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Coining a New Jurisdiction: The Security Council as Economic Peacekeeper

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Coining a New Jurisdiction: The Security Council as Economic Peacekeeper

*Kristen E. Boon**

ABSTRACT

Economic conditions are linked to international peace and security. Financial crises, mismanagement of natural resources, food shortages, and climate change can create transnational effects, including conflict. The Security Council is the executive organ of the United Nations, with primary jurisdiction over the maintenance of international peace and security. This Article explores the extent to which the Security Council can and should assert jurisdiction over economic and financial issues.

In the past decade, the economic dimensions of conflict, including the economic causes of war, economic agendas of state and nonstate actors, and economic measures for reconstruction have become central to the Security Council's work and to contemporary concepts of collective security. This Article argues that the Security Council's increasing engagement with

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economic and financial issues is proper and permissible under Article 39, provided that certain thresholds are met. For example, purely internal disruptions such as bankruptcies would be unlikely to rise to the level of a threat to peace and security, whereas the manipulation of natural resources destined for, or regulated by, international markets may well create threats within the Council's jurisdiction. The Security Council's enforcement jurisdiction under Article 41 has similarly evolved, shifting from the wholesale restriction of economic opportunities via trade embargoes and sanctions to the promotion of prospective measures such as good economic governance. If the Council's economic interventions continue, it will become a player of some significance in applying and developing international economic norms.

Ultimately, the Security Council's jurisdiction over new threats to peace and security—including economic and financial issues—is a function of its legitimacy. Support for the Council's evolving economic jurisdiction will be highest if the Council adopts measures to improve its procedural and substantive legitimacy among member states. This Article thus situates its analysis within the context of democratic decision making and argues for a better delineation of economic responsibilities among the Security Council and other international entities, such as the IMF, the World Bank, the General Assembly, ECOSOC, and the Peacebuilding Commission.

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I. INTRODUCTION

The severity and frequency of financial crises, especially the combined currency and banking collapses of the past decade, have made financial instability a scourge of our times, one that bears comparison with damage inflicted by famine and war.¹

Economic conditions are linked to international peace and security.² Financial crises, mismanagement of natural resources,

1. *Economics Focus: A Remedy for Financial Turbulence?*, ECONOMIST, Apr. 17, 2004; see also *Argentines Barter to Survive*, BBC, May 9, 2002, <http://news.bbc.co.uk/2/hi/business/1977804.stm> (similarly stating "it's like a war without bombs.").

2. See UN Econ. & Soc. Council [ECOSOC], *World Economic and Social Survey 2008: Overcoming Economic Insecurity*, ¶¶ 10–15, U.N. Doc. E/2008/50 (Apr. 21, 2008) (describing the effects of covariant economic risks attached to events that affect a large number of people simultaneously, such as an economic shock or climatic hazard); Paul Collier, *Policy for Post-Conflict Societies: Reducing the Risks of Renewed Conflict* 2–3 (World Bank, Working Paper No. 28135, 2000), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2004/03/10/000265513_20040310161907/Rendered/PDF/28135.pdf (stating that the three highest risks for post-conflict societies are a high dependency on natural resource rents, a downturn in economic opportunities, and ethnic dominance); PAUL COLLIER, INT'L PEACE ACADEMY, POST-CONFLICT ECONOMIC RECOVERY 2 (2006), <http://users.ox.ac.uk/~econpco/research/>

food shortages, and climate change can create transnational effects, including conflict. The repercussions may include refugee flows, trafficking in people and goods, unrest or conflict, and even terrorism where haven is given to individuals involved in such activities or to the funds that support them.³ Research has shown that richer states and states with higher levels of economic growth are less prone to large-scale internal violence.⁴ Furthermore, a strong correlation exists between the level of income at the end of a conflict and the likelihood of relapse.⁵ As a result of these links, economic policies are an important component of multilateral intervention by international organizations.⁶

The Security Council of the United Nations (UN) has primary jurisdiction over the maintenance of international peace and security.⁷ It is often said that the powers accorded to the Council

pdfs/IPA-PostConflictEconomicRecovery.pdf ("Typically there is 39% risk that a peace will collapse within the first five years, and a 32% risk that it will collapse in the next five years.").

3. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), *THE STATE OF THE WORLD'S REFUGEES 10–20* (2006), available at <http://www.unhcr.org/static/publ/sowr2006/toceng.htm> (discussing the relationship between war, economic conditions, and internal and international displacement); Ethan B. Kapstein, *The New Global Slave Trade*, 85 FOREIGN AFF. 103, 112–13 (2006) (discussing the link between economic conditions and modern day slavery); Michael L. Ross, *Oil, Drugs, and Diamonds: The Varying Role of Natural Resources in Civil War*, in *THE POLITICAL ECONOMY OF ARMED CONFLICT: BEYOND GREED AND GRIEVANCE* 47 (Karen Ballentine & Jake Sherman eds., 2003) (discussing the role of natural resources and globalization in conflict); CHRISTIAN AID, *HUMAN TIDE: THE REAL MIGRATION CRISIS* 1–3 (2007), http://www.christianaid.org.uk/issues/climatechange/resources/human_tide.aspx (discussing the relationship between climate change, competition for scarce resources, and security).

4. See Ibrahim Elbadawe & Nicholas Sambanis, *How Much War Will We See? Estimating the Incidence of Civil War in 161 Countries* (World Bank, Working Paper No. 2533, 2001), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/05/24/000094946_01050805111123/Rendered/PDF/multi0page.pdf.

5. See CARNEGIE COMMISSION ON PREVENTING DEADLY CONFLICT, *PREVENTING DEADLY CONFLICT: FINAL REPORT WITH EXECUTIVE SUMMARY* 82–89 (1997); S. Brock Bloomberg & Gregory D. Hess, *The Temporal Links Between Conflict and Economic Activity*, 46 J. CONFLICT RESOL. 74, 74–75 (2002); Paul Collier, Anke Hoeffler & Måns Söderbom, *Post-Conflict Risks*, 45 J. PEACE RES. 461, 469 (2008) (examining how economic recovery may reduce risks and risk reduction may speed recovery, and noting the links between post-conflict economic growth and risk of renewed conflict). The Collier analyses show that, "if the economy remains stagnant through the decade, the decade-risk is 42.1%. If, instead, the economy grows at 10% per year, which is fast but not without precedent, the decade-risk falls to 26.9%." Collier et al., *supra*, at 469.

6. See Graciana Del Castillo, *Economic Reconstruction in Post-Conflict Transitions: Lessons for the Democratic Republic of Congo (DRC)* (OECD Development Center, Working Paper No. 228, 2003).

7. U.N. Charter art. 24, para. 1 ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security . . ."). As Goodrich notes, however, the Security Council's responsibility "is primary, but not

under Chapter VII of the UN Charter make it the most powerful international “organ in history.”⁸ Like the ancient Privy Council, the Security Council is part court, part legislator, and part executive.⁹ Indeed, the Security Council has almost unlimited discretion in taking coercive action against the states and entities that it determines threaten peace and security.¹⁰ Its Chapter VII resolutions are binding on member states and rank highest in the legal hierarchy, taking precedence over other instruments, including treaties and domestic laws.¹¹ Moreover, the UN Charter imposes few express limits on the jurisdiction of the Security Council, and the Council is virtually immune from judicial review.¹² Given this context, it is not surprising that the Security Council’s growing interest in combating new threats to peace and security is generating commentary and concern.

Over the past decade, the Security Council has adopted a variety of direct and indirect economic measures in pursuance of its mandate. It has frozen funds associated with terrorist financing, promoted economic stabilization in post-conflict zones such as Kosovo and East Timor, integrated principles of economic governance such as transparency and accountability into the transitional governance regime in Liberia, and developed an increasingly sophisticated range of peace-building strategies to stabilize the ownership of natural resources like oil, timber, and diamonds.¹³ The Security Council has also partnered with or facilitated the economic intervention of other international actors in post-conflict situations such as the World Bank, the International Monetary Fund, regional organizations, donors, and the private sector.¹⁴ In sum, the economic dimensions of conflict—including the economic causes of war, economic agendas of state and nonstate actors, and economic measures for

exclusive,” because “the General Assembly has important responsibilities of its own” under UN Charter arts. 10–14. LELAND M. GOODRICH & EDVARD HAMBRO, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 204 (2d ed. 1949).

8. Jochen Frowein & Nico Krisch, *Introduction to Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression)*, in 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 701, 702 (Bruno Simma ed., 2d ed. 2002).

9. ALBERT VENN DICEY, *THE PRIVY COUNCIL* 7 (London, MacMillan 1887) (“[T]he ‘Curia Regis’ possessed every attribute which has been ascribed to it. It was the executive. It was also a Law Court. It certainly took part in acts of legislation.”); see also R. M. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 3–8 (6th ed. 1972).

10. GOODRICH & HAMBRO, *supra* note 7, at 264–65.

11. U.N. Charter arts. 25, 103.

12. See *infra* Part VI.D.

13. See *infra* Part V.

14. See Kristen E. Boon, “Open For Business”: *International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law*, 39 N.Y.U. J. INT’L L. & POL. 513, 554 (2007) (discussing the role of the Security Council as an institutional enabler for international financial institutions). See generally Allan Gerson, *Peacebuilding: The Private Sector’s Role*, 95 AM. J. INT’L L. 102 (2001).

reconstruction—are becoming central to the Security Council’s work and to contemporary concepts of collective security.¹⁵

Given that economic globalization is a reality, and that economic issues are major causes of conflict, this Article assesses the extent to which the Security Council can act on economic threats to peace and security in fulfillment of its mandate. The UN Charter permits the Security Council to take jurisdiction under Article 39 when any situation poses a “threat to peace and security.”¹⁶ The Charter does not distinguish among the sources or types of threats, however, and it is this Article’s contention that certain economic and financial issues fall within the Security Council’s Chapter VII jurisdiction, permitting it to respond to catastrophic economic situations, as it did in Albania after the collapse of the pyramid savings schemes in 1997.¹⁷ Only acute or illicit situations will meet the Article 39 threshold, however, and this Article explores what those factors might be in order to distinguish them from chronic or discrete economic and financial situations that lie outside of the Council’s competence.

A second dimension of the Council’s economic jurisdiction arises from its Article 41 enforcement powers. Although the Council has the power to authorize both nonmilitary and military measures to render compliance with its decisions, it has increasingly relied on nonmilitary tools such as economic sanctions over the past decade. These regulatory measures discourage financial support for terrorism, promote economic rehabilitation, and encourage good economic governance. The Council is no longer simply responding to crises that have already erupted with economic sanctions; rather, it is integrating preventive economic measures into its long-range peace and security strategies. Given the Council’s prospective economic focus, this Article examines the Security Council’s emerging role as an international economic risk manager and a generator of international economic norms.

15. This new economic dimension of collective security is to be distinguished from traditional armed conflict.

[T]he defining characteristic of collective security is the protection of the members of the system against a possible *attack* on the part of another member of the same system. Thus, the concept is primarily directed (unlike a system of collective self-defence) against the *illegal use of force* from within the group of States forming the collective security system, rather than against an external threat.

Rüdiger Wolfrum, *Article 1*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 8, at 39, 42 (emphasis added); see Laurence Boisson de Chazournes, *Collective Security and the Economic Interventionism of the UN – The Need for a Coherent and Integrated Approach*, 10 J. INT’L ECON. L. 51, 52 (2007) (discussing emerging practice of integrating economic elements into collective security).

16. U.N. Charter art. 39.

17. See *infra* Part V.C.

This Article is organized in seven parts. Part II addresses the links between peace, economics, and security at the founding of the UN. Part III describes the Security Council's recent economic measures, and Part IV discusses why such measures have drawn criticism. Part V takes up the Security Council's Article 39 jurisdiction and also demonstrates which economic issues can fall within these parameters and what limits apply. Part VI outlines the Security Council's economic jurisdiction under its Article 41 enforcement powers. Part VII concludes the Article with a discussion of democratic decision making and situates the Security Council's jurisdiction over economic threats to peace and security within the debate on Security Council reform and better international coordination.

II. THE LINK BETWEEN PEACE AND ECONOMICS

The connection between peace, economic development, and freedom was keenly understood when the United Nations was created in 1944. After World War I, John Maynard Keynes noted that the "economic tendencies which underlie the events of the hour" were left unaddressed by the Peace of Paris.¹⁸ He was most struck by the lack of focus on the economic dimensions of the postwar talks: "[I]t is an extraordinary fact that the fundamental economic problems of a Europe starving and disintegrating before their eyes, was the one question in which it was impossible to arouse the interest of the Four."¹⁹ This lacuna was fateful. In the inter-war years, "beggar thy

18. JOHN MAYNARD KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* (1920), *reprinted in* THE END OF LAISSEZ-FAIRE 48, 264 (2004). An exception was the founding of the International Labour Organization in 1919, which sought to regulate labor so as to minimize the effects of unrest and maintain the economic balance of the world after the war. See Charles Picquenard, *The Preliminaries of the Peace Conference: French Preparations*, in 1 THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION 85 (James T. Shotwell, ed., 1934). The preamble to the ILO Constitution, for example, states:

[W]hereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, . . . the High Contracting Parties . . . agree to the following Constitution of the International Labour Organization.

ILO Constitution, pmb. (1997), available at <http://www.ilo.org/ilolex/english/constq.htm>.

19. KEYNES, *supra* note 18, 239–40 (2004); see BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 55 (Philippe Sands & Pierre Klein eds., 5th ed. 2001) (noting that the Covenant of the League of Nations "did not reflect any real

neighbor” policies, multiple currency practices, and exchange rate manipulation contributed significantly to the outbreak of World War II.²⁰ Hans Morgenthau, assessing German aggression on the eve of the Bretton Woods conference, remarked: “These monetary devices were measures of international economic aggression, and they were the logical concomitant of a policy directed toward war and conquest.”²¹

After World War II, the great powers did not repeat their failure to address international economic issues. The newly created United Nations was given a principal economic organ: the Economic and Social Council (ECOSOC).²² The World Bank and the International Monetary Fund (IMF) were founded as specialized agencies with their own constituent treaties to manage the economic aspects of reconstruction, development, and financial stability.²³ And within Europe, the Organization for European Economic Co-operation, and

appreciation of the relationship of international economic and social stability to world peace”). For a contemporary recognition of this linkage, see U.N. High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, at 11, *delivered to the Secretary General*, U.N. Doc. A/59/565 (Dec. 2, 2004) (“[T]hey also understood well, long before the idea of human security gained currency, the indivisibility of security, economic development and human freedom.”).

20. ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 501 (2002).

21. Hans Morgenthau, *Bretton Woods and International Cooperation*, 23 *FOREIGN AFF.* 182, 185 (1945), *cited in* LOWENFELD, *supra* note 20, at 501 n.5; *see also* RICHARD N. GARDNER, *STERLING DOLLAR DIPLOMACY* 8–12 (1980) (discussing the American preoccupation with economic postwar reconstruction).

22. PAUL KENNEDY, *THE PARLIAMENT OF MAN* 114 (2006) (discussing the founders’ assessment of the relationship between economic distress and political violence, and the subsequent creation of ECOSOC); *see also* BOWETT’S *LAW OF INTERNATIONAL INSTITUTIONS*, *supra* note 19, at 57.

23. *See* International Bank for Reconstruction and Development (World Bank) Articles of Agreement art. I, (Feb. 16, 1989), *available at* <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf> [hereinafter *IBRD Articles of Agreement*] (“The purposes of the Bank are: (i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war . . .”).

The purposes of the International Monetary Fund are: . . . (i) To promote international monetary cooperation . . . (ii) To facilitate the expansion and balanced growth of international trade . . . (v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity. (vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

International Monetary Fund Articles of Agreement art. I (June 28, 1990), *available at* <http://www.imf.org/external/pubs/ft/aa/aa.pdf> [hereinafter *IMF Articles of Agreement*]. *See generally* BOWETT’S *LAW OF INTERNATIONAL INSTITUTIONS*, *supra* note 19, at 57; GARDNER, *supra* note 21, at 74–76 (discussing the history of negotiations and proposals).

later the European Coal and Steel Community, implemented recovery programs and promoted economic cooperation.²⁴ International law, which has long had economic dimensions,²⁵ consequently received its key institutional anchors only after World War II.

At this early juncture, the Security Council, the Executive organ of the UN, had limited explicit economic jurisdiction. Procedurally, the Council is required to make a threshold determination that the situation in question constitutes a threat to the peace, a breach of the peace, or an act of aggression under Article 39 before it can exercise its authority.²⁶ The Council can then make a substantive decision

24. Jean Monnet, President of the European Coal and Steel Community, Remarks at a Special Session of the Common Assembly (later renamed the European Parliament), reprinted as *La Construction de l'Europe selon Jean Monnet* (Nov. 30, 1954), in CHARLES ZORGBIBE, *HISTOIRE DE LA CONSTRUCTION EUROPÉENNE* 44 (1993) (Fr.), available at: www.ellopos.net/politics/monnet.htm.

