not disappear over time either, but surfaced again at the time of the renewal of the mandate of the 1540 Committee, which was opposed by some countries on the grounds that the issue belonged in the General Assembly.

Justifiability

In terms of justifiability, the lack of clarity on certain key issues was perceived to be a problem in the discussions on resolution 1540 as well. This was mainly related to the consequences of non-compliance and the mandate of the 1540 Committee. Arguments based on justifiability were also made concerning a perceived lack of consistency in treatment between cases and countries.

The consequences of non-compliance

Like resolution 1373, the language of the draft resolution did not clearly determine either the definition or the consequences of non-compliance. However, when acting under chapter VII, the Security Council, in theory at least, may follow up states' compliance and, if considered necessary, decide on a variety of enforcement measures up to and including military force. Specifically, the inclusion of the phrase "to combat by all means" in one of the operative paragraphs in the April 15 draft, caused Pakistan to express a "legitimate fear" (S/PV.4950, p. 15). Although the usual SC lingo authorizing the use of force is "the use of all necessary means", this could still possibly be interpreted as justifying coercive measures.[62] To allay such concerns, the sponsors of the resolution repeatedly declared that "[w]hat this draft resolution does not do is authorize enforcement action against States or against non-State actors in the territory of another country. […] Any enforcement action would require a new Council decision" (UK, S/PV.4950, p. 12). Yet an interesting twist is offered by France, arguing that "any coercion that is not justified, *considered or* authorized by the Council" would be precluded (S/PV.4950, p. 9, my emphasis). This literally means that as long as the situation had been

[62] See the discussion in chapter five under "Characteristics of resolution 1373".

considered by the Security Council, a Council authorization would in fact not be necessary.

In the final version of the resolution, OP 11 expresses the Council's "intention to monitor closely the implementation of this resolution, *and, at the appropriate level, to take further decisions* which may be required to this end" (S/RES/1540, my emphasis). According to Germany, this means that any enforcement measures must be subject to decisions by the Security Council as a whole (S/PV.4956, p. 10). Still, this is not stated explicitly, but rather clothed conveniently in constructive ambiguity. The fact that the resolution is open-ended, further means that it can always be taken out of the closet and dusted off, when the political climate is different. As discussed previously, the entire post-Cold War period has been one of expansive interpretation and innovation for the Council. Merav Datan therefore argues:

> It has to be acknowledged that there is a rational basis for concern over the potential for expansive interpretations of SC resolutions authorising the use of force, particularly in the view of the US and UK interpretation that UNSC 1441 (November 2002) provided a sufficient basis for their use of military action in Iraq despite interpretations to the contrary by other Council members and legal scholars (Datan 2005:6).

Her point is that in any case it will be political realities, rather than legal arguments, that determine which interpretations may be possible (Datan 2005:10).

Illustratively, while the United States initially downplayed the enforcement card, in the hope that states would comply with resolution 1540 on a voluntary basis, it later indicated that that policy is not set in stone. According to senior State Department official Andrew Semmel, the US "will revisit this view if it becomes evident that countries are not taking their 1540 obligations seriously or are ignoring their responsibility to put in place the legal and regulatory infrastructure required under the resolution" (Semmel 2004a). In another speech a couple of weeks later, he clarified that the US "game plan … should include diplomacy, law enforcement, economic incentives and disincentives, border security measures, *and where necessary the use of force*" (Semmel 2004b,

my emphasis). Yet the question remains as to who decides on the threshold for necessity.

The mandate of the 1540 Committee

Once more, as in the case of resolution 1373, a lack of clarity surrounded not only the issue of non-compliance, but also the mandate of the 1540 Committee. For that reason Pakistan argued that "the creation of a Security Council committee … is unnecessary. Its functions are unclear and unspecified. … [and it] could be used to harass countries, and even demand explanations regarding 'why they are not parties to the NPT'" (S/PV.4950, p. 15). Others, such as Spain, felt that the obvious model for the 1540 Committee was the CTC, and accordingly it envisioned "a committee governed by the principles of cooperation, equal treatment and transparency, and of which providing technical assistance to States would be an essential component" (S/PV.4950, p. 7). Furthermore, in contrast to the CTC, the proposed Committee was intended to exist only for a limited period of time, but in the beginning it was not clear how long that time period should be, with suggestions ranging from six months to two years. Hence, the Philippines complained that, "[b]ased on the divergence of ideas on the time frame of the committee, it is clear that the sponsors have different ideas on the scope of the role of the committee" (S/PV.4950, p. 3). Some states then wanted the sponsors to specify the committee's mandate in advance (*cf.* Algeria S/PV.4950, p. 5-6). The US declined, referring to the "standard practice for Security Council committees" to determine their own program of work, to be composed of all – but only – members of the Council and to operate by consensus (S/PV.4950, p. 18). Later on, however, even the United States emphasized that the purpose of the 1540 Committee "is not to make judgments about whether States are 'good' or 'bad' in relation to implementing resolution 1540" (S/PV.5538, p. 14).

Consistency and coherence

In relation to the discussions whether resolution 1540 should be adopted under chapter VII or not, the sponsors also attempted to justify their position based on consistency arguments. Spain, for example, referred to its view of the draft resolution as a "continuation of what began with resolution 1373 … It would therefore be hard to understand why one would not apply Chapter VII on this

occasion" (S/PV.4950, p. 7). Other countries disagreed with the Spanish stance and stressed that the use of Security Council resolutions was exceptional and should therefore not constitute a "precedent … for the handling of other new issues on the world agenda" (Mexico, S/PV.4950 (Resumption 1), p. 3). In the debates, the principles of consistency and coherence were also referred to concerning the actual intention and purpose of the resolution, whether it was based on consistent and coherent treatment of all states. Against the backdrop of the constant tension between the goals of disarmament and non-proliferation, many non-aligned countries emphasized, for example, that the only truly effective way to prevent non-state actors from gaining access to weapons of mass destruction was complete disarmament. Namibia thus lamented that the "problem is that those States that have such weapons are unwilling to eliminate them. Instead, they are preoccupied with preventing others from acquiring them. At the same time, they continue to modernize their weapons, in the name of national security" (S/PV.4950 (Resumption 1), p. 16).[63]

Another issue that was brought up as discriminatory was the resolution's inclusion of so-called dual-use technology. Some developing countries voiced their concerns that an additional motive of the resolution might be to keep technological advances to a select few. India, for example, remarked that the "flip side of export controls is indiscriminate technology denial to States with legitimate socio-economic needs" (S/PV.4950, p. 24). China agreed and argued that in order to make non-proliferation efforts effective, "we must guarantee the legitimate rights of all countries – including developing countries – to utilize and share dual-use scientific and technological advances and products for peaceful purposes" (S/PV.4950, p. 6). For them, adherence to the principles of consistency and coherence was intimately linked to the legitimation of the Security Council's actions. According to India, the issue "goes beyond a mere legal consideration of the Council's allocated powers under the Charter. The credibility and even respect that the Security Council can garner depend on its actions being the product of internal cohesion and

[63] A case in point is the recent decision by the UK Parliament to spend £ 20 billion on a new generation of nuclear submarines to carry Trident missiles after the current ones go out of service in 2024 (Cowell 2007).

universal acceptability" (S/PV.4950, p. 23). The Indian representative thus explicitly connected legality with justifiability and consent, indicating that a lack in the former may be partly compensated by the two latter elements. Later on in the implementation process, the issue of the nationality of the experts assisting the 1540 Committee also came up. Thus, when Chairman Motoc, in December 2004, invited additional nominations for the Committee's experts, he particularly asked for persons from the Asian and African regional groups, as they were not represented in the first stage of the expert recruitment process (S/PV.5097, p. 3). The importance of this issue was further stressed by the representative of Pakistan, who argued that a more representative mix of experts would help

> dispel the widely held perception – outside the Council, perhaps, if not inside – that the whole process of drafting the resolution, the push for its implementation and the composition of the Committee's experts and staff are being led by the developed countries to the exclusion of developing Member States (S/PV.5097, p. 6-7).

