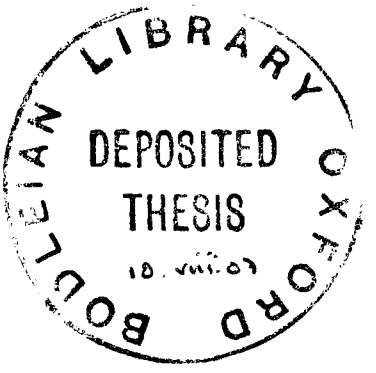
CIVIL CONFLICT PROHIBITED?
Emerging Norms of *Jus ad Bellum Internum*

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ABSTRACT

Civil conflict, a violent conflict fought between factions internal to a sovereign State, is traditionally considered to be a domestic matter within the exclusive jurisdiction of States and neither permitted nor prohibited by international law permission. However, increasingly, States, regional organisations and the UN intervene in civil conflicts: they condemn civil conflicts, call on parties to cease fighting and to resolve their disputes by peaceful means, and impose sanctions or intervene forcefully. This thesis reviews this accumulating practice, which has up to now not been systematically analysed, and explores what changes it evidences – or foreshadows – in the relationship between civil conflict and international law.

The thesis adopts a two part structure. Part I reviews and categorises the practice of the international community (particularly that of the Council, States and regional organisations) in response to civil conflict. Part II seeks to analyse this practice and investigates whether it evidences the emergence of new norms of *jus ad bellum internum* prohibiting certain forms of civil conflict.

The thesis begins by setting out a cross section of relevant practice. It first charts the practice of the Security Council in response to 42 civil conflicts since 1945. The thesis then considers three recent cases studies in detail (Sierra Leone, Côte d'Ivoire and Liberia) from the perspective of the response of the Security Council, States and regional organisations.

This review establishes that there is a substantial and growing amount of international community intervention in civil conflicts, contrary to what could be expected given its domestic nature. The thesis then turns to an analysis of this practice, which essentially requires an evaluation of the impact that condemnatory practice by States and regional actors and the Security Council can have on international law. In general terms, an evaluation of whether this practice should be characterised as a policy – or non-binding – response, or whether its existence and repetition evidences, or anticipates, the emergence of international law rules, such as the emergence of new customary law norms of *jus ad bellum internum.*

In order to address this issue, it became clear that a number of methodological questions that have not up to now received much attention in the literature would need to be considered: in particular the role the Security Council plays in shaping new international law. This role is markedly under-theorized – in contrast to that of the General Assembly practice in customary law formation which has been widely debated – but is central to the thesis because of the remarkable scope of Security Council practice in response to civil conflicts. Following the examination of this question, the thesis takes the view that

Security Council practice is relevant evidence of the practice of States and of the collective attitude of the international community. It also influences the conduct and attitude of States. In addition, where the Security Council regularly condemns certain conduct in a range of similar situations and seeks to enforce its condemnation, it can create a quasi-legislative prohibition against that conduct.

Following the analysis of the practice, the thesis concludes that contrary to widespread assumptions, civil conflict is no longer treated as a domestic matter, and is increasingly being recognised as having a severe impact on the peace and stability of the world. A major and continuing shift in practice is relied on to support predictions of fundamental change in the perception of the legality of recourse to force in civil conflict. The thesis identifies three possible norms within the practice: the rejection of civil conflict aiming to overthrow a democratically elected government; the rejection of civil conflict aiming to cause or causing massive violence against civilians; and the rejection of civil conflict which is undertaken for political aims (other than in self-defence by a State against violent uprising or by a people in self-defence against violent oppression).

Much of the practice is too recent and not established enough in the public discourse of States to evidence the emergence of traditional customary law rules at present. Nonetheless, there is strong evidence to support the emergence of a limited norm prohibiting the overthrow of a democratically elected government. In addition, the extent and scope of the international community condemnation and rejection of civil conflict can be taken to support the proposition that, in time, broader international prohibitions against civil conflict will crystallize in international law.