Le charbon et l'acier plus abondants, de meilleure qualité, à un prix plus bas, c'est la possibilité pour chacun d'acheter davantage, et pour chaque famille d'obtenir un niveau de vie plus élevé. C'est l'ampleur et la liberté du marché unique qui permettront de développer une production de masse, seul moyen d'obtenir la diminution des prix de revient, le développement des débouchés et l'expansion de la production.

Id.; A.H. Robertson, *Different Approaches to European Unity*, 3 AM. J. COMP. L. 502, 516 (1954) (discussing how seven of the ten postwar institutions in Europe had an economic mandate). Trade was also considered to be a fundamental basis for European unity. See, e.g., William N. Parker, *The Schuman Plan—A Preliminary Prediction*, 6 INT'L ORG. 381, 382 (1952) ("The prosperity and good-fellowship attendant upon the operation of common economic institutions will create the economic and spiritual bases of European unity."); Leonard V.B. Sutton, *World Peace Through Foreign Trade*, 18 DEPAUL L. REV. 38, 43 (1967) ("[P]eace itself can come through the economic interdependence which can be seen on the horizon—and foreign trade itself is the bloodstream that will pump progress and hope through the world's veins").

25. See Robertson, *supra* note 24, at 516–19.

26. Lori Fisler Damrosch, *Introduction*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 1, 10 (Lori Fisler Damrosch ed., 1993) ("[I]t has been thought that the Council must at a minimum be able to make a finding of a 'threat to the peace' as a prerequisite to the exercise of its enforcement powers."). When the Security Council makes no express reference to Article 39, this determination is usually understood to be implied, provided the Council indicates, at a minimum, that it is "acting under Chapter VII of the Charter." See, e.g., S.C. Res. 1779, at 2, U.N. Doc. S/RES/1779 (Sept. 29, 2007). Alternatively, while not invoking either Chapter VII or article 39 expressly, the Council may indicate that the situation under consideration constitutes "a threat to international peace and security." See, e.g., S.C. Res. 1784, at 2, U.N. Doc. S/RES/1784 (Oct. 31, 2007) (a subsequent resolution on the Sudan, adopted one month later, presumably with identical legal effect); see also Jochen Frowein & Nico Krisch, *Article 39*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 8, at 717, 727–28; Ruth Lapidot, *Some Reflections on the Law and Practice Concerning the Imposition of Sanctions by the Security Council*, 30 Archiv des Völkerrechts 114, 115 (1991) ("It seems that it would be possible to proceed directly to a resolution on measures to be taken and a determination under Article 39 would be implied in this resolution."); cf. Frans A.M. Alting von Geusau, *Recent and Problematic: The Imposition of Sanctions by the UN Security Council*, in UNITED NATIONS SANCTIONS: EFFECTIVENESS AND EFFECTS, ESPECIALLY IN THE FIELD OF HUMAN RIGHTS

about how the threat to the peace, breach of the peace, or act of aggression should be remedied. Finally, the Security Council can enforce its decision either with economic measures pursuant to Article 41 of the UN Charter or with military measures under Article 42. Economic issues are thus potentially relevant both to the threshold determination of whether Article 39 should be invoked and to the subsequent measures adopted by the Council to implement its decisions under Article 41. The Council's expanding economic practices under Articles 39 and 41 are canvassed next.

III. THE SECURITY COUNCIL'S GROWING INVOLVEMENT IN ECONOMIC ISSUES

In 1992, the President of the Security Council stated: "[T]he absence of war and military conflict amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."²⁷ With this, the President portended a "new look" at the Council's Article 39 jurisdiction.²⁸ Since then, the Security Council's ever more diverse interventions have amounted to what some are calling a jurisdictional amendment by practice.²⁹ In order to remain effective and relevant, the Security Council has reacted to the human rights revolution, the spread of market economies, and the globalization of communications and travel by "unavoidably and quite properly" taking jurisdiction over a much broader range of threats to international peace and

1, 1 (Willem J.M. van Genugten & Gerard A. de Groot eds., 1999) (noting that the wording of Article 39 of the Charter indicates that the prior determination of the existence of a threat is a mandatory precondition to taking any further measures the Council "shall" determine, although it "may" make recommendations or decide what measures shall be taken in accordance with Article 41).

27. President of the Security Council, *Note by the President of the Security Council*, at 3, *delivered to the Security Council*, U.N. Doc. S/23500 (Jan. 1, 1992).

28. This emphasis on new and emerging threats has been apparent in subsequent Presidential Statements. See President of the Security Council, *Statement by the President of the Security Council*, at 1, *delivered to the Security Council*, U.N. Doc. S/PRST/2007/31 (Aug. 28, 2007) ("The Security Council notes the varied nature of conflicts, which involve not only conflicts between States and within States, but also new emerging threats, and thus reiterates its determination to strengthen its role in preventing and resolving conflict in all its forms.").

29. See generally INGER OSTERDAHL, *THREAT TO THE PEACE: THE INTERPRETATION BY THE SECURITY COUNCIL OF ARTICLE 39 OF THE UN CHARTER* 90-91 (1998); Frederic L. Kirgis, Jr., *The Security Council's First 50 Years*, 89 AM. J. INT'L L. 506, 517 (1995).

security than was originally envisioned by the drafters of the Charter.³⁰

Economic and financial issues are part of the Security Council's new frontier.³¹ Given that the interconnectedness of markets, funds, and goods is fueling conflict, the Council is developing a range of economic and financial instruments: (A) measures that target whole economic sectors through trade embargoes; (B) measures to limit illicit financing; (C) measures that promote good economic governance and resource management; and (D) compensation or enforcement of judicial disputes.³² The common denominator in these instruments is their economic or financial focus.

A. *Comprehensive Embargoes*

The traditional pillar of the Council's economic strategy is to assert control over whole economic sectors. Indeed, for many years, the mainstay of the Council's enforcement jurisdiction was comprehensive economic sanctions whose general objective was to react to existing threats to the peace by imposing embargoes to modify the target State's behavior.³³ For example, the Security Council imposed comprehensive economic sanctions on Iraq on August 6, 1990, in response to the Iraqi invasion of Kuwait.³⁴ The sanctions imposed on Iraq created a set of conditions which virtually cut Iraq off from the world economy—a ban on all trade, an oil embargo, a freezing of Iraqi government financial assets abroad, an arms embargo, and a suspension of international flights.³⁵ The effect of these sanctions was drastic and immediate: Iraq was dependent on imported food for 70%–80% of its total caloric intake, and by

30. Kirgis, *supra* note 29, at 517; Cora True-Frost, *The Security Council and Norm Consumption*, 40 N.Y.U. J. INT'L L. & POL. 115, 116 (2007) (discussing the Security Council's adoption and promulgation of human rights norms).

31. I use the term economic measures to refer to broad economic policies such as the economic or financial prohibitions imposed upon a target country or its nationals with the intended effect of creating dysfunction in commercial and financial transactions. Trade embargoes are an example. I use the term financial measures to refer to the subset of economic measures dealing with banking measures and financial relations, which the Council currently applies to specific individuals, groups or activities engaged in illicit financing.

32. See *infra* Part III.A–D.

33. LOWENFELD, *supra* note 20, at 708 (identifying four main categories of sanctions: prohibiting (i) imports from the target country; (ii) exports to the target country; (iii) the transfer of funds to or for the benefit of the target country; or (iv) transport in vessels or aircraft registered in member states of cargo destined for the target country); Altling von Geusau, *supra* note 26, at 10–11; see also MARGARET P. DOXEY, *INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE* 56–57 (1996) (discussing various goals of sanctions regimes including deterrence, compliance, punishment, destabilization, limitation of conflict, solidarity, symbolism & signaling).

34. S.C. Res. 661, ¶¶ 3–4, U.N. Doc. S/RES/661 (Aug. 6, 1990).

35. *Id.*

November 1990, shortages had increased food prices by up to 1800%.³⁶

After the humanitarian impact of comprehensive sanctions in Iraq became apparent, the Council began to refine its sanctions practice in two ways. First, it began selectively targeting individuals and nonstate actors with “smart” or “targeted” sanctions to limit the targets’ access to markets, funds, weapons, and supplies, with sanctions that often involved travel bans and arms embargoes.³⁷ Second, the Council began to regulate whole economic sectors within member states in an attempt to mitigate future threats proactively. In Security Council Resolution 1540, for example, the Council implemented stringent controls on trade in nuclear goods and services in all states.³⁸ In so doing, it targeted the entire economic industry rather than a specific state.

B. *Illicit Financing*

The second prong of Security Council activity in the economic realm has been to target the illicit financing of terrorism. In response to 9/11, the Council determined that terrorism constitutes a threat to the peace and authorized the freezing of terrorist assets in order to

36. Abbas Alnasrawi, *Iraq: Economic Sanctions and Consequences 1990–2000*, 22 *THIRD WORLD Q.* 205, 209 (2001).

37. See Matthew Craven, *Humanitarianism and the Quest for Smarter Sanctions*, 13 *EUR. J. INT’L. L.* 43, 44–46 (2002); August Reinisch, Note and Comment, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 *AM. J. INT’L. L.* 851, 852 (2001); cf. Brun-Otto Bryde & August Reinisch, *Article 50*, in 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 8, at 784, 787–88 (noting the recommendation of such targeted sanctions to the Security Council). To review the use of targeted sanctions generally, see documents at State Secretariat for Economic Affairs (SECO), <http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en> (last visited Sept. 30, 2008).

38. S.C. Res. 1540, ¶¶ 1–2, U.N. Doc. S/RES/1540 (Apr. 28, 2004). The Resolution declared:

[A]ll 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 their means of delivery.

Id. The Resolution stated further that

[A]ll States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.

Id.

deny suspected terrorists access to economic resources.³⁹ These measures do not remove title to the property, but they limit the powers and privileges of ownership.⁴⁰ In Resolution 1735, the Security Council required states to

freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit, or by their nationals or by persons within their territory.⁴¹

On authority delegated from the Security Council, several Counter-Terrorism Committees have now developed standards on financial regulation and are advising states on their implementation.⁴² These resolutions create concrete obligations for national banking systems and financial intelligence agencies. Given their Chapter VII pedigree, they also constitute significant and sometimes onerous incursions into the economic affairs of member states.⁴³

39. S.C. Res. 1373, ¶ 1(c)–(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1333, ¶ 8(c), U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1267, ¶ 4(b), U.N. Doc. S/RES/1267 (Oct. 15, 1999). Furthermore, numerous preambles to Security Council Presidential Statements on terrorism state: “The Security Council reaffirms that terrorism constitutes one of the most serious threats to international peace and security, and that any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed.” See, e.g., President of the Security Council, *Statement*, at 1, *delivered to the Security Council*, U.N. Doc. S/PRST/2006/56 (Dec. 20, 2006); President of the Security Council, *Statement*, at 1, *delivered to the Security Council*, U.N. Doc. S/PRST/2005/3 (Jan. 18, 2005) (using slightly but not materially different language); President of the Security Council, *Statement*, at 1, *delivered to the Security Council*, U.N. Doc. S/PRST/2004/37 (Oct. 19, 2004) (using language identical to Jan. 18, 2005 resolution).

40. Peter Gutherie, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491, 500 (2004); Samuel D. Porteous, *Targeted Financial Sanctions*, in GREED AND GRIEVANCE: ECONOMIC AGENDAS IN CIVIL WARS 173, 174–75 (Mats Berdal & David Malone eds., 2000).

41. S.C. Res. 1735, ¶ 1(a), U.N. Doc. S/RES/1735 (Dec. 22, 2006).

42. These measures have been subject to criticism not for jurisdictional reasons but due to perceived procedural deficiencies, such as the absence of periodic review and delisting procedures for individuals who were not, in fact, associated with terrorist financing. See, e.g., Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT'L L. 203, 204 (2007); Eric Rosand, *The UN-Led Multilateral Institutional Response to Jihadist Terrorism: Is a Global Counterterrorism Body Needed?*, 11 J. CONFLICT & SEC. LAW 399, 413 (2006).

43. Boisson de Chazournes, *supra* note 15, at 8–12.

C. Economic Governance

The third economic dimension of the Council's practice involves the promotion of economic growth and good governance under Article 41. A case in point is Liberia, where the Security Council partnered with international financial institutions and donor states to further transparency and equity in the Governance and Economic Management Assistance Programme of 2005 (GEMAP).⁴⁴ In effect, the Security Council is now using Article 41 to intervene in domestic economic policies such as management schemes for natural resources,⁴⁵ to promulgate laws on economic rehabilitation in fragile states,⁴⁶ and to create cooperative schemes with international financial institutions on economic governance.⁴⁷ The Security Council's shift from traditional comprehensive sanctions restricting economic activities to proactive resolutions promoting good economic practices signals a new, interventionist turn in its approach to its enforcement jurisdiction.

D. Compensation

A fourth economic role for the Council involves its potential involvement in judicial disputes. The Security Council has, on rare occasion, become directly involved in the arbitration of compensation claims involving significant sums of money.⁴⁸ A UN Claims Commission was established in 1991 as a subsidiary organ of the Security Council for losses resulting from Iraq's invasion and occupation of Kuwait.⁴⁹ Pursuant to Resolution 687 and 692, the Commission has the power to provide compensation for direct loss and damage—including environmental damage, the depletion of natural resources, and injury to foreign governments, nations, and corporations—as a result of Iraq's unlawful invasion and occupation

44. Liberia Governance and Economic Management Assistance Program (GEMAP) – Overview, <http://www.gemapliberia.org/pages/overview?PHPSESSID=7232f2343b3cea6e37274676c71d8d5d> (last visited Sept. 30, 2008).

45. *Id.*

46. *Id.*

47. *Id.*

48. See U.N. Claims Commission – Claims Processing, <http://www2.unog.ch/uncc/clmsproc.htm> (last visited Sep. 30, 2008); see also Lea Carol Owen, *Between Iraq and a Hard Place: The U.N. Compensation Commission and Its Treatment of Gulf War Claims*, 31 VAND. J. TRANSNAT'L L. 499, 517 (1998).

49. S.C. Res. 687, ¶¶ 16–19, U.N. Doc. S/RES/687 (Apr. 8, 1991); Owen, *supra* note 48, at 509–13.

of Kuwait.⁵⁰ The great sums involved—more than \$24 billion as of April 2008—indicate the economic impact of this intervention.⁵¹

The Security Council may also be called upon to intervene in economic issues through the enforcement of International Court of Justice (ICJ) judgments pursuant to Article 94(2) of the UN Charter.⁵² A state could, for example, request that the Council attach or seize assets in a recalcitrant State in order to satisfy an ICJ judgment; or, the Security Council might have to consider circumstances of noncompliance, such as financial inability to pay.⁵³ Although the Council has not, to date, been called to enforce ICJ decisions as such, private arbitration agreements often make reference to enforcement by the Security Council,⁵⁴ which suggests that international actors view the Security Council as a potential source of recourse.

IV. THE CRITICS OF THE SECURITY COUNCIL'S INVOLVEMENT IN NEW THREATS TO PEACE AND SECURITY

The increased attention paid by the Security Council to new threats to peace and security on one hand, and to economic and financial tools for multilateral intervention on the other hand, has provoked some concern. First, some states object to the Security Council's involvement in economic issues on the basis that the Security Council is not representative of the majority of UN member states and should not intervene in what are essentially domestic issues of economic policy.⁵⁵ A second objection is that economic issues should be left to specialized bodies such as ECOSOC, the IMF, or the World Bank, which are better equipped to address them.⁵⁶ A final source of resistance relates to the scope of powers accorded to the

50. S.C. Res. 687, *supra* note 49, ¶ 16; S.C. Res. 692, ¶ 5, U.N. Doc. S/Res/692 (May 20, 1991).

51. U.N. Claims Commission – Status of Processing and Payment of Claims, <http://www2.unog.ch/uncc/status.htm> (last visited Sept. 30, 2008); *see also* Owen, *supra* note 48, at 522–31.

52. U.N. Charter art. 94, para. 2.

53. Hermann Mosler & Karin Oellers-Frahm, *Article 94, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 8, at 1174, 1177; Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1, 22 (1960) (discussing the Monetary Gold case by analogy).

54. Mosler & Oellers-Frahm, *supra* note 53, at 1176 (stating that in the case of non-compliance with an ICJ decision or an international arbitral tribunal, the Security Council "shall propose what steps should be taken to give effect thereto").