In sum, it can be concluded that the discussions on the justifiability element displayed many similarities to those in the context of resolution 1373. The Security Council's actions were criticized based on the lack of clarity both in relation to the mandate of the 1540 Committee and the issue of non-compliance. In relation to the latter, however, the United States has explicitly not ruled out the use of force, demonstrating that the fears of states concerning the use of chapter VII that were discussed under "Legality", may not have been completely unwarranted. Interestingly, however, justifiability arguments were here used in support of the legitimacy of the Council's legislative activity for the first time. Based on the principle of consistency, it was argued, UNSCR 1540 should be adopted in the same way as UNSCR 1373. Consistency was also referred to in the criticisms of the Security Council's inclusion of so-called "dual use" technology in the scope of the resolution. This, along with an inequitable distribution of experts in the Committee, caused some states to characterize the whole process as driven by developed countries to the exclusion and detriment of developing countries.

Consent

Whereas member states initially freely consented to resolution 1373, despite questionable legality, they displayed a much more cautious attitude with regard to resolution 1540 and their consent can perhaps best described as conditional. At the same time, they are more aware of the full implications of their actions, which is why consent can be viewed as even more significant in the legitimation of resolution 1540. As in the previous chapter, consent will be discussed in relation to exceptional circumstances, participation and ownership.

Exceptional circumstances

Similar to resolution 1373, consent to this unusual process was given on an exceptional basis, motivated by a perception of emergency. At a press conference in his capacity as Security Council President for the month of April, 2004, German Ambassador Gunter Pleuger described the situation as one in which "everyone felt that there was an 'imminent threat', which had to be addressed and which could not wait for the usual way" (Press Briefing 2004). Despite the lack of any directly precipitating events, Member states deemed there was a "clear and present danger that non-State actors will take advantage of this gap [which] requires exceptional responses" (Philippines, S/PV.4950, p. 3). While many states qualified their consent, maintaining that the resolution "represents a critical stopgap measure rather than an optimal solution" (New Zealand, S/PV.4950, p. 21), for most it seemed to be acceptable to substitute the procedural element of one legitimation logic for another, i.e. consent for legality. Interestingly, however, the representative of Spain (one of the sponsors of the resolution) stated that "since the Council is legislating for the entire international community, this draft resolution should *preferably*, *although not necessarily*, be adopted by consensus and after consultations with non-members of the Council" (S/PV.4950, p. 7, my emphasis). In other words, Spain could apparently accept that even fewer than 15 states were legislating for the rest. Yet, summing up the initial debate, the small country of Nepal probably spoke for the majority of the participants when it concluded that:

> The Council needs the willing support of the broader membership to maintain international peace and security. To ensure such support, the Council … should

> resist the temptation of acting as a world legislature, a world administration and a world court rolled into one (S/PV.4950 (Resumption 1), p. 14).

Having been established with an initial two-year mandate, the 1540 Committee, and by extension the regime set up by the resolution itself, was up for a new test of approval by the Security Council in the spring of 2006. Most of the permanent members (all but China) had stated their explicit support for an extension of the Committee's mandate already by February, and some even before that (see the statement of the Russian Federation S/PV.5375, p. 10). The United Kingdom held that the 1540 would remain a vital tool "with, or without a Committee. But we see a lot of work for the Committee still to do that it cannot complete by the end of April" (S/PV.5375, p. 16). A few non-Council members, however, were not quite as enthusiastic about the proposed extension on account of their conviction that the issue belonged in the General Assembly and that resolution 1540 had been an exceptional measure (*cf.* Brazil S/PV.5375, p. 30). Many states also took a middle position, such as Indonesia who had "no difficulties with an extension" so long as the mandate was not changed and – preferably – the possibility for a multilateral legal instrument was explored (S/PV.5375, p. 27). In the end, the position of the permanent members prevailed, and the Security Council – acting under chapter VII – unanimously adopted resolution 1673 on April 27, 2006. The new resolution reiterated the decisions in resolution 1540 and stressed their importance, endorsed the work being carried out by the 1540 Committee, called upon states that had not yet submitted a report to do so without delay and decided "to extend the mandate of the 1540 Committee for a period of two years" (S/RES/1673, OP 4). Although no state asked to speak at that meeting, the decision to extend the Committee's mandate was welcomed by most states speaking at the open meeting of May 30, 2006 (*cf.* Greece, S/PV.5446, p. 11; Qatar, S/PV.5446, p. 14; United States, S/PV.5446, p. 20; Russian Federation S/PV.5446, p. 21).

Participation

As mentioned in the beginning of the chapter, the negotiating history of resolution 1540 is significant in many ways. Although the negotiation process moved at lightning speed compared to most treaty negotiations, the

time between the first draft and the adopted resolution is unusually long by Security Council standards where negotiations on most drafts are completed in a matter of weeks. Additionally, more states were consulted on drafts of the resolution than ever before. Indeed, the representative of the United Kingdom called it "an unprecedented effort to discuss and consult with the United Nations membership" (S/PV.4950, p. 11), which can be interpreted as a conscious move on the part of the resolution's sponsors to compensate for the criticized legality aspect by way of an inclusive consent-giving process. This effort was also duly appreciated and, speaking on behalf of NAM, Malaysia's ambassador conveyed his sincere appreciation of the "preparedness to engage the larger membership of the United Nations in consultations on this very important question, [and] not just confining discussion to members of the Security Council" (S/PV.4950 (Resumption 1), p. 3). Illustratively, at the request of six non-Council members,[64] the Security Council even agreed to hold an open debate on the draft resolution, where members and non-members alike could express their views on the subject and the text at hand. The initiative was a "first", according to Egypt (S/PV.4950 (Resumption 1), p. 2) and highly appreciated by practically all states based on the principle phrased by the representative of the Philippines:

> Those who are bound should be heard. This is an essential element of a transparent and democratic process, and is the best to proceed on a resolution that demands legislative actions and executive measures from the 191 Members of the United Nations (S/PV.4950, p. 2).

An alternative take on this development, however, is offered by political scientist Ian Hurd, who argues that the tendency of sponsors of a draft resolution to increasingly consult with non-Council members reduces the importance of a non-permanent seat on the Council. As the distance between permanent and non-permanent members on the Security Council has simultaneously increased, the difference between being a non-permanent member and non-member of the Council has doubly declined over the past few years (Hurd 2002:42-43). This could then explain why the Security Council has been such

[64] Canada, Mexico, New Zealand, South Africa, Sweden and Switzerland.

an accommodating channel for the permanent members' (especially the P1) use of institutional power.