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CONTENTS

INTRODUCTION **1**

1 TERMINOLOGY **4**

1.1 CIVIL CONFLICT 4

1.2 RECOURSE TO FORCE AND VIOLENCE AND *JUS AD BELLUM INTERNUM* 6

1.3 REBELLION, INSURGENCY AND BELLIGERENCY 6

2 THE TRADITIONAL LEGAL POSITION ON CIVIL CONFLICT **7**

2.1 INTERVENTION PROHIBITED 7

2.2 SELF-DETERMINATION 8

2.3 SECESSION 9

2.4 HUMANITARIAN LAWS IN ARMED CONFLICT 10

PART I: THE PRACTICE **11**

CHAPTER 1: THE RESPONSE OF THE COUNCIL TO CIVIL CONFLICTS **11**

1 PRELIMINARY ISSUES **12**

1.1 THE RELEVANCE OF RESOLUTIONS 12

1.1.1 Textual Interpretation 12

1.1.2 When are Resolutions Binding? 14

1.2 THE LEGAL FRAMEWORK 18

1.2.1 Pacific Settlement of Disputes 18

1.2.2 Intervention under Chapter VII 19

1.2.3 Peacekeeping Forces 20

1.2.4 Conclusion 20

2 THE PRACTICE OF THE COUNCIL **21**

2.1 REJECTING RECOURSE TO FORCE TO GAIN POLITICAL POWER 21

2.1.1 Overview of the practice 22

2.1.2 Analysis 29

2.1.3 Conclusion 36

2.2 REJECTING THE FORCEFUL OVERTHROW OF DEMOCRACY 36

2.3 DEMANDING PEACEFUL SETTLEMENT 38
2.3.1 Overview of the Practice 39
2.3.2 Conclusion 41
2.4 DEMANDING THE PROTECTION OF CIVILIANS 41
2.5 RELIANCE ON A BREACH OF A PEACE AGREEMENT 43
2.6 SUMMARY 46

CHAPTER 2: THE RESPONSE OF STATES AND REGIONAL ORGANISATIONS 48

1 CASE STUDIES 48

1.1 SIERRA LEONE 48
1.1.1 The Conflict in Sierra Leone 48
1.1.2 The Response of the international community 50
1.1.3 Conclusion 58
1.2 CÔTE D'IVOIRE 58
1.2.1 The Conflict in Côte d'Ivoire 59
1.2.2 The Response of the international community 61
1.2.3 Conclusion 69
1.3 LIBERIA 69
1.3.1 The conflict in Liberia 70
1.3.2 The response of the international community 72
1.3.3 Conclusion 78

2 RELEVANT TREATY PROVISIONS 79

2.1 THE LEGAL FRAMEWORK 80
2.1.1 The UN Charter 80
2.2 THE PRINCIPLES ADOPTED BY THE AFRICAN UNION 81
2.2.1 The Constitutive Act 81
2.2.2 The Protocol Relating to the Establishment of a Peace and Security Council 82
2.2.3 The principles supported 83
2.3 THE PRINCIPLES ADOPTED BY ECOWAS 85
2.3.1 The Mechanism 86
2.3.2 The principles supported 86
2.4 IN SUMMARY 88