55. Edith M. Lederer, *Security Council Tackles Climate Change*, WASH. POST, Apr. 18, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/04/18/AR2007041800219_pf.html.

56. *See supra* Parts I–III.

Security Council under the UN Charter.⁵⁷ In particular, some argue that the Council does not possess specific jurisdiction over nonmilitary policy matters such as, but not limited to, economic situations. This Part explores each of these concerns in turn.

A. *The Representation Critique*

The first criticism of the Security Council's emerging economic statecraft is that, because the Security Council is not representative of the UN membership, it should not be empowered or encouraged to address broad economic issues. This concern was highlighted in two Security Council debates in 2007. In April 2007, Great Britain organized an open Security Council debate on climate change, which explored the effects of economic production and increased industrialization on pollution, flooding, famine, crop failure, and economic disruptions.⁵⁸ As Foreign Secretary Margaret Beckett stated: "What makes wars start? Fights over water, changing patterns of rainfall, fights over food production, land use. There are few greater threats to our economies too . . . but also to peace and security itself."⁵⁹ Empirical studies support this conclusion; databases on civil wars and water now show that, "when rainfall is significantly below normal, the risk of a low-level conflict escalating to a full-scale civil war approximately doubles in the following year."⁶⁰

The suggestion that the Security Council had jurisdiction over climate change, however, sparked controversy among developing states. Pakistani representative Farukh Amil, speaking on behalf of the "Group of 77" developing countries and China, argued that the UN membership as a whole needs to solve economic and social

57. Gaetano Arangio-Ruiz, *The 'Federal Analogy' and the UN Charter Interpretation: A Crucial Issue*, 8 EUR. J. INT'L L. 1, 1 (1997).

58. Lederer, *supra* note 55; Press Release, Security Council, Security Council Holds First Ever Debate on Impact of Climate Change on Peace, Security, Hearing over 50 Speakers, U.N. Doc. SC/9000 (Apr. 17, 2007) [hereinafter Press Release, Security Council, Climate Change]; cf. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT (2007), available at <http://www.ipcc.ch/ipccreports/ar4-syr.htm> (confirming independently the effects of increased industrialization on the environment).

59. Lederer, *supra* note 55; see also Elizabeth Burleson, *A Climate of Extremes: Transboundary Conflict Resolution*, 32 VT. L. REV. 477, 520–23 (2008); Lydia Polgreen, *A Godsend for Darfur, or a Curse?*, N.Y. TIMES, July 22, 2007, at 4.1, available at <http://www.nytimes.com/2007/07/22/weekinreview/22polgreen.html> (discussing a UN Environment Programme report that attributes the conflict and social collapse in Darfur to ecological collapse); Press Release, Security Council, Climate Change, *supra* note 58.

60. Jim Giles, *Rainfall Records Could Warn of War*, NEW SCIENTIST, June 2, 2007, at 12, available at <http://environment.newscientist.com/article/mg19426064.500>.

problems.⁶¹ He stated that the Security Council's primary duty is to maintain international peace and security, whereas other issues, including those related to economic and social development, are assigned by the UN Charter to ECOSOC and the General Assembly.⁶² In his view, the encroachment of the Security Council on the roles and responsibilities of the other main organs of the United Nations compromises the rights of the organization's wider membership.⁶³ Small island states such as members of the Pacific Islands forum, however, "said that the impact of climate change on small islands was no less threatening than the dangers guns and bombs posed to large nations."⁶⁴

A second open debate on economic issues took place in the Security Council in June 2007, when Belgium organized a session on how natural resources fuel and prolong conflict.⁶⁵ Because "illicit trade in natural resources has become a principal source of revenue" for rebels, governments, and organizations fueling conflict, there has been a concerted international effort to control resource flows to combatants.⁶⁶ The Council President and Minister for Foreign Affairs of Belgium expressed the Council's opinion that "in conflict and post-conflict situations," responsibility must be shared among "source, transit, and destination countries in preventing and combating trafficking, illicit trade, and illegal exploitation of natural resources."⁶⁷ South African representative Dumisani Kumalo also noted the influence of economic integration on markets for conflict goods: "In many countries that had seen conflict, rebel movements had developed access to external markets of the developed world, making the role of traders, transport companies, international banks and transnational corporations a critical part of the debate."⁶⁸ The debate over natural resources was less controversial than that on

61. *U.N. Attacks Climate Change as Threat to Peace*, INT'L HERALD TRIB., Apr. 17, 2007, available at <http://www.iht.com/articles/2007/04/17/news/climate.php>; cf. *U.N. Security Council Adopts First Health-Only Resolution – on AIDS*, CNN.COM, July 18, 2000, <http://archives.cnn.com/2000/HEALTH/AIDS/07/18/un.aids/index.html> (showing that similar objections were raised with regard to Resolution 1308 on HIV/AIDS).

62. See Press Release, Security Council, Climate Change, *supra* note 58.

63. *Id.*

64. *Id.*

65. Press Release, Security Council, Security Council Underscores Need for Peacekeeping Mandates to Consider Helping States Prevent Illegal Exploitation of Natural Resources from Fueling Conflict, U.N. Doc. SC/9060 (June 25, 2007) [hereinafter Press Release, Security Council, Prevent Exploitation].

66. Jonathan M. Winer, *Tracking Conflict Commodities and Financing*, in PROFITING FROM PEACE 69, 69 (Karen Ballentine & Heiko Nitzschke eds., 2005).

67. Press Release, Security Council, Prevent Exploitation, *supra* note 65. B. Lynn Pascoe, Under-Secretary-General for Political Affairs, also stated that the national economic governance capacities of vulnerable countries should be developed as a component of peace-building strategies. *Id.*

68. *Id.*

climate change because of the Council's established track record on commodity sanctions and natural resources management in countries subject to UN sanctions.⁶⁹ Nonetheless, the general tenor of the debate revealed a basic concern: developing countries affected by an expansion of the Security Council's jurisdiction over socioeconomic issues often have no input in the Council's decision making process.

There is little question that since the Council was formed, the nature of threats to global order has evolved. The shift from nation-states to so-called "market states" has created interconnected economic, financial, and environmental systems.⁷⁰ Climate change and competition for scarce natural resources are "threat multipliers" that, in already fragile economies, will exacerbate poverty, refugee flows, food shortages, and create the potential for armed conflict.⁷¹ Although support for the Council's expanding jurisdiction has not been universal,⁷² the most cogent response will be based on both the substantive and procedural legitimacy of the Security Council's activities and on better coordination with other actors such as the Peacebuilding Commission (PBC), ECOSOC, and the international financial institutions. Part VII explores why this approach will ultimately be required if the Council is to exercise its economic jurisdiction.

B. *The Regime Capture Critique*

The second general objection to the Council's involvement in economic issues is based on a dispute over which body within the UN system should address economic threats to peace and security. More precisely, perhaps economics should be left to specialized bodies with a specific mandate in economic affairs—the IMF, the World Bank, and ECOSOC.⁷³ In this view, where economic and security issues

69. See David Cortright & George A. Lopez, *Introduction: Assessing Smart Sanctions: Lessons from the 1990s*, in SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 1, 11–13 (David Cortright & George A. Lopez eds., 2002) (discussing commodity sanctions).

70. See PHILIP BOBBITT, TERROR AND CONSENT 9 (2008) (describing the impact of the market state on terrorism).

71. NICOLAS FRANKCOM, CIVITATIS INT'L, CLIMATE CHANGE, SECURITY AND SUSTAINABLE DEVELOPMENT 27 (2008), available at http://www.civitatis.org/pdf/FBTP_Report.pdf; Oli Brown, Anne Hammil & Robert McLeman, *Climate Change as the 'New' Security Threat: Implications for Africa*, 83 INT'L AFF. 1141, 1142 (2007).

72. U.N. High-Level Panel on Threats, Challenges, and Change, *supra* note 19, ¶¶ 245–246; see also Ingo Winkelmann, *Bringing the Security Council into a New Era – Recent Developments in the Discussion on the Reform of the Security Council*, 2 MAX PLANCK Y.B. U.N. L. 35, 74–75 (1998).

73. Cf. GRACIANA DEL CASTILLO, REBUILDING WAR-TORN STATES: THE CHALLENGE OF POST-CONFLICT ECONOMIC RECONSTRUCTION (forthcoming Oct. 2008) (manuscript at 54–55, on file with author) (suggesting that the U.N. should establish specific economic task forces for its post-conflict operations).

overlap, the Security Council should not exercise its Article 39 jurisdiction, but defer to specialized economic agencies.⁷⁴

This criticism is particularly cogent in light of recent UN missteps in economic and financial fields. As Graciana del Castillo writes,

Mismanagement, corruption, and influence peddling (most clearly associated with the "oil-for-food" program and overall procurement practices), sexual abuse and exploitation of women and children by peacekeeping forces, and visible cases of incompetent and unaccountable staff members at the highest levels have led many observers to question the [abilities of the UN] Furthermore, the strong resentment—particularly in the Muslim world—of comprehensive sanctions imposed by the Security Council and maintained for a dozen years in Iraq has undermined the organization's credibility⁷⁵

In other words, the Security Council has significant image and legitimacy problems, based in part on its past interventions in economic and financial matters.

The "regime capture" critique must, however, be considered in light of the jurisdiction of other specialized agencies. While it is true that the World Bank, the IMF, and other multilateral institutions have jurisdiction over some aspects of the international monetary system—including monetary stability, reconstruction, and development—they do not have jurisdiction over peace and security.⁷⁶ The World Bank has a carve-out in Article IV(10) of its Articles of Agreement that prohibits it from interfering in its members' political affairs.⁷⁷ The narrower Article IV(3) in the IMF Articles of Agreement similarly limits the IMF to non-political considerations in its surveillance activities.⁷⁸ Moreover, as a matter of design, international financial institutions (IFIs) were inspired by functionalist theories of international organizations, according to which they were created to provide technical and apolitical assistance and to avoid inherently political issues like peace and security.⁷⁹ The Security Council's advantage as an executive organ lies in its power to react quickly, decisively, and (where it chooses) with military force.⁸⁰ Its disadvantage is that, as a small organ composed of

74. Cf. *id.* (same).

75. *Id.* (manuscript at 53, on file with author).

76. IBRD Articles of Agreement, *supra* note 23, art. IV, § 10; see Boon, *supra* note 14, at 521.

77. See Boon, *supra* note 14, at 521 (discussing the origin and effects of these provisions).

78. IMF Articles of Agreement, *supra* note 23, art. IV, § 3.

79. Boon, *supra* note 14, at 521–22.

80. Malcolm N. Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function*, in *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* 219, 225 (A.S. Muller et al. eds., 1997); *Report of Rapporteur of Committee III/3 to Commission III on Chapter VIII, Section B*,

political representatives and a lean secretariat at the UN, the Council has neither the infrastructure nor the skills to tackle matters of broad economic and financial policy.⁸¹

The fact that other international organizations operate in the economic field does not prohibit the Security Council from engaging in economic practices, as long as they are consistent with its powers as set out in the UN Charter. The Council has, in fact, attempted to coordinate with the IMF and World Bank to enlist their assistance when economic issues arise. In Resolution 1483 on Iraq, for example, the Security Council gave the IFIs a direct role by calling on them to “assist the people of Iraq in the reconstruction and development of their economy and to facilitate assistance by the broader donor community.”⁸² Thus, the future of the Council’s involvement in the economic and financial fields will likely involve greater coordination with specialized agencies, but not the abdication of Council power given its unique political and legal status.

Nonetheless, converging economic mandates may sow the seed of future inter-institutional conflict. Security Council resolutions with economic content may require IFIs to implement Security Council objectives which are not in accordance with their own mandates.⁸³ For example, the Security Council could require IFIs to bail out a failing state or to provide technical assistance, which might not correspond with IFI priorities or practices.⁸⁴ Alternatively, the Council may choose to follow the IFIs’ practices when addressing economic matters, adhering to such norms of international economic

in THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: SELECTED DOCUMENTS 761, 761 (U.S. Dep’t of St. ed. 1946) [hereinafter *U.N. Organization Conference Report*]. The Report stated that the Council’s application of enforcement measures, in the context of relations between the Council and the General Assembly,

in order to be effective, must above all be swift . . . [I]t is impossible to conceive of swift and effective action if the decision of the Council must be submitted to ratification by the Assembly, or if the measures applied by the Council are susceptible of revision by the Assembly.

U.N. Organization Conference Report, supra, at 761.

81. See Francis Fukuyama, *Nation-Building and the Failure of Institutional Memory*, in NATION-BUILDING BEYOND AFGHANISTAN AND IRAQ 1, 4–8 (Francis Fukuyama ed., 2006) (demonstrating the complexity of economic reconstruction and development).

82. S.C. Res. 1483, ¶ 15, U.N. Doc. S/RES/1483 (May 22, 2003); see also S.C. Res. 1621, ¶ 4, U.N. Doc. S/RES/1621 (Sept. 6, 2005) (referencing that IFIs appear in the Security Council’s resolutions on the UN Mission in the Congo (MONUC)).

83. See Agreement Between the United Nations and the International Bank for Reconstruction and Development art. VI, § 1, Nov. 15, 1947, available in 2 INT’L ORG. 198, 199–200 (1948); Boon, *supra* note 14, at 559 (discussing that under Article VI of the individual Relationship Agreements between the IMF, the World Bank and the UN, IFIs must give Security Council resolutions “due regard,” but the IFIs have generally not considered this as binding).

84. See Boon, *supra* note 14, at 565.

law as transparency (with its requirements of publication and oversight), nondiscrimination in trade, and free competition in the procurement and reconstruction processes.⁸⁵ This will be influenced by the fact that the IFIs have taken on significant responsibilities in the economic and regulatory reform of post-conflict situations, where international peace and security are at the forefront.

C. *The Jurisdictional Critique*

The third and final criticism of the Council's expanding jurisdiction is based on the powers accorded to the Security Council in the UN Charter. The UN Charter is both the constituting treaty of the UN and a sort of constitution for the organization. It sets forth the powers and functions of the various UN organs and the rights and duties of member states. Like any national constitution, the UN Charter must be interpreted and applied to new situations that are not expressly set out in the Charter itself.⁸⁶ Although the Security Council determines its own competence under Chapter VII, it is not a judicial organ, nor does it have a comprehensive methodology or interpretive process.⁸⁷ Thus, controversy persists on the range of the so-called implied powers possessed by the Security Council.⁸⁸ While the doctrine of implied powers justifies those deemed "essential" to carrying out the functions of the organization, implied powers are sometimes used to permit an expansive reading of Charter purposes.⁸⁹ In other words, the doctrine has been used to permit organizations to take action that is not, strictly speaking, "essential" or "necessary" but merely desirable or consistent with the aims or powers in the Charter.⁹⁰

During the Cold War, the Security Council's implied powers were rarely an issue due to the ideological deadlock between the permanent members.⁹¹ After the Cold War ended, however, the Council began aggressively exploring the scope of its Chapter VII

85. Boisson de Chazournes, *supra* note 15, at 69–73; Thomas M. Franck, *Collective Security and UN Reform: Between the Necessary and the Possible*, 6 CHI. J. INT'L L. 597, 603 (2006).

86. Blaine Sloan, *The United Nations Charter as a Constitution*, 1 PACE Y.B. INT'L L. 61, 63–64 (1989) (discussing the limits to the constitutional analogy as well).

87. Cf. George Abi-Saab, *The Appellate Body and Treaty Interpretation*, in THE WTO AT TEN: THE CONTRIBUTIONS OF THE DISPUTE SETTLEMENT 453 (Giorgio Sacerdoti et al. eds., 2006) (discussing the evolution in the judicial function of the Appellate Body of the WTO).

88. Gaetano Arangio-Ruiz, *The 'Federal Analogy' and the UN Charter Interpretation: A Crucial Issue*, 8 EUR. J. INT'L L. 1, 1 (1997).

89. *Id.* at 2–3.

90. See generally JOSE E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005).

91. *Id.*

powers.⁹² Its interventions increased dramatically in number and in nature as cooperation improved,⁹³ making the practices of the Security Council the subject of some concern. The next Part shows that concerns about the Security Council's jurisdiction over economic and financial issues can be addressed through tailored criteria for the invocation of Articles 39 and 41. The critical question is not whether the Council has jurisdiction over economic and financial issues, but rather what is its scope?