For many states, however, this still was not enough, or rather "no substitute" (New Zealand, S/PV.4950, p. 21) for the "legitimacy that is provided by negotiations in a multilateral framework" (Chile, S/PV.4950, p. 10).[65] Pakistan therefore expressed its strong preference for negotiations on non-proliferation taking place within the Conference on Disarmament, which it described as "universal and non-discriminatory" (S/PV.4956, p. 3). Apparently, this was a deeply held belief for a couple of countries as they continued to emphasize, more than one year later, that the purpose of the Committee must be to "serve as a supplement to, and not a substitute for, multilateral and international conventions related to weapons control and the elimination of weapons" (Syria, S/PV.5229 (Resumption 1), p. 3; see also Pakistan, S/PV.5229 (Resumption 1), p. 16). Connecting consent with efficiency, India further stressed that the limitations in the implementation process of resolution 1373 should be seen as an illustration of the need for caution in using the Security Council "as a route to short-circuit the process of creating an international consensus" (S/PV.4950, p. 23). Along the same lines, New Zealand added that acceptance by Member States is not furthered by "any impression of negotiations behind closed doors or that a smaller group of States is drafting laws for the broader membership" (S/PV.4950, p. 21). Thus, the working principles of the CTC – transparency, cooperation and even-handedness – were eventually also adopted by the new subcommittee, as well as the tradition to brief the Security Council regularly, and hold periodic open debates that allow non-members to express their views on the work of the Committee. This approach was often also commented on appreciatively by states (*cf.* Spain, S/PV.5097, p. 8). Nonetheless, after a slowdown in the number of reports submitted by member states in the second quarter of 2005, Ambassador Motoc, speaking in his capacity as the representative of Romania, argued that the transparency characterizing the work of the committee had to go both ways. In the same way that the Council and the committees informed the general membership

[65] For a discussion of multilateralism as the *sine qua non* of legitimacy, see the section on "consent" in chapter four.

of their work, the individual states should inform the Security Council of their implementation efforts (S/PV.5229, p. 11).

Ownership

In one sense, it is possible to argue that resolution 1373 compensated part of its lack of participation in the negotiation process by using previously agreed language from the 1999 Convention on Terrorism Financing. Although the convention had only been ratified by four states at the time of adoption of resolution 1373, it had still been negotiated in the General Assembly's Sixth Committee and was adopted without a vote by a General Assembly resolution on December 9, 1999 (A/RES/54/109). The obligations imposed on states by resolution 1540, however, have no equivalent in either General Assembly resolutions or other multilaterally negotiated instruments. Notwithstanding a more inclusive negotiating history then, it goes further than resolution 1373 as it is laying down rules that were altogether new and thereby lacking the legitimacy normally associated with language agreed upon in inclusive multilateral settings (Lavalle 2004:426, 436; Datan 2005:9-10). Nonetheless, the sponsors did initiate discussions with regional groups "and other interested parties [on] what is in the text and what is not in the text" (Philippines, S/PV.4950, p. 2), and changes did occur. The last permanent member to agree, for example, was China, and it did so only after a reference to interdiction of shipments (which supposedly could have been seen as an endorsement of the PSI) had been deleted (Datan 2005:5; S/PV.4950, p. 6).When asked by a reporter to confirm this deal with the Chinese, however, US Ambassador Negroponte repeatedly dodged the question (see USUN Press release # 41 (04)). Still, however, Cuba argued that the wording of OP 10 was ambiguous enough to allow for an interpretation that activities such as the PSI had now been approved by the Security Council (S/PV.4950, p. 30). The United States has also subsequently promoted the PSI by citing OP 10 of resolution 1540 and explained how the PSI and resolution 1540 are not only politically and legally compatible, but also mutually reinforcing[66] (PSI – FAQ, Bureau of Nonproliferation, 26 May 2005).

[66] Since the time of the adoption of UNSCR 1540, however, both the Report of the Secretary-General's High-Level Panel and the SG himself has commended the PSI, thereby making the issue somewhat less controversial (A/59/565, p. 43; Press

Another concession made to several of the non-members and non-aligned countries concerned disarmament. The original draft presented by the permanent members to the wider Council and UN membership on March 24, 2004, lacked any references to the importance of disarmament and disarmament agreements, even though such references are usually included in WMD non-proliferation initiatives[67] (Datan 2005:4). The connection between non-proliferation and disarmament is also part of the so-called "basic bargain" of the NPT, which has played a big part in shaping international norms in this area and which stipulates that non-nuclear weapon states agree to non-proliferation in exchange for access to peaceful nuclear technology and good faith disarmament negotiations by nuclear weapon states (Graham 2004:52). Thus, it is possible that such references were withheld for the purpose of using them as bargaining chips with non-nuclear weapon states that deem the association between disarmament and non-proliferation to be crucial (Datan 2005:4). According to the Indian representative, "[e]xclusive focus on non-proliferation does disservice to the essential principle of the mutually reinforcing linkage between disarmament and non-proliferation" (S/PV.4950, p. 23-24). In response, the sponsors used efficiency arguments, stressing their desire to have a focused resolution, dealing with the specific problem of WMD proliferation and non-state actors, and not to risk deadlock by "bringing in too many additional issues" (UK, S/PV.4950, p. 11), thereby attempting to substitute substance for process.

However, in the draft of April 15, which constituted the textual basis for the debate a week later, a preambular reference to disarmament had been included in the context of a reaffirmation of the Presidential Statement from the Security Council Summit in January 1992 (Datan 2005:4). Still, a number of delegations continued to call for more and more significant references to disarmament during the debate (see e.g. the statements of Algeria, Germany, Peru and New Zealand in S/PV.4950, pp. 5, 18, 20 and 21 respectively). In

Release SG/SM/9757). The US has also publicly announced their satisfaction with that development, see USUN Press releases # 63 (05) and # 83 (05) respectively.

[67] See for example the *EU Strategy Against Proliferation of Weapons of Mass Destruction*, adopted in Thessaloniki, Greece, on 12 December, 2003 (Council of the European Union 2003).

response, however, the United Kingdom used an argument based on legality and differing mandates, similar to those made with regard to UNSCR 1373. The UK representative pointed out that the resolution would then "risk treading on the toes of competent bodies such as the First Committee of the General Assembly, the Conference on Disarmament and the review process of the Treaty on the Non-Proliferation of Nuclear Weapons" (S/PV.4950, p. 11). Nonetheless, in the final version of the resolution the following additional preambular reference was included: "*Encouraging* all Member States to implement fully the disarmament treaties and agreements to which they are party" (S/RES/1540, emphasis in original). As previously mentioned, the resolution was unanimously adopted and Pakistan, one of its fiercest critics, explained its change of position in the following way: "We appreciate the serious efforts made by the sponsors of the draft resolution to accommodate our major concerns and those of other States. The draft resolution was revised three times. That enabled Pakistan to support the resolution" (S/PV.4956, p. 3).

In sum, it has been shown that legitimation based on consent in lieu of legality was a strategy consciously sought by the sponsors of resolution, as they made an effort to create an inclusive negotiation process. While the sponsors' effort was welcomed in all quarters, it is clear that it was still not seen as carrying the same legitimating capacity as negotiations in traditional multilateral forums. Since changes in the text of the draft resolution to accommodate some of the concerns of non-members did occur, however, it is clear that legitimation arguments based on consent in this case had more to do with opportunities for participation and ownership than feelings of sympathy and solidarity.

Efficiency

If the consent-based arguments were somewhat weaker here than in relation to resolution 1373, legitimation based on efficiency was probably stronger. With resolution 1540 de facto closing a gap in international law, its utility was valued by practically all member states. As in the previous chapter, efficiency will be discussed under the following sub-headings: efficient law-making, effective implementation and appropriate methods.