V. WHEN SHOULD ECONOMIC ISSUES BE CONSIDERED AS THREATS TO THE PEACE UNDER ARTICLE 39?

There is little question that economic issues are key components of conflict.⁹⁴ Oil is at the root of many modern disputes—the Suez Crisis of 1956, the Kuwait Crisis of 1990, and, most recently, the decisions whether to intervene in Iraq and the Sudan.⁹⁵ Corruption and misuse of the mining sector in the Democratic Republic of the Congo played a major role in the 1998–2003 wars, which led to the deaths of nearly four million people and embroiled a number of neighboring states.⁹⁶ In Liberia, corruption, financial scandals, and the exploitation of natural resources like diamonds and timber have

92. *Id.*

93. See generally David Malone, *Introduction*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21st CENTURY* 1–13 (David Malone ed., 2004).

94. David Malone & Heiko Nitzsche, *Economic Agendas in Civil Wars: What We Know, What We Need to Know* 6 (World Inst. for Dev. Econ. Research, Discussion Paper No. 2005/07, 2005), available at http://www.wider.unu.edu/publications/working-papers/discussion-papers/2005/en_GB/dp2005-07/ (discussing that it is accepted that economic factors, including access to natural resources and other sources of finance can have important consequences for the character and duration of conflict). See generally *RETHINKING THE ECONOMICS OF WAR: THE INTERSECTION OF NEED, CREED, AND GREED* (Cynthia J. Arnson & I. William Zartman eds., 2005).

95. NICO SCHRIJVER, *SOVEREIGNTY OVER NATURAL RESOURCES* 385 n.54 (1997); Rex J. Zedalis, *Iraqi Oil and Revenues from Its Sale: A Review of How Existing Security Council Resolutions Affected the Past and May Shape the Future*, 18 *EUR. J. INT'L L.* 499, 499–500, 513 (2007); Peter S. Goodman, *China Invests Heavily in Sudan's Oil Industry, Beijing Supplies Arms Used on Villagers*, *WASH. POST*, Dec. 23, 2004, at A1; Joseph Kahn, *China Courts Africa, Angling for Strategic Gains*, *N.Y. TIMES*, Nov. 3, 2006, at A1.

96. Dino Mahtini, *Congo Launches Review of Mine Deals*, *FIN. TIMES* (London), June 12, 2007, at 9 (“During the war, many of Congo's mining concessions had been mortgaged off by government and rebels alike to pay for weapons and the support of foreign armies.”); see also *Armed Activities on Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 1 (Dec. 19) (discussing the findings of the court on illegal exploitation of natural resources in the Congo); U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of DR Congo, *Final Report*, ¶¶ 27–28, U.N. Doc S/2003/1027 (Oct. 15, 2003).

funded and perpetuated conflict.⁹⁷ The most prevalent threats today are perpetrated not by governments or armies, but by terrorists, drug traffickers, and transnational organized crime.⁹⁸

New ecological issues have grave implications for peace and security as well. Sir David King, the British government's chief scientist, went on record as saying that "climate change is a far greater threat to the world's stability than international terrorism."⁹⁹ The food crisis of 2008 has provoked similar concerns. Egypt, Indonesia, Côte d'Ivoire, Mauritania, Mozambique, Senegal, and Cameroon, have seen demonstrations leading to fatalities, "as starving, desperate people have taken to the streets."¹⁰⁰ Jacques Diouf, Director-General of the UN Food and Agriculture Organization, has remarked on the "tragic political and social consequences" of the world food crisis and its potential to further "endanger world peace and security."¹⁰¹ The issue, then, is not whether economic issues are linked to international peace and security, but rather what factors the Security Council should take into account in determining if it has Article 39 jurisdiction over economic and financial matters.

For the Security Council to act under Article 39, it must ground its jurisdiction on one of three bases: threats to the peace, breaches of the peace, or acts of aggression. Breaches of the peace and acts of aggression have been easy to identify in practice because they are characterized by actual hostilities. A breach of the peace is the use of armed force, unless it is an act of self-defense.¹⁰² The 1974 General Assembly Resolution 3314 defines aggression as the "use of armed force" by a state against the sovereignty of another state, and the ICJ has upheld this definition as consistent with customary international law.¹⁰³ Illustrative examples include actual conflict; unauthorized

97. Dino Mahtani, *In Need of Monitoring and Better Enforcement*, FIN. TIMES (London), July 17, 2006, at 4 ("Liberian diamonds, and those smuggled in principally from neighboring Sierra Leone, were one significant source of revenue sustaining the regime of former warlord-turned-president Charles Taylor.").

98. Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination*, 49 WM. & MARY L. REV. 1345, 1356 (2008).

99. *Global Warning "Biggest Threat,"* BBC NEWS ONLINE, Jan. 9, 2004, <http://news.bbc.co.uk/2/hi/science/nature/3381425.stm>.

100. Robin McKie & Heather Stewart, *Hunger. Strikes. Riots. The Food Crisis Bites*, OBSERVER, Apr. 13, 2008, <http://www.guardian.co.uk/environment/2008/apr/13/food.climatechange>; see also *Food Riots Turn Deadly in Haiti*, BBC NEWS ONLINE, Apr. 5, 2008, <http://news.bbc.co.uk/2/hi/americas/7331921.stm>.

101. Moming Zhou, *Leaders Urge Action to Address Food Crisis*, MARKETWATCH, June 3, 2008, <http://www.marketwatch.com/news/story/leaders-urge-action-address-global/story.aspx?guid={29D4EB4A-B6E0-4FC6-BC87-47C9744C127B}>.

102. Frowein & Krisch, *supra* note 26, at 721–22.

103. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27); G.A. Res. 3314 (XXIX), Annex art. I, U.N. Doc. A/RESS/3314/Annex (Dec. 14, 1974); cf. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 26–36 (Apr. 9) (holding that mere

armed force; invasions; military occupations; bombardments; blockades; attacks on land, sea, or air forces; and the sending of armed groups against another state.¹⁰⁴

The term "threats to the peace," however, is more ambiguous.¹⁰⁵ The Charter does not limit the definition of "threats to the peace" in any way, nor does it require the Council to distinguish between the many potential types of threats or causes of conflict before acting under Article 39.¹⁰⁶ Furthermore, unlike a breach of the peace or an act of aggression, either of which requires actual hostilities by definition, a "threat to the peace" is prospective. As Frowein and Kirsh write, "[i]n the conception of the Charter, the most typical case of a threat to the peace is that of an impending armed conflict between States, i.e. the imminent danger of a breach of the peace or an act of aggression," not actual violence itself.¹⁰⁷ This jurisdictional basis allows the Security Council to act preventively and use its discretion to determine which threats are likely to evolve into real hostilities. Article 39, therefore, creates a preventive role for the Security Council; it does not require that the Council wait for the outbreak of conflict before acting.¹⁰⁸

This analysis shows there are three justifications for addressing economic issues as "threats to peace and security": (A) the Charter is deliberately broad and leaves ultimate determinations of what constitutes a threat to peace and security to the Security Council; (B) the terms "peace" and "security" can include economic dimensions; and (C) the developing practice of the Security Council under Article 39 has led to an evolution in its powers.¹⁰⁹

presence of British warships in Albanian waters was not a serious violation international law and did not warrant violent Albanian response).

104. G.A. Res. 3314, *supra* note 103, at Annex.

105. See BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS, *supra* note 19, at 51 (stating that the lack of definition was intentional).

106. The Council's pattern of response to human rights issues illustrates the flexibility accorded the Council in the interpretation of its mandate. While Article 39 does not directly provide for human rights as a basis for Security Council intervention, the Council has determined human rights violations can constitute a threat to the peace; see True-Frost, *supra* note 30, at 116 (observing that, beginning in 1999, the Security Council has adopted an increasing amount of resolutions in response to human rights abuses).

107. Frowein & Krisch, *supra* note 26, at 722.

108. *Id.* (noting, however, that the Security Council has also found ongoing conflicts, such as the continued fighting between Eritrea and Ethiopia, to constitute threats to the peace (citing S.C. Res. 1298, U.N. Doc. S/RES/1298 (May 17, 2000))).

109. Carolyn Willson, *Changing the Charter: The United Nations Prepares for the Twenty-First Century*, 90 AM. J. INT'L L. 115, 118 (1996) ("Interpretation and practice may also modify and expand the meaning of the Charter in some cases.").

A. *The Security Council Is Empowered with Great Discretion*

Lowenfeld quipped: “[A] threat to the peace under Article 39 is whatever the Security Council determines to be a threat to the peace.”¹¹⁰ To be sure, Article 39 of the UN Charter grants the Security Council wide berth in determining its jurisdiction over “threats to the peace, breaches of the peace and acts of aggression.”¹¹¹ Consensus holds that the threat of expansion of warfare across international boundaries constitutes a threat to the peace, as do genocide, the collapse of civil order involving loss of life, interruption of democratic elections, and violations of cease-fire agreements.¹¹² Nonetheless, the outer limits of the Council’s jurisdiction are not settled. According to a 2005 European Court of Justice decision:

[D]etermining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts, subject only to the inherent right of individual or collective self-defence¹¹³

The view that the Council has authority to treat economic and financial matters as threats to the peace is supported by the drafting history of the UN Charter.¹¹⁴ The architects of the UN Charter intended the Council to be an organ of action that could quickly and decisively intervene in the face of conflict. The role of the Security Council was envisioned as preventing disagreements from escalating into war given the indivisible nature of peace and security.¹¹⁵ Delegates at the conference founding the UN thought the Security Council would need great fluidity in fulfilling its role; rather than restricting the categories in which the Council could intervene, they chose to leave the door open for the Council to intervene in a wide range of situations.¹¹⁶ Given the progression of modern warfare, they argued that the Council should have full discretion to determine what

110. LOWENFELD, *supra* note 20, at 706.

111. U.N. Charter art. 39.

112. Damrosch, *supra* note 26, at 12.

113. Case T-306/01, *Yusuf v. Eur. Council*, 2005 E.C.R. II-3533, ¶ 270; *see also* Christian Tomuschat, *Case Law Comment*, 43 COMMON MARKET L. REV. 537, 545 (2006) (commenting on *Yusef case*); Geoffrey R. Watson, *Constitutionalism, Judicial Review and the World Court*, 34 HARV. INT’L L.J. 1, 3 (1993) (considering whether the actions of the Security Council should be subject to review by the World Court).

114. The *travaux préparatoires* are a supplemental means of interpretation when the text of a treaty is ambiguous. Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331; *see also* Sloan, *supra* note 86, at 101.

115. ROBERT C. HILDERBRAND, *DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY* 129–30 (1990).

116. Frowein & Krisch, *supra* note 26, at 718 (discussing the drafters’ intention not to unduly restrain the authority of the Council).

constitutes a threat to the peace, breach of the peace, or an act of aggression.¹¹⁷

In practice, Article 39 opened the door to broad Security Council action even in the Council's early days. For example, the Council distanced itself from suggestions that it could only act where there were international effects. Instead, it treated internal conflicts—for instance, civil wars and violations of international norms such as the prohibition on apartheid—as potential threats to the peace.¹¹⁸ In more recent times, the Security Council has found threats to the peace in grave internal human rights violations¹¹⁹ and health crises such as the HIV/AIDS pandemic, where no armed force was present.¹²⁰ Even non-imminent or latent terrorist threats by nonstate actors have become the subject of Security Council action under Chapter VII.¹²¹ In short, the Council has used Article 39 as a jurisdictional hook to intervene in nontraditional, domestic crises

117. *U.N. Organization Conference Report*, *supra* note 80, at 763 (discussing the determination of acts of aggression). An evolutionary interpretation of Article 39 is supported by the arguments that the UN Charter serves as a lawmaking treaty and that an evolutionary interpretation was embraced as early as the San Francisco Conference. George Ress, *Interpretation*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 8, at 13, 24–25.

118. See THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 224–28 (1995) (discussing the Security Council's responses to General Franco's regime in Spain and the Congo crisis of 1960); Damrosch, *supra* note 26, at 12 (noting that the Council's identification of certain situations as threats to peace involved “quite a stretch from previous conceptions”); Gian Luca Burci, Legal Aspects of U.N. Economic Sanctions 1 (2000) (lecture paper, on file the Lauterpacht Cen. for Int'l Law), available at <http://www.lcil.cam.ac.uk/Media/lectures/doc/Burci.doc> (noting the increased willingness of the Security Council to respond to internal conflicts).

119. See, e.g., S.C. Res. 688, ¶ 1, U.N. Doc. S/RES/688 (April 5, 1991); see also Jost Delbrück, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 898 (1992) (discussing the necessary reinterpretation of the notion “threat to . . . international peace and security” and noting that, if “taken only to mean the threat of using military force in states' international, transborder relations, situations such as the genocide in Cambodia or the treatment of the Kurds in Iraq” would be excluded); Mary Ellen O'Connell, *Debating The Law of Sanctions*, 13 EUR. J. INT'L L. 63, 66–67 (2002) (discussing whether human rights abuses threaten the peace); *supra* note 106 and accompanying text.

120. See S.C. Res. 1308, ¶¶ 10–11, U.N. Doc. S/RES/1308 (July 17, 2000) (noting the potential security risk posed by the HIV/Aids pandemic).

121. See S.C. Res. 1540, *supra* note 38; S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1267, *supra* note 39; S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998); S.C. Res. 1193, U.N. Doc. S/RES/1193 (Aug. 28, 1998); see also Jose E. Alvarez, *The UN's 'War' on Terrorism*, 31 INT'L J. LEGAL INFO. 238, 241 (2003) (stating that the Council's resolutions on terrorism represent a revolution in that body's interpretation of what constitutes an ongoing “threat to the international peace”); Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 181 (2005) (discussing how abstract situations, such as terrorism, have been termed “threats to the peace”).

that it deemed would have an adverse effect on international security.¹²²

B. "Peace" and "Security" Have Positive Dimensions and
Include Economic Factors

A second reason for the Security Council's jurisdiction over economic issues is based on the terms "peace" and "security" in Article 39. No clear definition of peace exists in international law, and as a consequence, some have suggested that a negative definition of peace—such as "the absence of armed conflict"—should prevail.¹²³ For example, Inger Osterdahl writes that "a threat to the peace could well include very many different phenomena and an empirical analysis of what constitutes a threat to the peace in the broad sense would have to become correspondingly more comprehensive and complex."¹²⁴

A fuller understanding of the contours of peace has emerged only recently, in no doubt influenced by the simultaneous fragmentation of the concept of war. It is now acknowledged that peace is not simply created by a *de jure* agreement like a peace treaty, but requires consolidation, such as compliance with peace agreements, monitoring cease-fires, demilitarization of former combatants, repatriation of refugees, mine clearance, and the reform of police forces. Like the "positive obligations" that inure with economic and social rights, the establishment of a durable peace is based in part on conditions that

122. For example, scholars have argued that the Palestine conflict of 1948, the Indonesian civil war of 1948, the 1961 conflict in the Congo, and the cases of Rhodesia and South Africa in 1966 and 1976, respectively, were all internal conflicts that the Security Council determined to be threats to the peace. See Damrosch, *supra* note 26, at 10; Frowein & Krisch, *supra* note 26, at 723–24; Farid Wahid Dahmane, *Les Mesures Prises Par Le Conseil De Securite Contre Les Entites Non-Etatiques*, 11 RADIC 227, 237 (1999); see also Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 30 (Oct. 2, 1995) ("[E]ven if [the situation] were considered merely an 'internal armed conflict,' it would still constitute a 'threat to the peace.'"). As Professor Odre Kittrie writes: "The Council has been willing to find a 'threat to the peace' in the absence of existing or even imminent armed conflict, in the absence of a clear transnational element, and in the absence of any breach of international law." Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337, 363 (2007).

123. HANS Kelsen, RECENT TRENDS IN THE LAW OF THE UNITED NATIONS 930 (1951) ("Peace or, as the Charter says, 'international peace' is a relation between states. Hence a 'breach of the peace' can be committed only by a state in its relation to another state."); Daniel W. Abbott, *The United Nations and Intrastate Conflict: A Legislative History of the United Nations Charter*, 8 U.C. DAVIS J. INT'L L. & POL'Y 275, 282 (2002) (noting the view that "only in clear cases of interstate conflict could the Council act under Article 39").

124. INGER ÖSTERDAHL, THREAT TO THE PEACE: THE INTERPRETATION BY THE SECURITY COUNCIL OF ARTICLE 39 OF THE UN CHARTER 88 (1998).

make it practicable, including aid, economic reconstruction, the provision of food and medical care, and mechanisms to address accountability for past atrocities.¹²⁵

A useful analogue is Article 55 of the UN Charter, which indicates that maintaining international peace and security requires not only banning force, but also actively promoting international social and economic cooperation “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”¹²⁶ Although Article 55 is not binding on the Security Council as such,¹²⁷ it requires the UN to promote (1) higher standards of living; (2) full employment; (3) conditions of economic and social progress and development; (4) solutions of international economic, social, health, and related problems; (5) international cultural and educational cooperation; and (6) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.¹²⁸ In other words, Article 55, read together with the principles and purposes of the UN in Article 1,¹²⁹ offer a positive definition of peace that the UN has advocated since its founding days: the promotion and encouragement of self-determination and the economic and social advancement of all peoples. For its part, the Security Council now states that it “recognizes that peace is not only the absence of conflict, but requires a positive, dynamic, participatory process.”¹³⁰ Security Council Resolutions 1325 (on women, peace, and security) and 1645 (on sustainable peace similarly) demonstrate that a broader, positive reading of peace has prevailed.¹³¹ On this analysis, the Council’s

125. See generally MICHAEL HOWARD, *THE INVENTION OF PEACE AND THE REINVENTION OF WAR 2* (2000) (“Positive peace implies a social and political ordering of society that is generally accepted as just.”). The same can be said of war. War no longer requires active combat; consider the Cold War, the war on terrorism, and the war between South Korea and North Korea—all examples of situations which are called “war” but in fact contain no active fighting. See Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT’L & COMP. L.Q. 283–84 (1987).

126. U.N. Charter art. 55; Rüdiger Wolfrum, *Article 55(a) and (b)*, in 2 *THE CHARTER OF THE UNITED NATIONS*, *supra* note 8, at 897, 898.

127. Wolfrum, *supra* note 126, at 901 (noting that Article 55 functions “are to be performed by the GA and, under their authority, by the ECOSOC”).

128. U.N. Charter art. 55.

129. Wolfrum, *supra* note 15, at 40 (observing that the purposes delineated in Article 1 are applicable to all UN organs).

130. President of the Security Council, *Statement by the President of the Security Council, delivered to the Security Council*, U.N. Doc. S/PRST/2000/25 (July 20, 2000).

131. S.C. Res. 1645, U.N. Doc. S/RES/1645 (Dec. 20, 2005); S.C. Res. 1325, UN Doc. S/RES/1325 (Oct. 31, 2000).

jurisdiction over “threats to the peace” encompasses positive characteristics, rather than the absence of negative characteristics.¹³²

The concept of “security” requires similar scrutiny. Traditionally, security issues were examined in the context of “state security,” or the protection of the state and its boundaries, people, institutions, and values from external attack.¹³³ As nonstate threats have proliferated, this view has become inadequate. International security today involves a broader range of issues, potentially encompassing environmental issues, damage caused by violent conflicts, and mismanagement of natural resources.¹³⁴ Indeed, in 2007, Yoweri Museveni, the President of Uganda, called climate change an “act of aggression” by the developed world against the developing world.¹³⁵ Security may also include “human security,” such as respect for human rights and the protection of fundamental rights and freedoms.¹³⁶

C. *The Security Council’s Practice Demonstrates an Evolution in Its Powers*

Amendment by practice is a supplemental method of interpretation of the UN Charter.¹³⁷ The acts and omissions of the

132. See Charles G. Fenwick, *The Concept of Peace*, in DUMBARTON OAKS 33, 33–36 (Robert E. Summers ed., 1945) (noting that international peace, when appropriately conceived as “justice and order in international relations,” may be approached from social and economic perspectives).

133. Lloyd Axworthy, *Human Security and Global Governance*, 7 GLOBAL GOVERNANCE 19, 19 (2001).

134. See Ken Conca, *The Case for Environmental Peacekeeping*, in ENVIRONMENTAL PEACEMAKING 1, 5–9, 13 (Ken Conca & Geoffrey D. Dabelko eds., 2002) (discussing the link between environmental change and violent conflict, and the concept of international environmental peacemaking); see also VIOLENT ENVIRONMENTS 8–10 (Nancy Lee Peluso & Michael Watts eds., 2001) (addressing the connection between environment and international security).

135. Andrew Clark, *Climate Change Threatens Security, UK Tells UN*, GUARDIAN (London), Apr. 18, 2007, at 18, available at <http://www.guardian.co.uk/environment/2007/apr/18/greenpolitics.climatechange>.

136. See also S. NEIL MACFARLANE & YUEN FOONG KHONG, HUMAN SECURITY AND THE U.N.: A CRITICAL HISTORY 1 (2006); Rajagopal, *supra* note 98, at 1356 (noting the emergence of the idea of “human security,” challenging traditional conceptions of “security”).

137. Although not binding on the United Nations according to the conventions, both Article 31(b) of the Vienna Convention on the Law of Treaties and Article 31(3)b of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations recognize subsequent practice as a method of interpretation. Vienna Convention on the Law of Treaties, *supra* note 114, art. 31 (observing that “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be taken into account); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 31, ¶ 3, Mar. 21, 1986, 2 Official Records of the U.N. Conference on the Law of Treaties Between States & Int’l Orgs. or Between Int’l Orgs (1986), available at <http://untreaty.un.org/>

Security Council and its members are probative of their intent.¹³⁸ As Justice Lauterpacht wrote, “a proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in light of revealed tendencies in the life of the Organization.”¹³⁹ As the ICJ further recognized in the Namibia case, when interpreting the UN Charter, one must take into account the changes that have occurred since its creation.¹⁴⁰ Today, these changes include economic globalization. While military threats to international peace might have been the primary situations anticipated when the Security Council was created, the Council today has rightly broadened the scope of international security.¹⁴¹

Although Security Council intervention on economic grounds may appear to be uncharted territory, it is not entirely unprecedented.¹⁴² In 1997, the Council intervened in Albania under Chapter VII after a pyramid banking scheme collapsed in the formerly communist country.¹⁴³ In this instance, over two million people—three-quarters of the country’s citizens—lost their life savings shortly after a shaky transition to a market economy.¹⁴⁴ The collapse provoked rioting, violence and chaos bordering on near

ilc/texts/instruments/english/conventions/1_2_1986.pdf; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 325(2) (1987); ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 7 (2007) (arguing that Articles 31–33 of the Vienna Convention represent a codification of existing customary international law binding on entities not party to the Vienna Convention).

138. Cf. LINDERFALK, *supra* note 137, at 166 (observing that acts, as well as omissions, may constitute “practice” demonstrating the agreement of the parties regarding the interpretation of the treaty).

139. Voting Procedures on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, 1955 I.C.J. 67, 106 (June 7) (separate opinion of Judge Lauterpacht).

140. Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 31 (June 21).

141. Article 31 of the Vienna Convention on the Law of Treaties requires that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, *supra* note 114, art. 31.

142. *But see* Boisson De Chazournes, *supra* note 15, at 53 (“[I]n practice, severe economic degradation has not yet in and of itself constituted a threat to peace in accordance with Chapter VII.”).

143. S.C. Res. 1101, U.N. Doc. S/RES 1101 (Mar. 28, 1997); Ettore Greco, *New Trends in Peacekeeping: The Experience of Operation Alba*, 29 SEC. DIALOGUE 201, 203 (1998); Dino Kritsiotis, *Security Council Resolution 1101 (1997) and the Multi-National Protection Force of Operation Alba in Albania*, 12 LEIDEN J. INT’L L. 511, 513–21 (1997).

144. Kritsiotis, *supra* note 143, at 514.

dissolution of the country.¹⁴⁵ About two thousand people were killed, and waves of refugees fled to neighboring countries.¹⁴⁶ In that instance, the Security Council found that the situation—the country's economic and financial demise—constituted a “threat to international peace and security” under Security Council Resolutions 1101 and 1114.¹⁴⁷ In response, the Council created a multinational force known as Operation Alba, comprising military units from eleven member states, which lasted from April 15 to August 11, 1997. Albania consented to the Italian-led intervention, which was given a mandate to facilitate the delivery of humanitarian assistance and to reestablish political and economic order.¹⁴⁸

The Security Council's willingness to intervene in Albania was undoubtedly influenced by the Council's extensive regional involvement in the Balkans in the 1990s¹⁴⁹ and by the transborder effects of refugees on neighboring NATO member states.¹⁵⁰ Nonetheless, Operation Alba demonstrates that the Security Council is prepared to intervene under Chapter VII, even with military force, when it deems a “threat to the peace” to have arisen as a result of a government's inability to maintain or restore economic stability.¹⁵¹ In the final report to the Security Council on Operation Alba, for example, member states participating in the force confirmed that “[t]he presence of the multinational protection force effectively blocked the risk of Albania sliding towards anarchy or even internal political conflict,”¹⁵² and concluded with the observation that “[a] new phase [in Albania] must start without delay, focusing on the rehabilitation of state institutions and the return of the country to an orderly social, political and economic condition . . .”¹⁵³ In an August 14, 1997, Security Council debate organized on the eve of the operation's termination, the financial triggers of the crisis were again

145. Christopher Jarvis, *The Rise and Fall of Albania's Pyramid Schemes*, 37 FIN. & DEV. 46, 47–48 (2000); U.S. Department of State, Background Note: Albania, <http://www.state.gov/r/pa/ei/bgn/3235.htm> (last visited Sept. 30, 2008).

146. Jarvis, *supra* note 145, at 48.

147. S.C. Res. 1101, *supra* note 143; S.C. Res. 1114, U.N.Doc. S/RES/1114 (June 19, 1997).

148. See President of the Security Council, *Statement of the President of the Security Council, delivered to the Security Council*, U.N. Doc. S/PRST/1997/14 (Mar. 13, 1997) (urging all parties involved to work together to lower tension and facilitate the stabilization of the economy).

149. See S.C. Res. 1101, *supra* note 143; S.C. Res. 1114, *supra* note 147.

150. Jarvis, *supra* note 145, at 48 (noting that the collapse prompted the evacuation of foreign nationals and Albanians).

151. Cf. Damrosch, *supra* note 26, at 12, 19–21 (discussing responses to situations involving the “collapse of civil order,” resulting in loss of life).

152. The Secretary-General, *Eleventh and Final Report to the Security Council on the Operation of the Multinational Protection Force in Albania*, ¶ 13, *delivered to the Security Council*, U.N. Doc S/1997/632 (Aug. 12, 1997).

153. *Id.* ¶ 22.

acknowledged. The Japanese delegate stated that “[r]eform of the financial system was particularly important in view of a recent experience in which disturbances had been ignited by the collapse of pyramid investment schemes.”¹⁵⁴ Similarly, the U.S. delegate concluded that “[t]here must be an end to the pyramid scheme that had ravaged the country and deprived millions of their life savings.”¹⁵⁵

Even when economic situations fall under the Security Council’s jurisdiction, however, it does not automatically follow that the Security Council will act. The Council’s history and composition readily indicate that intervention decisions are political in nature.¹⁵⁶ Thus, in practical terms, the Council’s decision not to intervene in a given situation indicates either that the grounds for Council intervention are lacking, or that there is no political consensus on intervention in that particular situation.¹⁵⁷ Zimbabwe is a cogent current example of an economic crisis with serious humanitarian dimensions that arguably created Chapter VII jurisdiction, yet did not result in Security Council intervention. Nonetheless, there are grounds to believe that the Council’s failure to act thus far in Zimbabwe is reconcilable with the emerging practice of including economic issues within the Council’s Article 39 jurisdiction.

During the twenty-eight years President Mugabe has ruled Zimbabwe, the country has endured the repression of opposition parties, an HIV/AIDS crisis of epic proportions, and rampant inflation and unemployment. In both 2005 and 2008, Great Britain, a permanent member of the Security Council, suggested that the Security Council take jurisdiction over the situation in Zimbabwe, citing “an economic meltdown”¹⁵⁸ and a record 66,212% inflation

154. Press Release, Security Council, Security Council Marks Withdrawal of Multinational Force from Albania; Need for Continuing Global Support is Noted, U.N. Doc SC/6410 (Aug. 14, 1997).

155. *Id.*

156. See Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 13, 23–25 (Oct. 2, 1995).

157. The functional limits are what some have termed its “legitimacy.” See Thomas M. Franck, *The United Nations as Guarantor of International Peace and Security: Past, Present and Future*, in *THE UNITED NATIONS AT AGE FIFTY – A LEGAL PERSPECTIVE* 25, 37 (Christian Tomuschat ed., 1995) (“The legitimacy of such a system of delegation, and thus its permanence, depends upon visible and effective checks on unsupportable aggrandizement by the Council.”); see also Frowein & Krisch, *supra* note 8, at 704–05. See generally Alexander Orakhelashvili, *Legal Aspects of Global and Regional International Security – The Institutional Background* 61 (May 2000) (unpublished final report, NATO/EAPC Research Fellowships Programme 1998–2000), available at <http://www.nato.int/acad/fellow/98-00/orakhelashvili.pdf> (suggesting that legitimacy is critical to the continued international influence of the U.N. and the Security Council).

158. Peter Heinlein, *Britain Wants UN Security Council Attention on Zimbabwe*, VOICE OF AMERICA NEWS, Mar. 16, 2007, <http://www.voanews.com/english/archive/2007-03/2007-03-16-voa73.cfm?CFID=35193476&CFTOKEN=74860889>; see also *Zimbabwe*

rate.¹⁵⁹ In July 2008, the U.S. joined the effort by proposing a draft Chapter VII resolution which would have imposed economic and financial sanctions and a travel ban on top members of the government.¹⁶⁰ Zimbabwe opposed the resolution, stating that the country was at peace with itself and its neighbors, thereby posing no threat to international peace and security.¹⁶¹ The resolution was ultimately blocked when two permanent members of the Security Council—China and Russia—voted against the draft resolution, reasoning that the situation in Zimbabwe was a domestic issue that did not threaten international peace and security.¹⁶² Nonetheless, the circumstances in Zimbabwe present an important window into the Council's view of economic crises creating humanitarian emergencies, and, consequently, into its jurisdiction over international peace and security.

The arguments in favor of the Security Council's intervention in Zimbabwe were four-fold. First, Mugabe's government had attacked opposition leaders and prompted an economic crisis "compounded by shortages of foreign currency, food, fuel, electricity, and medicines."¹⁶³ Second, the situation created mass violence, refugee flows, and economic devastation affecting the entire region.¹⁶⁴ Political and economic refugees from Zimbabwe had fled into neighboring states—South Africa in particular.¹⁶⁵ Third, the security situation deteriorated seriously after the March 29, 2008 elections, "in which the opposition Movement for Democratic Change (MDC) party emerged as having the widest public support."¹⁶⁶ However, by

Report Discussed at UN, BBC NEWS, July 27, 2005, <http://news.bbc.co.uk/2/hi/africa/4721189.stm>.

159. Nelson Banya, *Zimbabwe Inflation Hits New Record at 66,212.3 Percent*, REUTERS, Feb. 14, 2008, <http://africa.reuters.com/country/ZW/news/usnL14777380.html>.

160. Press Release, Security Council, Security Council Fails to Adopt Sanctions Against Zimbabwe Leadership as Two Permanent Members Cast Negative Votes, U.N. Doc. SC/9396 (July 11, 2008).

161. *Id.*

162. *Id.* (recording the Chinese representative's statement that "the situation in Zimbabwe had not exceeded the context of domestic affairs").

163. *Zimbabwe: Security Council to be Briefed on Humanitarian Situation*, March 20, 2007, <http://www.alertnet.org/thenews/newsdesk/IRIN/e0771554311940a759309dc329214874.htm>.

164. Bronwen Dachs, *Church Officials: South Africa Unprepared to Help Zimbabwean Refugees*, CATHOLIC NEWS SERVICE, Mar. 20, 2007, <http://www.catholicnews.com/data/stories/cns/0701579.htm> (quoting the South African Council of Churches, which offers much of the aid to refugees in the region, that the situation in Zimbabwe threatens to destabilize the entire South African region); *PM to Boycott Talks over Mugabe*, BBC NEWS, Nov. 27, 2007, http://news.bbc.co.uk/2/hi/uk_news/politics/7115205.stm (stating there are now four million Zimbabwean refugees in South Africa and "inflation is running into hundreds of per cents").

165. Dachs, *supra* note 164.

166. SECURITY COUNCIL REPORT, INC., SECURITY COUNCIL REPORT: UPDATE REPORT – ZIMBABWE 1 (2008), <http://www.securitycouncilreport.org/atf/cf/%7B65BF6>

the time of the June 27, 2008 presidential run-off, episodes of violence and intimidation directed at the opposition suggested that free and fair elections would be impossible.¹⁶⁷ Finally, the Government's misuse of food aid and its suspension of humanitarian relief obviated the possibility of assistance from international humanitarian organizations, and ultimately deprived vulnerable people—including women, children, orphans, and refugees—of basic humanitarian aid.¹⁶⁸

Zimbabwe's humanitarian crisis was largely caused by economic destabilization. The virtual paralysis of its national institutions and the regular violence and grave human rights abuse parallel prior situations where Article 39 interventions were deemed appropriate.¹⁶⁹ Despite the statements of some Security Council members at the July 11, 2008 debate that internal situations are outside of the Council's Article 39 jurisdiction,¹⁷⁰ it is now well established that certain internal situations can constitute a threat to international peace and security.¹⁷¹ Nonetheless, key states either

F9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Update%20Report%209%20July%202008%20Zimbabwe.pdf.