Efficient law-making

The sense of urgency that member states felt with respect to non-proliferation and non-state actors, even in the absence of catastrophic events like 9/11, stemmed from the perception that existing law on the matter was not complete. Thus, in his remarks to the press on March 24, 2004, after a resolution draft had been shared with all Council members, US Ambassador Negroponte emphasized that the "fundamental purpose of this resolution is to deal with a very important gap that exists in international law today" (USUN Press release # 41 (04)). According to German Ambassador Pleuger, the Americans had made a correct assessment and new law needed to be created. He further concluded that both the traditional means of custom formation and treaty negotiations took a long time and that the issue therefore could not wait for the usual way (Press Briefing 2004). Countering arguments that the Security Council was going beyond its mandate, the UK representative further stressed that "only the Security Council can act with the necessary speed and authority", thus "not only is it appropriate for the Security Council to act, it is imperative to do so" (S/PV.4950, p. 11). Indeed, for France, this resolution symbolized the "idea of effective multilateralism" (S/PV.4950, p. 9). Even non-traditional allies of the US, such as Algeria, admitted that "[i]n the absence of binding international standards, and because of the seriousness and the urgent nature of the threat, the response to it needs to be articulated and formulated by the Security Council" (S/PV.4950, p. 5). It is thus clear that for most states, the Security Council was seen as the least bad option in their consideration of all the elements of legitimacy.

Yet for the Americans, the Security Council avenue was not a necessity, it was a strategic choice, and going down the road of multilateral treaty negotiations was never an alternative for several reasons. First, having made the assessment in the aftermath of 9/11 that the non-proliferation regime was lacking, the US assumed that they simply did not have "the luxury of our predecessors for negotiation crossing many months or years to arrive at a solution to this danger" (Semmel 2004a). Second, although most, if not all, states generally agree on the threat stemming from WMD ending up in the hands of terrorists, it has still proven to be difficult for states to reach agreement on concrete measures (Semmel 2004a). This is also illustrated by the controversy surrounding the

PSI and the complete failures of both the 2005 NPT Review Conference and the World Summit to create a consensus on non-proliferation issues. The attitude of the Americans was also supported by the UK, which argued in the April debate that this issue "should not be held hostage to the uncertainty over how long such [multilateral] arrangements would take to negotiate, how comprehensive they would be or whether agreement would be reached at all" (S/PV.4950, p. 12). In the form of a Security Council resolution, however, strong national controls and criminalization of non-state proliferation became a requirement, not an option – hence its utility. Just like its predecessor then, resolution 1540 clearly violates the legislative equality of states, illustrating further how non-proliferation of weapons of mass destruction is placed in the same special category of issues as terrorism – namely those that are too important to be conditioned on states' consent.

Effective implementation

Highlighting the importance of results for legitimation arguments, Ambassador Pleuger said it was not enough to adopt a Security Council resolution "with legitimacy and acceptance", it also had to be implemented (Press Briefing 2004). However, as the original deadline for states to submit their national reports on their implementation of resolution 1540 rolled around, only 59 states had done so, making the initial response rate less than one-third. By December 2004, over a month past the original deadline, the number was up to 86 states and one organization (the EU) (S/2004/958, annex, p. 4). Chairman Motoc explained that while the practice of submitting reports to a Security Council body was not new, "the subject matter of the Committee's work has an added degree of both complexity and sensitivity" (S/PV.5097, p. 2), which could then perhaps account for the large number of tardy reports, including by developed countries, as pointed out by Pakistan (S/PV.5097, p. 6). Several Council members recognized this and commended the work of the chairman and his Committee, but the United Kingdom was not satisfied.

> The rapidity with which we have responded to the adoption of this resolution actually does not do us much credit. The need now to continue on this path, expedite progress and actually achieve the goals of the resolution is, it seems to me, quite apparent (S/PV.5097, p. 11).

In conclusion, the UK representative added that

> with this Committee – and I fear with the others – there has been an excessive emphasis put on process rather than substance. Process may be important, but the substance has to be got right; otherwise we do not deliver what we need to deliver (S/PV.5097, p. 12).

Thus, while the efficiency of a Security Council resolution was praised by the United Kingdom just months earlier, it is clear that potential capacity is not necessarily enough to legitimate a policy, it needs to actually be seen to produce some results. When Chairman Motoc briefed the Security Council in April 2005, however, the numbers had significantly improved. 115 states had then submitted a first report to the Committee (S/PV.5168, p. 7) and by the end of October, 21 states had also provided additional information in response to questions from the committee based on their first reports. Yet 67 states still had not submitted a first report (S/PV.5293, p. 7) and when the Committee's mandate expired in April 2006 that number was only down to 62 (S/2006/257, p. 3).

In the Committee's final report to the Security Council at the end of its initial two-year mandate, the reasons for non-reporting as well as gaps in implementation were said to be, among other things, "insufficient understanding, lack of capacity, and different national priorities" (S/2006/257, p. 3). With "insufficient understanding", the Committee referred to the fact that many countries had been under the impression that the reporting requirements and other obligations of the resolution only applied to those states actually possessing weapons of mass destruction. Nonetheless, the 1540 Committee emphasized that the prescribed measures in this resolution needed to be taken by everyone in order to avoid the creation of a "safe haven" or "proliferation pathway" for terrorists (S/2006/257, p. 14, 15). Also, and perhaps most importantly, "inasmuch as this is a direct and binding requirement of the resolution, all States must take steps to enact and enforce the appropriate legislative measures" (S/2006/257, p. 15). Another problem pointed to in the report was that many states had not actually adapted their national laws to the requirements of the resolution but referred to such legislation as had been in place since their ratification of the main WMD treaties (the NPT,

the BWC and the CWC). However, since the problem with these treaties was that they did not include non-state actors – a gap filled by UNSCR 1540 – then the laws adopted in conformity with them were not sufficient for the demands of resolution 1540. In the end, the report concluded that the response from Member States was less than fully satisfactory, since almost a third of the UN member states still had to submit their first report and many of the submitted reports had insufficient information. In other words, much more remained to be done (S/2006/257, p. 28-29). Ultimately, the Committee concluded that a "full implementation of resolution 1540 (2004) by all States is a long-term endeavour that requires ongoing monitoring" and therefore the Committee recommended "that the Security Council … [e]xtend the mandate of the Committee established pursuant to resolution 1540 (2004) for another two years" (S/2006/257, p. 29). By September 2006, only three more states had submitted their first reports (Chairman Burian, S/PV.5538, p. 7), which seems to suggest a serious slowdown in the implementation process. Ghana described this as "disheartening" (S/PV.5538, p. 11).

The importance of concrete results for legitimation purposes can also be illustrated by the faltering perceptions of legitimacy for the Treaty on the Non-Proliferation of Nuclear Weapons and the Conference on Disarmament. According to former UN Secretary-General Kofi Annan, the former is facing "a crisis of confidence and compliance" and the latter, even more seriously, "a crisis of relevance" (*In larger freedom*, A/59/2005, p. 28). This further means that resolution 1540 has taken on added importance, albeit perhaps more because of others' failures than its own successes. Chairman Motoc of the 1540 Committee thus also argued that since the 2005 NPT Review Conference failed to produce a consensus outcome, "it was all the more important to work on the Council approach to non-proliferation" (Press Briefing 2005), and Kofi Annan has welcomed both resolution 1540 and the PSI as efforts to supplement the Non-Proliferation Treaty (*In larger freedom*, A/59/2005, p. 28). Recently, a US State Department official even described resolution 1540 as "a cornerstone in the international legal foundation against WMD terrorism" (Lehrman 2006).

Appropriate methods

As has been demonstrated, several member states legitimated resolution 1540 based on strict efficiency concerns. The trade-off in their reasoning is aptly captured by New Zealand, which emphasized that

> it is important that issues of process and substance do not become confused. It is no secret that there is some disquiet within and without the Council over the process by which this draft resolution is being produced. However, those qualms must not be allowed to distract States … from the importance of the issues being addressed (S/PV.4950, p. 21).