167. *Expressing strong concern* at the irregularities during the 27 June presidential election, the violence and intimidation perpetrated in the run up to the election that made impossible the holding of free and fair elections, and the creation of an environment that did not permit international election observers to operate freely before and during the 27 June vote.

Press Release, Security Council, *supra* note 160.

168. *Expressing strong concern over the grave humanitarian situation in Zimbabwe* which has been exacerbated by the Government of Zimbabwe's misuse of food aid as a political tool and its suspension of humanitarian relief programmes, conducted by international and non-governmental organizations, and that this suspension is depriving the Zimbabwean people, in particular vulnerable people, including those displaced by violence and women, children and orphans, of basic humanitarian assistance.

Id.

169. See discussion of Albania, *supra* Part V.C.
 170. See, e.g., Press Release, Security Council, *supra* note 160.

Ibrahim O. Dabbashi (Libya) said . . . [t]he draft was based on the assumption that the situation in Zimbabwe represented a threat to peace and security in the region. That assumption was undermined by the fact that the dispute was between Zimbabwean parties and the neighboring countries had affirmed that the situation in no way threatened peace and security in the region. That was why the situation did not fall under the Council's purview.

Id.

171. See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Oct. 2, 1995); Damrosch, *supra* note 26, at 4–5 (“[M]any internal conflicts entail some transboundary elements, either as

preferred that the Security Council not act, or that action take place in other fora, due to what Professor Ken Abbott has called "sovereignty costs."¹⁷² That is, states will resist the intervention of international actors in domestic situations or situations in which they may have a vested interest, unless the benefits outweigh the costs.¹⁷³ Security Council debates on Zimbabwe suggest that regional actors are making just this assessment; they prefer to operate through regional institutions such as the African Union and the South African Development Community, rather than through the Security Council.¹⁷⁴

The Security Council's intervention in Albania and its inaction in Zimbabwe are illustrative of its equivocal role. As Tono Eitel writes:

The criteria [for Council intervention] will remain not the urgency of an intervention or action, e.g. the extent, the cruelty or the violence of a conflict, but the success in finding states that are ready to contribute what is needed for a complete operation, i.e. troops, equipment, logistics and money.¹⁷⁵

From this perspective, an important distinguishing factor between Albania and Zimbabwe has been regional support. In Albania, Italy was willing and able to lead the humanitarian mission; whereas South Africa, Zimbabwe's closest neighbor, opposed Council intervention and preferred to act bilaterally through regional organizations.¹⁷⁶ Moreover, opposition to the July draft resolution was related, in part, to the March 2008 elections. The political violence after the elections spurred the U.S. into more focused action, but also created concern among UN members that unfair elections

contributing factors . . . or as effects of the crisis."); OSTERDAHL, *supra* note 29, at 19–20.

172. Kenneth Abbott, *Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption*, 4 J. INT'L ECON. L. 275, 285 (2001) (calling "governments [that] systematically resist international actions that limit their autonomy unless the perceived benefits clearly outweigh the costs" the problem of "sovereignty costs").

173. *Id.* (discussing the implications of the WTO's failure to develop rules on bribery and corruption).

174. The July 1, 2008, African Union Summit did not result in sanctions against Zimbabwe. See Press Release, ISS Resource Center, African Union Summit Resolution on Zimbabwe, http://www.iss.co.za/dynamic/administration/file_manager/file_links/AUSUM_ZIM0708.PDF?link_id=21&slink_id=6223&link_type=12&slink_type=13&tmpl_id=3 (last visited Oct. 15, 2008).

175. Tono Eitel, *The UN Security Council and Its Future Contribution in the Field of International Law*, 4 MAX PLANCK Y.B. U.N. L. 53, 64–65 (2000).

176. Ted Perlmutter, *The Politics of Proximity: The Italian Response to the Albanian Crisis*, 32 INT'L MIGRATION REV. 203 (1998) (describing the Italian leadership in the U.N. military-humanitarian mission); Alan Cowell, *Ally Warns Outsiders Not to Push Zimbabwe*, N.Y. TIMES, June 25, 2008, <http://www.nytimes.com/2008/06/25/world/africa/25zimbabwe.html?emc=rss&partner=rssnyt> (stating that South Africa's governing party rejected calls for outside diplomatic intervention in Zimbabwe).

might set an unwanted precedent for future Council intervention.¹⁷⁷ As such, the Council's decision not to act in Zimbabwe did not turn on whether economic grounds were sufficient for intervention, but rather involved broader political calculations about regional support and whether unfair elections created the necessary grounds for Council intervention.

D. Acute vs. Chronic Economic Factors

One of this Article's central claims is that economic causes of conflict are no different from other causes of conflict if they reach the Article 39 threshold and constitute a threat to international peace and security. In other words, the Security Council can act upon the breakdown of institutions or the dissolution of law and order, regardless of cause, so long as the situation presents a threat to peace and security under Article 39. However, not all economic threats will rise to a level that creates Article 39 jurisdiction for the Council. It is important to distinguish broad, structural issues like poverty and economic underdevelopment, which are chronic and fall outside of the Council's jurisdiction, from those acute situations that properly attract Security Council attention.

The first determinant of whether an economic matter is properly within the Security Council's jurisdiction is the existence of a palpable threat.¹⁷⁸ Economic conditions that result in actual or impending violence or upheaval or those that undermine confidence in fundamental state institutions would constitute such a threat. The situation in Albania, for example, was characterized by unrest, violence, and a loss of effective control of the territory.¹⁷⁹ In contrast, general economic conditions such as poverty, lack of economic opportunity, and inequality would not warrant Security Council jurisdiction because they are too remote to constitute a palpable threat to peace and security. As the 2001 Report of the Secretary-

177. Security Council, *Statement by the President of the Security Council*, U.N. Doc. S/PRST/2008/23 (June 23, 2008) ("The Security Council regrets that the campaign of violence and the restrictions on the political opposition have made it impossible for a free and fair election to take place on 27 June."); cf. *Russia, China Veto U.N. Sanctions on Zimbabwe*, CNN, July 12, 2008, <http://www.cnn.com/2008/WORLD/africa/07/11/zimbabwe.sanctions/> ("Ambassadors for China and Russia said they wanted to give the rival political parties a chance to resolve the election matter on their own terms without undue interference from the Security Council.").

178. The concept of anticipatory self-defense is a useful analogue. Cf. MICHAEL W. DOYLE, *STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT* 16 (Stephen Macedo ed., 2008) (noting that the criteria of true imminence is not a useful concept in practice); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 526 (2006) (analyzing the *Caroline* doctrine of anticipatory self defense, which calls for a "palpable and imminent threat").

179. Kritsiotis, *supra* note 143, at 515.

General on the Prevention of Armed Conflict suggests, structural causes of poverty may be more appropriately left to agencies such as ECOSOC and the Bretton Woods institutions.¹⁸⁰ Regular humanitarian and development assistance are not within the Security Council's domain, although preventive responses to problems that could lead to the outbreak or recurrence of violent conflict would be.¹⁸¹

A second determinant of an acute economic situation is the nexus between the economic or financial issues and the threat to peace or security. In other words, economic factors or illicit financial activity must *cause* the threat to peace and security. Whereas ordinary, albeit severe, bankruptcies or domestic financial matters would be outside of the Council's Chapter VII jurisdiction, economic situations that create conditions of significant, widespread instability would not be.¹⁸² The Council's antiterrorism activities reveal this link—its Article 39 resolutions on terrorism base the threat to peace and security on the flow of money through international networks that are linked to direct sponsorship of terrorist activities.¹⁸³

Economic globalization is destined to create broader windows for Security Council intervention. Integrated production processes and revolutions in technology, communications, and transport have deepened global economic integration and made all states more vulnerable.¹⁸⁴ While Article 39 does not require that the "threat to the peace" be international, the Security Council has been more inclined to act when it can see the international effects of a given situation for reasons of legitimacy.¹⁸⁵ Could bankruptcies or currency crises that trigger poverty, unrest, and conflict fall under the Security Council's jurisdiction? Could the Security Council act against transnational corporations whose commercial interests fragment weak governments? Could corruption and financial scandals in

180. The Secretary-General, *Report of the Secretary-General on the Prevention of Armed Conflict*, ¶ 13, delivered to the General Assembly, U.N. Doc. S/2001/574, A/55/985 (June 7, 2001).

181. *Id.* ¶ 7–11.

182. Detlev F. Vagts, Editorial Comment, *Sovereign Bankruptcy: In Re Germany (1953), In Re Iraq (2004)*, 98 AM. J. INT'L L. 302, 306 (2004) ("One doubts whether the Council would regard it as appropriate to use its powers in an ordinary state bankruptcy that did not post a threat to the peace, but Iraq continues to qualify as a problem for peacekeeping.").

183. Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 183 ("[T]he Council cannot regulate financial transactions in general but only transactions that may be linked to a threat to the peace; that is, to terrorist acts, the proliferation of weapons of mass destruction, and possibly transnational organized crime, the illegal arms trade, and drug trafficking.").

184. Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 717 (2002).

185. Frowein & Krisch, *supra* note 26, at 723–24.

fragile states be considered threats to the peace?¹⁸⁶ The short answer is yes. These are the threats of the future.

VI. ECONOMIC ENFORCEMENT MEASURES UNDER ARTICLE 41 OF THE UN CHARTER

The second and better developed branch of the Council's economic jurisdiction is based on Article 41 of the UN Charter. Article 41 permits the Council to make use of nonmilitary enforcement measures that may include "complete or partial interruption of *economic relations* and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."¹⁸⁷ These enforcement measures include moral condemnation or censure, loss of legal status or membership, complete or partial interruption of economic relations, and the power *not* to invoke enforcement measures following an Article 39 determination.¹⁸⁸ Article 41 has been described as the Security Council's "economic weapon" in that it permits the employment of multilateral sanctions to dissuade aggressive behavior.¹⁸⁹ The purpose of Article 41, however, is to achieve the non-economic end of maintaining or restoring "international peace and security," and this enforcement power is different from an assertion of the Security Council's general competence in economic matters.¹⁹⁰

The Council exercises great discretion under Article 41 in determining how to enforce its Article 39 decisions.¹⁹¹ The Charter

186. Andrew Clapham, *Human Rights and the Prevention of Humanitarian Emergencies* 16 (U.N. Univ. World Inst. for Dev. of Econ. Research, Working Paper No. 211, 2000) (positing some of these scenarios in the human rights context).

187. U.N. Charter art. 41 (emphasis added) ("The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.").

188. Georges Abi Saab, *Keynote Address—The Concept of Sanction in International Law*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 29, 39 (Vera Gowlland-Debbas ed., 2001); MARGARET P. DOXEY, INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE 82 (2nd ed. 1996); Alting von Geusau, *supra* note 26, at 1 (indicating that Article 41 contains an illustrative and non-exhaustive list); *see also* Jost Delbruck, *Commentary on International Law, A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 894 (1992) (stating that, even after an Article 39 determination, "the UN has adopted sanctions against grave human rights violations only in rare cases").

189. DOXEY, *supra* note 188, at 3 (stating that the founders of the League of Nations thought the "economic weapon" was a powerful tool for governments to apply against aggressors).

190. *See supra* Part III.

191. Jochen Frowein & Nico Krisch, *Article 41*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 8, at 735, 739–40. It is important to note,

empowers the Council to make decisions not only with regard to diplomatic, economic, financial, and military measures against aggressors, but also on which course or combination of courses is necessary to achieve the maintenance of international peace and security.¹⁹² As the ICTY noted in *Tadic*: “Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action it can take”¹⁹³ Because sanctions are primarily instruments of peace maintenance, this discretion includes the right not to act. In other words, the Council is not obliged to use enforcement measures to respond to international wrongs, because sanctions are not meted out in response to violations of international law.¹⁹⁴ The Council can ignore violations of international treaties or customary rules, or it can act and affect—even negate—the rights of parties concerned.¹⁹⁵ Where compliance with sanctions causes economic hardship for third party states, Article 50 provides member states a right to consult with the Council in order to find a solution to those problems.¹⁹⁶

Traditionally, the Security Council used Article 41 to react to threats to the peace by applying sanctions, monitoring ceasefires, assisting in peace negotiations, and sometimes ordering military enforcement.¹⁹⁷ More recently, however, the Security Council has adopted forward-looking resolutions that are prescriptive in nature.¹⁹⁸ These “legislative” resolutions reflect the Council’s

however, that views diverge as to whether the Security Council’s discretion is absolute, or whether it is bound by international law. Compare ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 133–34 (2004) (discussing the limits to the Security Council’s discretion), with Lapidoth, *supra* note 26, at 115 (“[T]his determination is conclusive and within the absolute discretion of the Security Council.”).

192. GOODRICH & HAMBRO, *supra* note 7, at 265–66.

193. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 31 (Oct. 2, 1995); cf. Vera Gowlland-Debbas, *Introduction*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW, *supra* note 188, at 1, 8; Karl Doehring, *Unlawful Resolutions of the Security Council and their Legal Consequences*, 1 MAX PLANCK Y.B. U.N. L. 91, 108–09 (1997) (discussing the possible unlawful nature of Security Council resolutions in some situations).

194. James Crawford, *The Relationship Between Sanctions and Countermeasures*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW, *supra* note 188, at 57, 57.

195. Burci, *supra* note 118, at 6.

196. U.N. Charter art. 50; accord Jeremy Carver & Jenine Hulsmann, *The Role of Article 50 of the UN Charter in the Search for International Peace and Security*, 49 INT’L L. & COMP. L.Q. 528 (2000) (discussing the invocation of Article 50 in response to sanctions by the Security Council).

197. Frowein & Krisch, *supra* note 191, at 738–45.

198. This important distinction between the Security Council’s politico-military and legal-regulatory approach is adopted from David Malone & James Cockayne, *The UN Security Council: 10 Lessons from Iraq on Regulation and Accountability*, 2 J. INT’L L. & INT’L REL. 1, 1–2 (2006).

developing role as a proactive risk manager.¹⁹⁹ The Council's regulatory reaction to new threats to peace and security such as terrorism and unstable economic conditions is illustrated by several trends: (A) its shift away from *restricting* economic opportunities via sanctions toward *promoting* economic reconstruction; (B) its emphasis on good economic governance and the management of natural resources; and (C) its focus on targeting individuals and companies rather than states. These trends are worth exploring because they both illustrate the Council's growing engagement with international economic norms and indicate where the Council's economic action will be most influential.

A. Economic Reconstruction

The objective of securing the economic transformation of war-torn regions can be traced to the end of the Cold War, when it became explicit in both Chapter VI and VII peace-building operations.²⁰⁰ Since then, the Security Council has underscored the importance of economic rehabilitation in a series of regions including Eastern Slavonia, Kosovo, East Timor, the Congo, Afghanistan, and Iraq.²⁰¹ Security Council resolutions on economic reconstruction in Iraq involved the incorporation of mechanisms to stimulate the economy, such as measures addressing unemployment, poverty, and environmental degradation, and to improve a region's integration into the global economy.²⁰²

199. Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002) (discussing recent Council resolutions that go beyond country-specific situations and have "legislative" effects on all U.N. members).

200. Prior to the 1990s, the most important precursor was the UN's operation in the Congo from 1960–1964. In that case, ONUC provided economic advice on foreign exchange controls, central banking, and debt relief. See JAMES DOBBINS ET. AL., *THE UN'S ROLE IN NATION-BUILDING: FROM THE CONGO TO IRAQ* 23–24 (2005); Edward Mortimer, *Under What Circumstances Should the UN Intervene Militarily in a "Domestic" Crisis?*, in PEACEMAKING AND PEACEKEEPING FOR THE NEW CENTURY, 111, 127–28 (Olara A. Otunnu & Michael W. Doyle eds., 1998); Robert L. West, *The United Nations and the Congo Financial Crisis: Lessons from the First Year*, 15 INT'L ORG. 603 (1961); see also The Secretary-General Boutros Boutros-Ghali, *An Agenda for Peace – Preventative Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992*, ¶ 15 (June 1992) ("Our aims must be . . . in the largest sense, to address the deepest causes of conflict: economic despair, social injustice and political oppression.").

201. S.C. Res. 1770, ¶ 2(b)(iv), U.N. Doc. S/RES/1770 (Aug. 10, 2007) (Iraq, after Saddam Hussein was captured); S.C. Res. 1483, *supra* note 82, ¶ 2 (Iraq); S.C. Res. 1419, ¶ 10, U.N. Doc. S/RES/1419 (June 26, 2002) (Afghanistan); S.C. Res. 1378, ¶ 4, U.N. Doc. S/RES/1378 (Nov. 14, 2001) (Afghanistan); S.C. Res. 1272, ¶ 13, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (East Timor); S.C. Res. 1244, ¶ 13, U.N. Doc. S/RES/1244 (June 10, 1999) (Kosovo); S.C. Res. 1037, ¶ 11(f), U.N. Doc. S/RES/1037 (Jan. 15, 1996) (Eastern Slavonia).

202. See, e.g., S.C. Res. 1770, *supra* note 201, ¶ 2(b).

The Council's creation of territorial administrations in Kosovo and East Timor under Chapter VII are salient, although unique, examples of the new focus on economic reconstruction. These transitional governance bodies exercised plenary authority over economic issues, including currency, banking, and finance.²⁰³ The UN Missions in both Kosovo and East Timor passed laws that affected fundamental aspects of their economic and financial orders.²⁰⁴ For example, the Missions drafted and implemented regulations on currency, taxation, foreign direct investment, and trade, and they created new legal frameworks with a pro-market orientation.²⁰⁵ These legislative acts on economic and financial issues illustrate both the relevance of economic reconstruction to the Council's vision of collective security and the UN's emerging role as a legislator in fragile and post-conflict states.

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- (ii) The implementation of the International Compact with Iraq, including coordination with donors and international financial institutions;
 - (iii) The coordination and implementation of programmes to improve Iraq's capacity to provide essential services for its people and continue active donor coordination of critical reconstruction and assistance programmes through the International Reconstruction Fund Facility for Iraq (IRFFI);
 - (iv) Economic reform, capacity-building and the conditions for sustainable development, including through coordination with national and regional organizations and, as appropriate, civil society, donors, and international financial institutions.

Id.

203. S.C. Res. 1272, *supra* note 201, ¶ 102 (similarly requiring the UN Transitional Administration in East Timor—known as UNTAET—“[t]o assist in the establishment of conditions for sustainable development”); S.C. Res. 1244, *supra* note 201, ¶¶ 10–11 (establishing the UN Mission in Kosovo—known as UNMIK—and requiring the international administration to “support the reconstruction of key infrastructure and other economic reconstruction”).

204. Frowein & Krisch, *supra* note 26, at 723 (noting that post-conflict situations are ongoing threats to the peace); Kristen Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285, 313–14 (2005).

205. See, e.g., Amending UNMIK Regulation No. 1999/20 On the Banking and Payments Authority of Kosovo, UNMIK Reg. 2001/24, U.N. Doc. UNMIK/REG/2001/24 (Oct. 1, 2001); On a Taxation System for East Timor, UNTAET Reg. 2000/18, U.N. Doc. UNTEAT/REG/2000/18 (June 30, 2000); On Bank Licensing and Supervision, UNTAET Reg. 2000/8, U.N. Doc. UNTEAT/REG/2000/8 (Feb. 25, 2000); On the Use of Currencies, UNTAET Reg. 2000/2, U.N. Doc. UNTEAT/REG/2000/2 (Jan. 14, 2000); On the Banking and Payments Authority of Kosovo, UNMIK Reg. 1999/20, U.N. Doc. UNMIK/REG/1999/20 (Nov. 15, 1999); On the Licensing of Non-Bank Micro-Finance Institutions in Kosovo, UNMIK Reg. 1999/13, U.N. Doc. UNMIK/REG/1999/13 (Oct. 16, 1999); On the Currency Permitted to be Used in Kosovo, UNMIK Reg. 1999/4, U.N. Doc. UNMIK/REG/1999/4 (Sept. 2, 1999).

B. *Economic Governance*

Economic governance has risen to the top of the Security Council's collective security agenda because of the Council's concern for the effects of corruption on peace and security.²⁰⁶ For example, the Council has integrated norms of economic management such as transparency and equity into recent enforcement measures. In Security Council Resolution 1546 on Iraq, the Council decided "that the Development Fund for Iraq shall be utilized in a transparent and equitable manner and through the Iraqi budget including to satisfy outstanding obligations against the Development Fund for Iraq . . ."²⁰⁷ This language acknowledges Iraqi control over oil revenues, but still recognizes that the oil and gas deposits must be used wisely for Iraq ever to stand on its own as a successful democracy.²⁰⁸ The Security Council has also urged governments to promote lawful and transparent use of natural resources among themselves and encouraged "certificate of origin" schemes such as the Kimberly Process for diamond certification.²⁰⁹ And, it has now obligated the IFIs to assist in this endeavor.²¹⁰

The most developed initiative in economic governance to date is in Liberia, where the Security Council endorsed the Governance and

206. Two recent examples include Liberia and Cote D'Ivoire. See Group of Experts on Cote d'Ivoire, *Report of the Group of Experts Submitted Pursuant to Paragraph 7 of Security Council Resolution 1584 (2005) Concerning Cote d'Ivoire*, U.N. Doc. S/2005/699 (Nov. 7, 2005) (highlighting the Government's high military expenditure and a lack of fiscal transparency in the cocoa sector); INT'L CRISIS GROUP, LIBERIA'S ELECTIONS: NECESSARY BUT NOT SUFFICIENT (2005), available at <http://www.crisisgroup.org/home/index.cfm?id=3646&l=1>; cf. Group of Experts on the Dem. Rep. Congo, *Interim Report of the Group of Experts on the Democratic Republic of the Congo, Pursuant to Security Council Resolution 1698 (2006)*, ¶¶ 47–48, delivered to the Security Council, U.N. Doc. S/2007/40 (Jan. 31, 2007) (proposing reporting obligations "on all government authorities who have oversight and monitoring obligations with respect to the nation's natural resources" and the creation of a "steering committee" to "take responsibility for and oversee the formal development of all aspects that will lead to a natural resource control system").

207. S.C. Res. 1546, ¶ 24, U.N. Doc. S/RES/1546 (June 8, 2004).

208. Zedalis, *supra* note 95, at 513.

209. See, e.g., S.C. Res. 1698, ¶¶ 6, 10–11, U.N. Doc. S/RES/1698 (July 31, 2006) (describing such urging in regards to the Congo). See generally Ian Smillie, *What Lessons from the Kimberly Process Certification Scheme?*, in PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR, *supra* note 66, at 47, 47 (describing the coverage of the Kimberley Process Certification Scheme).

210. S.C. Res. 1756, ¶ 15, U.N. Doc. S/RES/1756 (May 15, 2007). In the Congo, the Security Council urged

the Congo itself, to take appropriate steps to end the illicit trade in natural resources, including if necessary through judicial means, and, where necessary, to report to the Council, and *calls upon* the international financial institutions to assist the Government of the DRC in establishing effective and transparent control over the exploitation of natural resources.

Economic Management Assistance Programme of 2005 (GEMAP), which was adopted in response to serious corruption and mismanagement of public finances that threatened Liberia's prospects for a stable peace.²¹¹ Poor economic governance in Liberia had undermined the government and fueled violent competition over natural resources. The fraud and theft were so great that the Security Council reconceptualized an otherwise narrow rule of law issue as one of peace building, public sector development, and economic management reform.²¹² Indeed, GEMAP links economic governance to lifting sanctions under Resolutions 1607 and 1626.²¹³

C. Jurisdiction over Private Companies

A third aspect of the Council's new regulatory role is its focus on the behavior of individuals and corporations rather than states. The Council now targets nonstate actors such as rebel groups and private companies involved in the trade of goods fueling conflict.²¹⁴ Sanctions committees created by the Security Council now habitually draw up a list of companies involved in prolonging conflict.²¹⁵ Furthermore, the Security Council has taken action against named corporations fueling conflict. In Security Council Resolution 1267, for example, the

211. See S.C. Res.1626, ¶ 4, U.N. Doc. S/RES/1626 (Sept. 19, 2005) ("The Security Council . . . [l]ooks forward to the implementation of GEMAP by the NTGL and succeeding governments of Liberia in collaboration with their international partners, and requests the Secretary-General to include information on the progress of this implementation in his regular reports on UNMIL"). But see Scott R. Lyons, *GEMAP: The New Anti-Corruption Plan for Liberia*, AM. SOC. INT'L L. INSIGHTS, Dec. 15, 2005, <http://www.asil.org/insights051215.cfm> (citing uncertainty about the Council's vague language, such as "welcoming" and "looks forward" to GEMAP).

212. Richard Sannerholm, *Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template*, 12 J. CONFLICT & SEC. L. 65, 86 (2007). The Liberia Governance Plan of Action covers seven areas: Security Liberia's Revenue Base, Improving Expenditure and Revenue Controls, International Assistance with Executive Authority, Management Oversight, Revised Procurement Processes, Judicial Review and Anti-Corruption Measures, and Capacity Building. See RENATA DWAN & LAURA BAILEY, *LIBERIA'S GOVERNANCE AND ECONOMIC MANAGEMENT ASSISTANCE PROGRAMME (GEMAP) (2006)*, available at <http://siteresources.worldbank.org/INTLICUS/Resources/DPKOWBGEMAPFINAL.pdf> (providing topical commentary). See generally Governance and Economic Management Assistance Program, <http://www.gemapliberia.org/> (last visited Sept. 30, 2008) (providing GMAPS files under the "GEMAP Documents" link).

213. See S.C. Res. 1607, ¶¶ 1, 3, 5, 7, U.N. Doc. S/RES/1607 (June 21, 2005); S.C. Res. 1626, *supra* note 211, ¶ 4 (referencing the implementation of GEMAP).

214. The Security Council has defined a non-state actor as an "individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution." S.C. Res. 1540, *supra* note 38.

215. See, e.g., U.N. Security Council, Reports of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities (Oct. 1999–Dec. 2007), <http://www.un.org/sc/committees/1267/annualreports.shtml> (last visited Sept. 30, 2008) (collecting reports discussing individuals and entities subject to the sanctions regime).

Council targeted the parastatal entity Ariana Airlines, the national carrier for Afghanistan, for its role in transporting drugs and other illicit goods for the Taliban.²¹⁶ The Resolution froze the Taliban's economic assets abroad and curtailed international flights by Ariana in an attempt to force the Taliban to hand over Osama bin Laden.²¹⁷ As such, members of the private sector have effectively been put on notice that they may be subject to Security Council censure if they participate in activities that contribute to conflicts.²¹⁸ This emphasis on the responsibility of nonstate entities for threats to peace and security is laying the foundation for direct action against multinational corporations, either by the Security Council itself or through private remedies.²¹⁹

D. *Legal Effects of the Security Council's Resolutions*

Although the Security Council is not a judicial body, it does not limit itself to simple determinations under Articles 39 and 41.²²⁰ Instead, it often refers to other rules of international law and interprets and applies them with regard to the situations at hand.²²¹ This practice has included determinations of state responsibility, the

216. S.C. Res. 1267, *supra* note 39, ¶ 4.

217. Barbara Cossette, *U.S. Steps up Pressure on Taliban to Deliver Osama bin Laden*, N.Y. TIMES, Oct. 19, 1999, at A7.

218. BRUCE BROOMHALL, *ILLCIT PRIVATE-SECTOR ENGAGEMENT IN CONFLICT ZONES: INTERNATIONAL NORMS AND "HARD" REMEDIES UNDER NATIONAL LAW – OVERVIEW AND RECOMMENDATIONS FOR THE CONFERENCE ON ILLICIT PRIVATE-SECTOR ENGAGEMENT IN CONFLICT ZONES (2007)*, available at http://www.cedim.uqam.ca/files/-CEDIM_Projets_EIRN_Resource%20Conference%202007_Overview%20and%20Recommandations.pdf.

219. Resolution 1171 on Sierra Leone prohibits the supply of arms to nongovernmental forces, and Resolution 997 on Rwanda expands the arms embargo against Rwanda to persons in states neighboring Rwanda if the sale or supply is for the purpose of using arms within Rwanda. S.C. Res. 1171, U.N. Doc. S/RES/1171 (June 5, 1998); S.C. Res. 997, ¶¶ 4–5, U.N. Doc. S/RES/997 (June 9, 1995). Resolutions against Angola have similarly targeted UNITA (the National Union for the Total Independence of Angola) rather than the state itself. S.C. Res. 1213, U.N. Doc. S/RES/1213 (Dec. 3, 1998). A Panel of Experts Report on the Democratic Republic of Congo linked natural resource exploitation to private actors and documented systematic and systemic “plundering, looting, and racketeering” by foreign armies, criminal cartels, private companies,” and noted that “a number of companies have been involved and have fuelled the war directly, trading arms for natural resources.” Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, *Final Report*, ¶¶ 214–215, U.N. Doc. S/2001/357 (Apr. 12, 2001).

220. See Eitel, *supra* note 175, at 60–61 (arguing that resolutions by the Security Council constitute “Council law” that is equal in status to treaty law and court law).

221. CATHERINE DENIS, *LE POUVOIR NORMATIF DU CONSEIL DE SECURITE DES NATIONS UNIES: PORTEE ET LIMITES* 165 (2004) (“Le Conseil de sécurité ne se contente en effet pas de simples qualifications par rapport à l'article 39 de la Charte. Il se réfère à d'autres règles du droit international, il les interprète et les applique aux situations particulières dont il est saisi.”); Burci, *supra* note 118, at 6.

resolution of border disputes, and most importantly for the purposes of this analysis, the interpretation and development of principles of international economic law.²²²

The Security Council's application of the principle of permanent sovereignty over natural resources in its Chapter VII resolutions on Iraq illustrates the Council's judicial role. The principle of permanent sovereignty gives states an inherent and overriding right to control the use and exploitation of their natural resources, without imposing conditions on how that power should be exercised.²²³ Although the Council has targeted natural resources since its early involvement in Rhodesia in 1966, its focus on the management of natural resources such as diamonds, timber, and oil is new.²²⁴ In Resolution 1546(2), the Security Council reaffirmed "the right of the Iraqi people freely to determine their own political future and to exercise full authority and control over their financial and natural resources."²²⁵ Despite the recognition of Iraq's autonomous and independent authority over its natural resources, the Council still created obligations for the management of such resources—both within Iraq, by requiring transparent and equitable practices, and outside Iraq, by shielding oil revenues from international legal claims.²²⁶ In effect, recent Council resolutions have placed substantive standards on natural resource management and limited the authority and discretion of nation-states in this area.

The Council's evolving role as an economic peacekeeper is significant for two reasons: (1) pursuant to Article 103 of the UN

222. See S.C. Res. 674, ¶¶ 8–9, U.N. Doc. S/RES/674 (Oct. 29, 1990) (reminding "Iraq that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq," and inviting "States to collect relevant information regarding their claims, and those of their nationals and corporations, for restitution or financial compensation by Iraq with a view to such arrangements as may be established in accordance with international law"); Zedalis, *supra* note 95, at 507 (discussing the Council's determination of ownership of Iraqi oil).

223. See G.A. Res. 1803 (XVII), ¶ 1, U.N. Doc. A/5217 (Dec. 14, 1962); NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES 267 (1997); GEORGE ELIAN, THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES 15 (1979) ("Sovereignty includes the right of the State to freely exploit its resources and wealth on the basis of its economic independence. This right is part and parcel of State sovereignty.").

224. In the Council's first sanctions regime against Rhodesia (1966) for example, States were called upon to "ensure the diversion of any of their vessels reasonably believed to be carrying oil destined for Rhodesia which may be en route for Beira." S.C. Res. 221, ¶ 4, U.N. Doc. S/RES/221 (Apr. 9, 1966). The Security Council has imposed bans on petroleum and petroleum products on Iraq, the Former Yugoslavia, Haiti, UNITA in Angola, and on Sierra Leone. See, e.g., S.C. Res.1132, ¶ 6, U.N. Doc. S/RES/1132 (Oct. 8, 1997); S.C. Res. 864, ¶ 19, U.N. Doc. S/RES/864 (Sept. 15, 1993); S.C. Res. 841, ¶¶ 5–7, U.N. Doc. S/RES/841 (June 16, 1993); S.C. Res. 757, ¶ 4, U.N. Doc. S/RES/757 (May 30, 1992); S.C. Res. 661, *supra* note 34, ¶ 3.