Indeed, according to the Philippines, the importance of addressing this threat "should override any legal niceties regarding the resolution's possible political or technical implications, which may or may not materialize" (S/PV.4956, p. 9). Furthermore, in September 2005, a regional seminar on the implementation of resolution 1540 was held in Buenos Aires (S/PV.5293, p. 7), upon which France satisfactorily commented that states' attitudes toward the resolution were shifting. Although they had formerly felt that "the Security Council was legislating in their place", they now seemed to "better understand the objectives of the resolution" (S/PV.5293, p. 15). Once more, we can thus see how certain member states (most conspicuously the permanent members of the Security Council) designate themselves as the interpreters of the best interests of the others, prescribing the necessary medicine, to continue the medical analogy from the previous chapter. Even though states have negotiated several multilateral arms control agreements, the specific and highly valued contribution by UNSCR 1540, which made France describe it as "unique" (S/PV.5538, p. 9), is its comprehensive and mandatory character. According to the Committee's final report to the Council in April 2006, resolution 1540 constitutes "the first international instrument that deals with weapons of mass destruction, their means of delivery and related materials in an integrated and comprehensive manner" (S/2006/257, p. 2), whereas the traditional treaties are "far from providing a fool-proof net" (S/2006/257, p. 2).

From a more practical implementation perspective, however, the concerns over "reporting fatigue" that were so prevalent in connection with resolution 1373 spilt over to resolution 1540 as well, and the reporting requirements

were criticized even before they had been adopted. India, for example, argued that the "excessive reporting obligations resulting from resolutions 1267 (1999) and 1373 (2001) have led to repetitive reporting exercises and burdensome bureaucratic structures without commensurate results on the ground" (S/PV.4950, p. 23). Following the developments within the CTC, however, the Committee's report to the Council in April 2006 also recommended the Security Council to look into the feasibility of identifying best practices (S/2006/257, p. 9). Yet in contrast to what was done in the CTC, where these so-called best practices are taken from international and regional organizations and other multilateral arrangements, here they may be taken directly from other individual states. At the Committee Chairs' briefing of the Security Council in May 2006, Ambassador Burian informed that while examining national reports in the future, the 1540 Committee's experts would thus identify national practices that may be used as examples to states seeking legislative assistance in implementing the resolution (S/PV.5446, p. 9). This practice will almost inevitably serve to strengthen the influence of states with greater legal capabilities over the content of the domestic laws of other states. The United States, for example, offered its services already when President Bush first mentioned the need for a resolution of this kind to the General Assembly, informing that "[t]he United States stands ready to help any nation draft these new laws, and to assist in their enforcement" (USUN Press Release # 146 (03)).

In sum, it can be concluded that efficiency was highly prevalent in the debates over resolution 1540. In contrast to resolution 1373 which built on an existing convention, there was no international legal instrument addressing non-proliferation in relation to non-state actors. Thanks to this gap in existing law, the US managed to frame the matter as urgent and thus get other states to accept using the Security Council rather than a traditional treaty conference. The much weaker implementation record of UNSCR 1540 has caused some damage its perceived efficiency, but with key forums in the non-proliferation regime being completely deadlocked, legitimation arguments still stress efficiency to a large extent.

Concluding discussion

In conclusion, this chapter has demonstrated once more the utility of the analytical framework and the relevance of the legitimacy elements. More concretely, it has demonstrated how the political logic of legitimation is again substituted for the legal logic, even though the cases show significant differences concerning how each individual element is being used. In terms of process, legitimation arguments were solely based on consent and instead of being praised for its innovativeness, the Security Council was directed to observe its mandate strictly in the future. Furthermore, member states made it clear that legitimation through their consent was this time only to be seen as a temporary, "stopgap", measure until a traditional legal instrument could be negotiated. Even though the sponsors of resolution 1540 used dramatic language, the analysis suggests that the crucial factor for states when giving their consent, rather than exceptional circumstances as such, was a more inclusive negotiation process, where some adjustments were actually made in order to accommodate their concerns. Still, it was explicitly stated that – in the long run – this procedure could not be viewed as an alternative to regular inter-state negotiations in multilateral forums. Moreover, this was not only due to consent-based concerns. Many arguments relying on the legality element were explicitly concerned with protecting the international law-making process via treaty and custom formation and thereby states' legislative equality. As was stated previously, these concerns also did not subside much with time and this may be one reason why resolution 1540 is, so far, the last one with legislative qualities.

Regarding substance, legitimation was also predominantly argued according to the political logic and, as in the case of UNSCR 1373, legitimation was even based exclusively on efficiency at times. Indeed, with resolution 1540 being aimed toward filling a "gap" in international legislation, the efficiency of the process was viewed as superseding legal concerns, of which member states were well aware this time, and thus strongly reinforced consent-based arguments. However, based on the submitted national reports so far, the implementation of UNSCR 1540 is still unsatisfactory, almost three years after its adoption. Judging by the fate of the NPT regime, concrete results carry significant

weight for legitimation purposes, and thus one may ask how long resolution 1540 can be perceived as legitimate based on efficiency. Interestingly, in this case, the actions of the Security Council were also legitimated by some states based on justifiability arguments. In line with the principle of consistency, they argued that UNSCR 1540 should exhibit the same traits as UNSCR 1373, i.e. be adopted under chapter VII. Aside from that, justifiability arguments were used in much the same way and there even appears to have been some learning effects between the two adoption processes. In relation to clarity, for example, member states this time demanded explicit accounts for how certain paragraphs of the text were to be interpreted before they agreed to the language.[68] Additionally, definitions of some key terms ("means of delivery", "non-state actor" and "related materials") were provided for the purposes of the resolution and, although criticized by some for not being specific enough (*cf.* Pakistan, S/PV.4950, p. 15), arguments concerning a lack of definitional clarity were not as prevalent as they were in relation to resolution 1373.

As has been demonstrated by the preceding analysis, substitution of political for legal legitimation elements was much more difficult to achieve the second time around. On the other hand, the fact that the resolution was still finally adopted by consensus may be construed as a deliberate choice by member states to prioritize arguments following the political logic, which would then make the decision more consequential. Indeed, efficiency, supported by consent, was consciously substituted for both legality and justifiability. Yet the division was not clear-cut between the two logics and "within logic trade-offs" figured in this process as well. For example, some states advocated the use of chapter VII based on consistency, while others argued against the use of chapter VII based on legality. Also within the political logic, non-Council members motivated their suggestions for textual amendments with arguments based on consent, whereas the sponsors retorted with efficiency concerns.

[68] Admittedly, it is possible that such demands also were made in relation to resolution 1373, only in informal – and thereby closed – sessions, but either way, it can safely be assumed that the readiness to accept harsh language was much greater in late September 2001 than in April 2004.

Furthermore, through the adoption of resolution 1540 the United States, although in this case also aided by the UK and Russia, demonstrates once more how it is capable of using institutional power in order to increase its influence both temporally and spatially. While Security Council action on this issue was perceived as necessary, but sub-optimal, by most states, for the United States the choice was one of strategy, not necessity. Afterwards, the US has openly acknowledged that the option of multilateral treaty negotiations in order to regulate this issue was never on the table. With other countries acquiescing to this process, despite its implications for the international legal process, UNSCR 1540 could be viewed as a sign that that process may be about to change, or at least become more fragmented. The fragmentation and flexibilization of previously strict legal standards is further characteristic of hegemonic international law; and perhaps resolution 1540 is best described as an example of its collective version. In this case, compared to resolution 1373, all the permanent members (except China) pushed and pulled the other member states in a joint effort. The influence of the permanent members was displayed once more in relation to the renewal of the mandate of the 1540 Committee, a decision which was most enthusiastically advocated by the P5. Indeed, even the inclusive negotiation process can be interpreted as a sign of increased influence for the permanent members, as the difference between a non-permanent Council seat and non-member status decreases. In short, the consent given in this case carries the seed of substantial change in international rule-making.

Chapter seven

International legitimacy-making

"Like most fashions, fashions in legitimization change from time to time, and the crucial periods in political history are those transitional years of conflict between old and new concepts of legitimacy…"
Inis Claude

In this dissertation I have endeavored to explore the often misunderstood and sometimes also ignored relationship between power and law by focusing on the legitimation of international rule-making from both legal and political perspectives. It is now time to revisit the purposes and questions that were introduced in the introductory chapter in light of the conclusions drawn from the previous chapters. This chapter will begin by discussing the contribution of the focus on legitimacy and legitimation arguments to the study of issues at the nexus between international politics and international law. Thereafter the utility of the analytical framework will be addressed, including the question of its potential wider applicability. Then the empirical findings of the study will be addressed in relation to the wider implications that have been noted for the construction of legitimacy, the practice of international rule-making and the influence of the United States in the post-Cold War era. Lastly, the results of this study will be related to the need for further research on these issues.

Bridging the gap

One of the main arguments of this study is that power and law are intimately connected and that, consequently, neither international politics nor international law can be fully understood without an appreciation of the other. Fundamentally, this close, yet at times contradictory, relationship stems

from sharing an inherent dependence on legitimacy, while differing in how it is primarily constructed.

As was shown in chapter two, international legal rule-making is premised upon the principle of sovereign equality. When sovereignty became understood as ultimate decision-making authority within a specified territory, equality emerged with logical necessity as the principle for formal cooperation among states. Although states are manifestly unequal in material and other capabilities, sovereign equality is legitimated as a technique for deducing legal consequences, i.e. as a way of disregarding factors that are considered irrelevant in legal settings. In other words, equality is considered fundamental for the so-called "rule of law", as opposed to other, more hierarchical, forms of rule-making. When, in some situations, states are not treated equally, an action can still be legitimated from a legal perspective if the exceptions to the principle of equal treatment can show "justifiability" based on other legal principles – for example, if the unequal treatment is voluntarily accepted and thus coherent with states' equal sovereign right to enter into agreements. The point is that a rule need not only be legitimated on the basis of its legality, but may rest on its potential for justifiability as well. In other words, legal legitimation arguments can focus either on input legitimacy through conformity with legal rules or output legitimacy through congruence with legal principles.

From another perspective, this study has argued that states can equally construct their legitimation arguments according to a different logic. If equality is often described as the cornerstone of the international legal system, then it is my contention that hierarchy is actually the guiding principle in most political matters. This does not necessarily mean oppressive rule, however. Indeed, democracy itself, inasmuch as it does not follow a principle of consensus, involves a legitimate hierarchical relationship between the majority and the minority. Similarly, it was demonstrated in chapter three that what is most often described as an anarchic sphere is replete with examples of legitimate hierarchical relationships. I argue that the reasons why international rule-making resulting from hierarchical relationships, such as great power management and hegemony, may be perceived as legitimate are primarily that the subjects give their consent and it produces an outcome that is perceived

as effective, efficient and appropriate. In congruence with the legal logic, legitimation arguments may be based on either one or both of the elements in the political logic: consent and efficiency.

The greatest advantage of using legitimacy to connect the IR and IL literatures is that it explicates the infinite number of possible connections that can be made between international politics and international law through the construction of legitimation arguments. Thus, legitimation of legal rules, for example, is not restricted to legality, or even the legal logic as such, but can also be promoted based on consent and efficiency, which was made abundantly clear in this study. This avoids the circularity trap where legal rules are deemed to be legitimate based on their legality, period. Instead, it is the position of this study that all forms of international rule-making entail a quest for legitimacy. Yet the important thing to note is that legitimacy can never be found, but constantly needs to be made. Hence, treating legitimacy as an overarching concept, consisting of several elements, yet not reducible to any one of them, makes it clear how different elements can be used to compensate for one another. To the extent that this compensation is made consciously and strategically by actors, this may be one answer to the puzzle of *how* might may make right.

In other words, it is assumed that the substitution of political for legal elements in the legitimation process allows great powers to influence legal development, since legitimacy is thereby not reduced but merely transformed. Even though neither logic represents a "short-cut" to legitimacy, it is clear that political legitimation allows more room for manipulation by resourceful actors. Efficiency is obviously easier to achieve with greater resources, and while the element of consent supposedly entails genuine acceptance, in practice it is quite possible that both carrots and sticks as well as more structural forms of power are at work in the process. Additionally, legitimation according to the political logic is not dependent on the constraints posed by legality and justifiability, which are usually viewed as more restrictive by greater powers. Hence, while a full account including an explanation of why states construct their legitimation arguments the way they do and what consequences might arise based on their choice of elements is beyond the scope of this study, the

systematization and analysis of the use of legitimation arguments represents a first step toward such an undertaking.

The utility of the framework

In international relations today the line between international politics and international law is increasingly blurred, and one point of departure of this study is that we need to understand more about the bases on which states claim (as well as challenge) the legitimacy of actions at this crossroads. This conviction stems from the belief that knowing *how* will in the longer run also contribute to knowing *why* states accept and reject legitimation arguments. Thus, in line with the theoretical aim of the study, a framework was developed for the analysis of states' legitimation arguments in relation to the legislative activity by the UN Security Council contained in resolutions 1373 and 1540. Through the framework attention is drawn to two dimensions in legitimation arguments: the process–substance dimension and the legal–political dimension. In other words, each logic of legitimation consists of one procedural element (legality and consent respectively) and one more substantive element (justifiability and efficiency). It is thus possible to claim both input and output legitimacy based on only one logic, but combinations may also occur. In other words, since no one element is treated as *sine qua non*, the framework further enables an analysis of how different elements may compensate, or even substitute, for each other. In the analysis this was found to occur both between logics and within the same logic.

As stated in the introductory chapter, this framework was developed in conjunction with the material and primarily for the purpose of analyzing the legitimation arguments made by states in relation to resolutions 1373 and 1540. In other words, the ambition was not to generalize its applicability to a wide range of international rule-making exercises. However, this does not mean that it has no wider applicability than to the cases just examined. In chapters five and six, I concluded that the framework was useful in the analysis of the Security Council debates, in the sense that it provided interesting insights that were not readily available from a basic chronological examination of the meeting records. In addition, all four elements figured in states' legitimation

arguments, albeit with varying frequency over time and between the cases. Furthermore, since I did not encounter any significant instances where clearly relevant arguments were presented that did not concern either element, I interpret this as support for the way the framework was constructed. A possible drawback, not only of my framework but inevitably pertaining to all theoretical models in relation to reality, concerns the analytical simplification of the elements as *either* process *or* substance and *either* political *or* legal. In line with the meta-theoretical outlook of this study, it is further obvious that they could have been conceived of differently. Nevertheless, these categorizations were made in order to create a framework that could provide interesting insights as to the different functions and inter-relationship of the various elements and in light of the outcome of this particular conception I believe that the necessary simplification and misrepresentation were outweighed by the framework's analytical utility.

Thus, while it is still my position that these elements do not constitute an exhaustive list of elements of legitimacy, I do argue that this framework is suitable for systematizing and analyzing legitimation arguments concerning issues situated at the nexus of international politics and international law. However, it is quite possible, and moreover likely, that analyses of other issue-areas require other elements. For a study of complex decision-making processes, for example, an important element of legitimacy may be expert authority.[69] How wide is the applicability of this framework then? As stated above, I believe that this framework could profitably be used in contexts where both political and legal aspects are explicitly discussed. Other than the UN Security Council, this could include debates in many international organizations, as most issues now include legal aspects. Additionally, we are witnessing a development toward a greater number of actors involved in international (including legal) rule-making. Through the increasing legal competence of entities other than sovereign states (such as international organizations and multinational corporations), the development of concepts such as "soft law", and the propensity of the current predominant power – the United States – to regulate issues through various ad hoc constellations,

[69] For a study of such a problematique see Hedlund 2007.

the old conceptions of who can do what and how are increasingly in flux and new ones need to be legitimated.