225. S.C. Res. 1546, *supra* note 207, ¶ 3.

226. Zedalis, *supra* note 95, at 508–12.

Charter, Security Council resolutions trump other inconsistent legal instruments; and (2) because there are very limited means of reviewing Security Council resolutions. Under Article 103, Security Council resolutions suspend other international obligations such as inconsistent treaty provisions.²²⁷ Article 103 shields member states from international responsibility for violating existing obligations toward a state targeted by a Security Council resolution.²²⁸ The 2007 House of Lords decision in *Al-Jedda* confirmed the breadth of Article 103, holding that Security Council resolutions supersede all treaty obligations, including human rights provisions in international treaties.²²⁹ In the economic sphere, Article 103 has broad implications: Chapter VII resolutions will trump international agreements on trade, investment, and commerce.²³⁰

A Security Council resolution containing economic sanctions prohibiting trade with a targeted country would take precedence over a nondiscrimination clause in a Free Trade Agreement.²³¹ This priority is mirrored in trade agreements themselves. The General Agreement on Tariffs and Trade (GATT), like many multilateral investment treaties, specifically recognizes the hierarchical superiority of Security Council resolutions. Article XXI(c) of the GATT provides that “[n]othing in this Agreement shall be construed . . . (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”²³² To date, Article XXI(c) has been rarely evoked. The only prominent case in which countries imposing sanctions relied on the Charter

227. See U.N. Charter arts. 25, 103; Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), 1998 I.C.J. 115, 128 (Feb. 27); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 440 (Nov. 26).

228. *Burci*, *supra* note 118, at 3.

229. *R (Al-Jedda) v. Sec’y of State for Defence*, [2008] 1 A.C. 322, ¶¶ 35, 125 (H.L.) (U.K.); see also *id.* ¶¶ 115–118, 135 (discussing reasoning, history, and policy behind the supremacy of Security Council resolutions over other international obligations).

230. See Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT’L L. 413, 435 (2001) (explaining that the U.N. Charter “prevails over all other international agreements”).

231. Rudolf Bernhardt, *Article 103*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 8, at 1292, 1298; Cann, *supra* note 230, at 435.

232. The General Agreement on Tariffs and Trade art. 21, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; see, e.g., Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment art. 11, U.S.-Arg., Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (“This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.”).

exception was in the dispute between the UK and Argentina over the Falkland Islands. Canada and a handful of other countries imposed economic sanctions against Argentina, citing Security Council Resolution 502 in their defense.²³³ Because the resolution did not impose economic sanctions, instead referring only to troops,²³⁴ it was not a true application of Article XXI(c). As Security Council resolutions branch into new economic and financial domains, however, conflict with international economic instruments will inevitably increase.²³⁵ Council resolutions that implement programs for economic reconstruction, target certain industries or companies, or impose standards of economic governance will affect the content of a range of international obligations.

Council resolutions on economic matters are also particularly significant because of the immunity of Council decisions in national and international courts. The Council has been protected by a quasi-international "political question" doctrine since its inception, and virtually all courts have considered matters addressed by the Security Council immune from review.²³⁶ In *Kadi*, however, the European Court of Justice made no challenge to the primacy of Security Council resolutions, but found that they can be reviewed for internal lawfulness, and cannot derogate from the principles of liberty, democracy, respect for human rights, and fundamental freedoms.²³⁷ In addition, Security Council resolutions that are contrary to *jus cogens* norms would not bind Member States of the UN.²³⁸

233. Arie Reich, *The Threat of Politicization of the WTO*, 9336 U. PA. J. INT'L ECON. L. 779, 791-92 (2005).

234. *Id.* at 792.

235. Similar provisions appear in bilateral investment treaties, permitting a contracting party to invoke a treaty exception in situations where compliance would impede the "maintenance or restoration of international peace and security." William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 332-33 (2008); see also UN CONFERENCE ON TRADE AND DEVELOPMENT, *BILATERAL INVESTMENT TREATIES IN 1995-2006: TRENDS IN INVESTMENT RULEMAKING* 85 (2007) (noting that some clauses provide the contracting parties with discretion to determine whether a particular measure is in fact necessary in order to comply with obligations concerning the maintenance or restoration of international peace or security).

236. Case T-306/01, *Yusuf v. Eur. Council*, 2005 E.C.R. II-3533, ¶ 219.

237. Case C-402/05/P and C-415/05/P, *Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Eur. Council*, 2008 E.C.R. ¶¶ 299-304.

238. Recent investment disputes are relevant to this debate. For example, in his dissent from a German Constitutional Court decision involving Argentinian bondholders, Justice Lübke-Wolff argued that "international human rights law as *jus cogens* prevented the enforcement of payment obligations in a way that would cause, aggravate or prolong a State's inability to discharge its most elementary duties vis-à-vis its citizens." Stephan W. Schill, *German Constitutional Court Rules on Necessity in Argentine Bondholder Case*, AM. SOC. INT'L L. INSIGHTS, July 31, 2007, <http://www.asil.org/insights070731.cfm>. *But see* Lyons, *supra* note 211 (citing

The International Court of Justice (ICJ) has also tended to give the Council a wide berth in determining its own competencies.²³⁹ In the two instances in which it reviewed Security Council resolutions, the ICJ was hesitant to intervene. In *Certain Expenses*, the ICJ stated that Security Council resolutions should be afforded a presumption of legitimacy.²⁴⁰ In *Lockerbie*, the ICJ treaded carefully around the issue of judicial review, noting that UN members are required by Article 25 to accept and carry out the decisions of the UN, such as Chapter VII Resolution 748.²⁴¹ In separate opinions, however, individual judges made more spirited defenses of the ICJ's power to consider the legal limits to the Security Council's jurisdiction. Judge Lachs, for example, noted that the ICJ still has jurisdiction over cases even when they have been addressed by the Security Council.²⁴²

VII. REFORM OF THE SECURITY COUNCIL: WORKING METHODS, COORDINATION

The legitimacy of the Security Council's evolving economic statecraft is inevitably linked to representation on the Council, to the decision-making practices its members employ, and to the Security Council's accountability to the wider UN membership. Even if a Security Council measure is legal, it may not be considered legitimate when the Council acts in a manner that is contrary to the greater membership's wishes and goals.²⁴³ Although structural reform of the Council is, at present, a nonstarter given the failed 2005 reform attempts, new working methods and efforts at coordination with other international institutions could promote transparency and

uncertainty about the Council's vague language, such as "welcoming" and "looks forward" to GEMAP). See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 597-98 (6th ed. 2003) (defining *jus cogens*).

239. Although the ICJ is the principal judicial organ of the United Nations, it was designed to resolve disputes between states, not to review the lawfulness of the Security Council's interventions. Tomuschat, *supra* note 113, at 538 (stating that the ICJ provides no remedy to states who contend that the Council has infringed their rights).

240. *Certain Expenses of the UN*, Advisory Opinion, 1962 I.C.J. 151, 168 (July 20).

241. Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), 1998 I.C.J. 115, 128-29 (Feb. 27).

242. *Lockerbie*, 1992 I.C.J. 3, 26-27 (Apr. 14, 1992) (separate opinion of Judge Lachs); see also FRANCK, *supra* note 118, at 243-44.

243. Malone & Cockayne, *supra* note 198, at 15. The United States' decision to withdraw a resolution on ICC peacekeeper immunity is illustrative in this regard. Although "legal," it was not perceived to be "legitimate," and states rallied in opposition, eventually forcing the United States to withdraw the draft resolution rather than have it fail for lack of support.

accountability. Moreover, legitimacy will add to the Security Council's comparative advantage in addressing economic security, which will be based on the support of member states and its partnership with specialized agencies that have economic competencies.

A. Working Methods

The Council's decisions have often been criticized as lacking transparency because most decisions of substance are made in informal meetings. Because the Council has a small membership with veto power reserved to the five permanent members, states whose political and economic influence would today make them natural members of the Council have been particularly vocal about reform.²⁴⁴ It has been argued that Security Council resolutions enjoy legitimacy where they are consistent with the UN Charter, other rules of international law, and the practice of the Security Council in like cases.²⁴⁵ Some argue that legitimacy also rests on the procedural aspects of decision making: "[L]aws and regulations are legitimate to the extent that the processes of deliberation and substantive outcomes are consistent with the principles of deliberative democracy."²⁴⁶ The Security Council's emerging practice of holding monthly open debates on issues of concern suggests that the UN membership shares this view of procedural legitimacy.²⁴⁷

B. Coordination

A second reform relevant to the Council's economic jurisdiction is better delineation of responsibilities with other actors in the field, particularly through the PBC.²⁴⁸ The PBC is intended to coordinate post-conflict relief with other agencies, including the World Bank, the IMF, and UNDP.²⁴⁹ It is advising countries on integrated strategies for post-conflict peace building and recovery, including economic development.²⁵⁰ Economic measures could take a central place in its

244. G. John Ikenberry & Anne-Marie Slaughter, *A Bigger Security Council, With Power to Act U.N. Reform*, INT'L HERALD TRIB., Sept. 27, 2006, at 8.

245. Steven Wheatley, *The Security Council Democratic Legitimacy and Regime Change in Iraq*, 3 EUR. J. INT'L L. 531, 532 (2006).

246. *Id.* at 546.

247. The President of the Security Council, *Note by the President of the Security Council*, ¶ 35, U.N. Doc. S/2006/507 (July 19, 2006); Ian Johnstone, *Legislation and Adjudication in the Security Council*, 102 AM. J. INT'L L. 275, 303 (2008) (discussing how inclusive consultations will bring down the deliberative deficit).

248. The Peacebuilding Commission was created pursuant to Security Council Resolution 1645 (2005) and General Assembly Resolution 60/180 (2005). S.C. Res. 1645, *supra* note 131, ¶ 1; G.A. Res. 60/180, ¶ 1, U.N. Doc. A/RES/60/180 (Dec. 30, 2005).

249. S.C. Res. 1645, *supra* note 131, ¶ 2.

250. *Id.*

strategy, as demonstrated by the PBC's first reports.²⁵¹ The PBC's third referral, Guinea-Bissau, is particularly relevant in this regard. The economic nexus in Guinea-Bissau between Colombian drug smugglers purportedly trafficking cocaine through Guinea-Bissau and the threat to peace and security created by organized crime provides a concrete case for PBC and Security Council attention.²⁵² Not only did the Security Council support the addition of Guinea-Bissau to the Council's agenda, but it recommended that the PBC pay particular attention to two economic issues: oversight and management of national finances, and anti-corruption policies.²⁵³ To date, the two organs have coordinated efforts and have regularly apprised each other of programmatic developments.²⁵⁴

Coordination with ECOSOC is similarly important. Under Article 65 of the UN Charter, "The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request."²⁵⁵ In practice, this mechanism is rarely invoked, and the two Councils have had an uneasy relationship.²⁵⁶ The High Level Panel recommended more coordination between the Security Council and ECOSOC:

The Economic and Social Council can provide normative and analytical leadership in a time of much debate about the causes of, and interconnections between, the many threats we face. To that end:
(a) We recommend that the Economic and Social Council establish a Committee on the Social and Economic Aspects of Security Threats,

251. Peacebuilding Commission, *Report of the Peacebuilding Commission on its First Session*, ¶ 11, U.N. Doc A/62/137, S/2007/458 (July 25, 2007) (describing the meetings in Burundi and Sierra Leone where the Commission discussed "economic reconstruction and rehabilitation and note[d] that a comprehensive set of risk reduction strategies should be at the forefront of all efforts aimed at sustaining peace, initiating development and promoting post-conflict recovery in both countries").

252. See Antonio Maria Costa, U.N. Off. Drugs & Crime Exec. Dir., Assisting Guinea Bissau, Remarks made at Pleding Conference for Guinea-Bissau in Lisbon (Dec. 19, 2007), <http://www.unodc.org/unodc/en/frontpage/assisting-guinea-bissau.html>; Press Release, Security Council, Security Council Press Statement on Guinea-Bissau, U.N. Doc. SC/9198 (Dec. 12, 2007).

253. The President of the Security Council, *Letter Dated 11 December 2007 from the President of the Security Council to the Chairperson of the Peacebuilding Commission*, ¶ 1, U.N. Doc. A/62/736, S/2007/744 (Dec. 14, 2007).

254. See, e.g., *id.* (expressing the Security Council's support for intervention in Guinea Bissau); U.N. Peacebuilding Comm'n, *Letter Dated 28 December 2007 from the Chairperson of the Peacebuilding Commission to the President of the Security Council*, U.N. Doc A/62/686, S/2008/87 (informing the President of the Security Council of the admission of Guinea-Bissau to the Commission's agenda). See generally The Secretary-General, *Report of the Secretary-General on Developments in Guinea-Bissau and on the Activities of the United Nations Peacebuilding Support Office in That Country, delivered to the Security Council*, U.N. Doc. S/2007/715 (Dec. 6, 2007).

255. U.N. Charter art. 65.

256. Cf. Claire Breen, *The Necessity of a Role of ECOSOC in the Maintenance of International Peace and Security*, 12 J. CONFLICT & SEC. L. 261 (2007) (calling for greater dialogue between the ECOSOC and the Security Council with regard to the latter's mandate of peace and security).

and that it use its powers to commission research and develop better understanding about the economic and social threats to peace, and about the economic and social aspects of other threats, such as terrorism and organized crime; (b) We welcome the recent improvement in the exchange of information between the Economic and Social Council and the Security Council, for example through regular meetings of their Presidents, and encourage both bodies to regularize these exchanges.²⁵⁷

In fact, since 2002, the relationship has evolved, as the Council and ECOSOC have cooperated with regard to the situation in Africa.²⁵⁸

VIII. CONCLUSION AND OPERATIONAL IMPLICATIONS FOR THE SECURITY COUNCIL

Today, international security is best understood in the context of markets, trade, and networks of nonstate actors—not military might. As the world's economic and power bases change, the Security Council is showing its determination to avoid becoming an anachronism.²⁵⁹ The Security Council's increasing economic interventionism may become a defining choice. If the Security Council employs Article 39 to respond to economic threats to international peace and security and continues to expand its economic reconstruction activities under Article 41, it will be a significant player in the international economic sphere.

This economic evolution has its historical parallels. The crux of the collective security scheme envisioned by the founders of the UN was centralized coercion through the use of armed forces under Article 43 of the Charter.²⁶⁰ It is now trite to say that this organizational vision never materialized. Not only was a UN army never created, but an entirely new form of policing based on contributions of money and troops by member states eventually emerged: that of peacekeeping.²⁶¹ Although the UN Charter contains no reference to peacekeeping, nor does it contain guidelines for this form of collective action, the original rules of the Charter were reinterpreted (or perhaps even reinvented) in the 1990s to allow the Council to respond to the disasters in Somalia, Rwanda, Burundi, and Bosnia.²⁶²

257. U.N. High-Level Panel on Threats, Challenges, and Change, *supra* note 19, ¶ 276.

258. Ivan Šimonović, *Post-Conflict Peace Building: The New Trends*, 31 INT'L J. LEGAL INFO. 251, 258–59 (2003).

259. U.N. High-Level Panel on Threats, Challenges, and Change, *supra* note 19, ¶ 245.

260. U.N. Charter art. 43; KENNEDY, *supra* note 22, at 78.

261. KENNEDY, *supra* note 22, at 107–10.

262. *Id.* at 77, 107–08.

Just as peacekeeping enabled the Security Council to maintain its relevance to a changing reality, the Security Council's economic jurisdiction must evolve if the Council is to respond to new threats to peace and security. Such new realities as economic globalization, the rise of market states, and the security consequences of economic and financial conditions will require the Security Council to intervene in some economic and financial matters to fulfill its mandate. Ultimately, however, the Security Council's involvement in economic issues must be perceived as legitimate for it to further this role. If reactions to the climate change debate are any indication, the general membership will not support the Council as economic peacekeeper if the larger questions of representation and working methods are left unaddressed.²⁶³

The increasingly significant economic dimensions of international peace and security also create a number of practical considerations for the Council going forward. First, the Council should develop its relationships with both the PBC and ECOSOC, which have independent jurisdiction over economic issues related to peace and security. Second, the Council should ensure it has access to appropriate analytical expertise before acting on economic issues. Depending on the situation, this expertise could be garnered from ad hoc economic advisers, from resident experts within the Secretariat, or, in peacekeeping missions, from a unit headed by a high-level individual solely responsible for economic reconstruction.²⁶⁴ Third, the Security Council should consult experts who can advise on the noneconomic impacts of its Article 41 enforcement measures. International peace and security has positive content: it requires more than being free from external armed attack, given global economic integration, the threats of non-state actors, and the consequences of environmental calamities. Thus, the economic dimensions of international peace and security are a central new avenue of engagement for the UN Security Council.

263. See sources cited *supra* notes 58–64 and accompanying text.

264. See Carver & Hulsmann, *supra* note 196, at 535–36 (discussing economic assistance the Security Council could provide). See generally DEL CASTILLO, *supra* note 73.