Empirical findings

Following the empirical aim of this study, as well as the second research question, the legislative activity of the UN Security Council will be discussed in relation to states' construction of legitimation arguments, international rule-making and the influence of the United States during the post-Cold War era.

Constructing legitimacy

From a general perspective, the empirical analysis of the preceding two chapters shows that the legitimacy of the Security Council's legislative activity is primarily claimed according to the political logic. Arguments based on legal elements are also prevalent, but they are most often used with the opposite intention of challenging other legitimation arguments. The prevailing element within the political logic itself varies between the two resolutions, however. In the case of resolution 1373, the crucial element is consent, whereas in relation to resolution 1540 consent is bestowed more grudgingly based on the perceived necessity of efficient action. Thus, in terms of the process *vs.* substance dimension, it is not clear from the analysis that either procedural or substantive values were perceived as considerably more important in either case.[70] What is clear, however, is that it appears to be perfectly possible to substitute one procedural (or one substantive) element for another. In other words, questions of legality are not as important for legitimation purposes if a measure is supported by overwhelming consent. Indeed, this may be particularly true for the UN system, as the Charter puts the Security Council and the International Court of Justice in a position of co-equal authority and consequently does not provide for direct judicial review. From that perspective, member states' consent to the exercise of certain powers becomes all the more important (Matheson 2004:619; Bianchi 2006a:1072). Equally, the threat posed by terrorism and, even more so, WMD terrorism, has been perceived

[70] It may, however, be argued that the political logic is in itself more oriented toward substance compared to the legal (and more process-oriented) logic of legitimation.

as great enough to substitute efficiency for principles of justifiability. For example, preserving the freedom of action of the Security Council was seen as more important than strengthening justifiability by specifying definitions and consequences of non-compliance. Interestingly, however, there were also examples of both process and substance and political and legal arguments being substituted for one another. In other words, legitimation were at times constructed on the substitution of political substance (efficiency) for legal process (legality) and, equally, political process (consent) for legal substance (justifiability).

Thus, in terms of the dimensions used to analyze legitimation arguments in this study, it seems that both process and substance continue to be important for member states' respective claims and challenges of legitimacy. Concerning the two logics, however, political legitimation arguments appear to triumph also in matters with significant legal aspects and despite objections based on legal elements. Interestingly, this does not seem to be the result of the legal elements losing their status as contributors to legitimacy. On the contrary, member states explicitly challenge the legitimacy of the resolutions, based on their perceived lack of legality and justifiability. Yet, in the end, legitimation arguments based on consent and/or an efficient outcome still prevail. Somewhat puzzled, Andrea Bianchi (2006a:1071) therefore concludes that while the Council through this legislative activity has "acted as if it were a world government", states have generally not challenged the Security Council's substantially extended powers under chapter VII. For whatever reason, it may have considerable effects for the general practice of international rule-making in the future.

International rule-making

Throughout this study, I have deliberately used the term "international rule-making" in addition to the more narrow conception of "international law-making". Indeed, while international law-making is one particular way of creating international (legal) rules, recent years have witnessed a proliferation of rule-creating processes involving both new actors and mechanisms, as was discussed in chapter three. Yet, however influential, these new rule-making actors and processes have not been seen as capable of producing legal rules as

such, which have continued to rely on treaty negotiations and the formation of custom, where states' legislative equality is at least officially preserved. With the adoption of resolution 1373, however, the situation changed. Mlada Bukovansky (2002:44) writes that legitimacy contests involve much more than the settlement of the existing situation. Their outcomes can exclude a particular actor from future involvement as well as include another. Thus, I believe that a significant conclusion of this study is that the Security Council is here to stay as an actor involved in international rule-making concerning ever-wider issue-areas. Indeed, international lawyer Michael Matheson (2006:233) calls it "in many ways an entirely new system of legal authority".

The consequences of such a development, should it continue, are naturally both manifold and complex. Most importantly perhaps, it could undermine – as was explicitly feared by some member states – the authority of the treaty process. If, as in the case of UNSCR 1373, the Security Council, subsequent to conclusions of multilateral conventions, were to pick and choose among obligations, which often constitute parts of carefully negotiated package deals, and generalize those of its choosing through chapter VII resolutions, then the original multilateral negotiations would be rendered meaningless. Yet the example of UNSCR 1540 goes even further, as in that case the Council created completely new rules, without any association to previously accepted language. Thus, in attempts to preserve their legislative equality, states argued that resolutions such as 1373 and 1540, were not to be seen as alternatives to regular legal instruments. But, in fact, the argument can be made that they are even more influential than traditional conventions, as chapter VII provides the Security Council with an enforcement mechanism that is most often lacking in international law. Illustratively, the United States has explicitly not ruled out the use of force in regard to non-compliance with either UNSCR 1373 or UNSCR 1540.

Consequently, in addition to states' legislative equality, their existential equality, in terms of political independence and the right of non-intervention, may also be at risk. We have already witnessed a considerable conceptual move from sovereignty as a protective shield and a license for action toward sovereignty as responsibility. In relation to the present study, US Assistant Secretary of

State, Stephen Rademaker, has stated that resolution 1540 is "an example of an effort to promote universal exercise of sovereign responsibility" in relation to non-proliferation of WMD (as quoted by Perez 2005:316). In other words, if states do not freely shoulder their responsibilities to the international community, then they can be legally obligated and, theoretically, coerced to do so. Significantly, they are also obligated to shoulder them in relatively specific ways. The level of detail of the two resolutions was also severely criticized by member states, primarily developing states, for which sovereignty often is the most important of a limited number of power resources. For example, the fact that resolution 1540 included legally binding decisions on export controls gave rise to allegations that the Security Council violated states' socio-economic rights.

Thus, it is possible to discern an attitude within the Security Council, and especially as regards the permanent member(s), that certain issues are too important for sovereign equality. Indeed, the argument is not impossible to make. The designation of certain norms as *jus cogens* relies on a similar logic. Hence, the necessity "to impose obligations on recalcitrant states" has been mentioned as one example of when Security Council action may be warranted (Matheson 2006:71). Yet, while clearly an example of considerable institutional power, the question is how this mechanism should be viewed. Some depictions of power, as discussed in chapter three, assume that the outcome of A's power is to the detriment of B, but is it necessarily to B's detriment to be forced to adopt laws against money laundering? Andrew Boyd once noted that "the first time the tool is used there are almost bound to be complaints, from one quarter or another, that it is bent sinisterly" (as quoted by Caron 1993:554). So far, only terrorism and non-proliferation have qualified as threats so urgent that their regulation had to be dealt with through the Security Council, but, just recently, a suggestion has been made that the Council deal with the threat of climate change in the same way, i.e. through general and quasi-legislative chapter VII resolutions (Penny 2007). While certainly called for in one sense, the prospects of such a development look fairly gloomy at present, as the Council's actions in the post-Cold War era have been heavily influenced by the priorities of one permanent member in particular.

The influence of the United States

The empirical analysis of this study further points to a special influence of the United States with respect to the Security Council in general as well as its legislative activities in particular. Hence, commenting on the divisive Security Council debates leading up the invasion of Iraq in 2003, many scholars seemed to agree that the issue had at least as much to do with American power and influence as the existence of WMD in Iraq (Boulden & Weiss 2004:17). Indeed, "the nub of the matter is not who was right and who wrong but *who gets to decide what to do*" (Franck 2003:616, emphasis in original). After 9/11, as we have seen in the analysis, UN member states more or less gave the United States free hands to fight terrorism, and commentators argue that the fact that it was the US that was hit in the attacks on September 11 may have had significant effects on the legal consequences (Cosnard 2003:134). Like few other countries, the United States has the capacity to "universalize" its reactions (Clark 2005:231) and it is no coincidence that the Security Council has exercised what is arguably its greatest powers in relation to the two top security priorities on the US national agenda. In the case of resolution 1373, the obligations were partly also taken directly from US domestic law in the form of the President's Executive Order on terrorism financing. Later, the inclusion of best practices in the follow-up of the resolutions further served to increase the influence of the United States and other legally developed countries. This is especially so in relation to WMD proliferation, as the 1540 Committee uses national legislation, rather than policies adopted in international organizations, as examples of best practices. Yet, as concluded in the analysis, perhaps the most consequential result of the adoption of these two resolutions is the changed priority structure of the international community of states. This indicates the ability, characteristic of all great powers, "to define what the goals of the collective as a whole should be, i.e. to achieve their purposes for the collective in preference to others" (Beetham 1991:46). Indeed, the US has even suggested that specific criteria be used to assess candidates for non-permanent seats on the Council and that these criteria include, among other things, states' record on counter-terrorism and non-proliferation (USUN Press release # 119 (05)). This would not only further increase the importance of these two issues, but also serve to further

harmonize the priorities of Security Council members with the goals of the US foreign policy agenda.

Yet in the volume, *United States Hegemony and the Foundations of International Law* (Byers & Nolte 2003), the contributors agree that the question of US predominance affects the international law of treaties very little, except for those instances where it uses the Security Council to "trump" treaty obligations (Nolte 2003b:510-511), such as the adoption of resolutions 1373 and 1540. Consequently, and while I am still hesitant to designate the US as a hegemon in general (most significantly because of its failure to exercise legitimate leadership over other major powers), I do not think it inappropriate to characterize the adoption of UNSCR 1373 and UNSCR 1540 as examples of hegemonic international law. As was discussed in chapter three, the concept of hegemonic international law can be used to describe the practice of the hegemon to use its privileged position in existing international institutions (Alvarez 2005:216; Alvarez 2003), or, in the terms of Barnett & Duvall (2005), its institutional power. This institutional power is exhibited in formal influence of the permanent members in general, as well as the informal influence of US among the permanent members in particular. An example of this influence is the ability of the permanent members to achieve consensus around a draft resolution (later adopted as UNSCR 1540) that was initially strongly criticized by many states and on many grounds. Although writing in relation to resolution 678, David Caron (1993:563) captures it very well as he explains that while the non-permanent members of the Security Council "were broadly in agreement with the need to act, but not necessarily with all the particulars to the draft resolution … dominance consists of the ability to push a *certain* proposal through to adoption" (emphasis in original). The open-ended nature of UNSCR 1373 and UNSCR 1540 further increases the institutional power of the permanent members, as they can veto any attempt to repeal or modify them. Finally, in going through the Security Council the United States sought a response that would not only be effective but also legitimate (Stiles 2006:45). In other words, despite the impressive capabilities of the United States, as Michael Matheson (2006:239) argues, "[i]n the absence of the exercise of legal authority by the Council, these U.S. initiatives [on counter-terrorism and non-proliferation] would at the very least have been

more difficult, less effective, less timely, or less likely to attract wide support", i.e. less legitimate. Illustratively, Matheson, who also served as Acting Legal Advisor at the US State Department for much of the 1990s, further advises that Washington "make creative use" of the Security Council's legal authority in every instance possible (2006:240).

For many states, it matters *how* the US chooses to use multilateral institutions and not just whether it turns to them (Alvarez 2004:200). In the end, however, the crucial question, according to Georg Nolte (2003:511), is which risk one deems to be more serious: "the United States abusing the United Nations, or the United States acting unilaterally in disregard of its international obligations"? Although the US-UNSC relationship has been referred to in terms of a Faustian bargain (*cf.* Rawski & Miller 2004), it is important to remember that hegemonic international law, like any other form of hegemony, is a Janus-faced phenomenon capable of both positive and negative outcomes; and, most importantly, that it is dependent on continued perceptions of legitimacy (Alvarez 2005:216; Alvarez 2003:874, 888). Scholars have different opinions on the proper source of Security Council legitimacy, arguing either that if its actions have legal consequences, then its authority must derive from the legal system (Gowlland-Debbas 2000:312), or that a Council that is out of touch with power realities is incapable of making authoritative pronouncements on legal issues (Ratner 2004:603). The position of this study, however, is that legitimacy is always susceptible to challenge, and the actions of the Security Council are therefore not wholly unbounded, as they will always need to be legitimated according to either the legal or the political logic of legitimation, or both. Interestingly then, whereas hegemonic international law is a direct violation of sovereign equality, its impact on the elements of legitimacy is mixed. While it weakens the legal element of justifiability and the political element of consent, it simultaneously strengthens efficiency and leaves legality more or less untouched. In conclusion, the overall impression of this analysis points to an increased influence for the political logic of legitimation in the post-Cold War era. This may, however, be a temporary characterization as the political elements – especially consent – are the mechanisms through which new conceptions of legality emerge.

Avenues for further exploration

Having now concluded this study with its overarching purpose to "explore", I am inevitably left with the appreciation that the more one learns, the more new puzzles are created and I will thus end this dissertation by touching briefly on a few of them. An important empirical area of future research, as well as a fruitful point of convergence for the research agendas of scholars from both IR and IL, is the continuously growing, and thereby more complex, process of general rule-making in the international arena. Globalization is a worn-out concept, but irrespective of the term, the increasing interconnectedness as well as interdependence of recent decades have caused the demand for international cooperation and common rules to virtually explode. At the same time, related processes have empowered new actors to become involved in the creation of international rules. This study has focused on rule-making within an international governmental organization, but more work is needed on the rule-making capacity (and legitimacy) of, for example, non-governmental organizations, multi-national corporations, and, perhaps the most interesting creature of them all, "results-oriented partnerships", such as the Proliferation Security Initiative.

Furthermore, as a result of the expansion in rule-making bodies, there is a tendency on the part of states, especially major powers, to go "forum-shopping". Although this tendency may not be new, I believe that it is time to examine it anew. Specifically, I believe that it is important to look at various alternatives as contributors of different elements of legitimacy (such as the ones advanced in this study, but also others), which may then have different consequences for the levels of compliance by states. This problematique is especially interesting in relation to the non-proliferation regime, which currently exhibits the interesting traits of being completely deadlocked on the formal-legal level yet highly vibrant through Security Council activities and international partnerships.

Lastly, I have only been able to briefly touch upon the crucial issue of the hierarchy of international legal norms. Pressing questions for the future include: Is action taken by the UN Security Council without legal limits? What

powers does the Council need in order to exercise its responsibility for the maintenance of international peace and security? What role do we envision, not just for the Security Council, but for the United Nations as a whole in issues of peace and security during the 21st century? These and similar issues represent urgent empirical dilemmas as well as intriguing theoretical meeting-places for researchers from International Relations and International Law alike. Hence, I will end with a quote from the Minister for Foreign Affairs of Denmark, Per Stig Møller:

> The Security Council is essentially a political body with far-reaching powers to maintain or restore international peace and security. Yet the Council operates within a legal framework set out in the United Nations Charter. The consequences for international law of the actions of the Security Council should not be underestimated (S/PV.5474, p. 3).

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