3 CONCLUSION 88

PART II: CHARACTERIZING THE EMERGING PRINCIPLES 90

CHAPTER 3: THE IMPACT OF SECURITY COUNCIL PRACTICE ON INTERNATIONAL LAW.. 90

1 THE COUNCIL AND CUSTOMARY LAW 91

1.1 THE APPROACH OF THE COURT AND COMMENTATORS 91

1.1.1 The International Court of Justice 91

1.1.2 The View of Commentators 92

1.2 EVIDENCE OF PRACTICE AND *OPINION JURIS* OF STATES 93

1.2.1 The Practice of an International Organisation 94

1.2.2 Analogy with the General Assembly? 95

1.2.3 Size of the Council 96

1.2.4 Seriousness and Binding Nature of Resolutions 97

1.2.5 Decision Making Body 98

1.2.6 Consequential Practice of States under Resolutions 98

1.3 CONCLUSION 99

2 QUASI-LEGISLATIVE IMPACT 100

2.1 QUASI-JUDICIAL 100

2.2 EXPLICIT QUASI-LEGISLATIVE DETERMINATIONS 102

2.3 IMPLICIT QUASI-LEGISLATIVE PROHIBITIONS? 103

2.3.1 *Ad Hoc* Policy or Binding Prohibitions? 104

2.3.2 Council Sanctions and Illegality 105

2.4 CONCLUSION 107

3 SHAPING INTERNATIONAL OPINION AND PRACTICE 107

3.1 CRYSTALLISING THE OPINION OF THE INTERNATIONAL COMMUNITY 108

3.2 SHAPING THE PRACTICE OF STATES 108

4 CONCLUSION 109

CHAPTER 4: THE NATURE AND IMPACT OF EMERGING NORMS 111

1 METHODOLOGICAL ISSUES 112

1.1 WHOSE PRACTICE IS RELEVANT? 112

1.2 CONDEMNATION FOLLOWED BY SANCTIONS 114

1.3 VERBAL ACTS AND PHYSICAL ACTIONS 116

1.4 A QUESTION OF CONSENT? 118

1.4.1 Response to a Breach of a Peace Agreement 119

1.4.2 Consent in Support of the Emergence of a New Norm 121

1.5 INCONSISTENT PRACTICE 122

1.6 THE IMPORTANCE OF INTERNATIONAL LAW MIRRORING REALITY 122

2 ANALYSIS OF THE PRACTICE 124

2.1 THE DOMESTIC NATURE OF CIVIL CONFLICTS 124

2.2 RECOURSE TO FORCE AIMING TO OVERTHROW A DEMOCRATIC GOVERNMENT 127

2.2.1 Security Council Practice 128

2.2.2 The Practice of States and Regional Organisations 134

2.2.3 Treaty Support 136

2.2.4 Conclusion 138

2.3 RECOURSE TO FORCE AIMING TO CAUSE OR INVOLVING MASSIVE VIOLENCE AGAINST CIVILIANS 139

2.3.1 The Impact of *Jus in Bello* 140

2.3.2 More than Principles of *Jus in Bello?* 141

2.3.3 Conclusion 144

2.4 A PROHIBITION AGAINST FORCE TO GAIN POLITICAL POWER? 144

2.4.1 Council Practice 145

2.4.2 The practice of State and Regional Organisations 156

2.4.3 Analysis 158

CONCLUSION 165

BIBLIOGRAPHY 167

INTRODUCTION

> "We are mad, not only individually, but nationally. We check manslaughter and isolated murders; but what of war and the much vaunted crime of slaughtering whole peoples?"[1]

The basic legal framework for the analysis of conflict is the division of wars into civil and international.[2] The former involve conflicts primarily fought between factions internal to a sovereign State, and the latter, conflicts between two or more sovereign States. According to this traditional approach, civil conflicts have been considered matters within the domestic jurisdiction of States, "where the jurisdiction of the state is not bound by international law".[3] Thus, in contrast to international conflicts, civil conflicts are not considered to be the legitimate concern of international law.[4]

The conventional view is that civil conflict is neither legal nor illegal.[5] Accordingly, there is apparently no restriction on *recourse to force* to initiate a civil conflict: whereas the unilateral use of force by States against the territorial integrity or political independence of any other State is outlawed, subject to the right of self-defence as preserved in Article 51 of the United Nations Charter.[6] Borrowing terminology from the international war context, no *jus ad bellum internum* norms prohibit civil conflict.

Indeed, a brief review of the applicable international law supports the traditional position. The UN Charter seems not to apply. The San Francisco debates on the UN Charter do not address civil conflicts and these were apparently not considered to be a threat to international peace and security at the time. What international law does apply to civil conflicts seeks to insulate such conflicts from external regulation or intervention: States are not permitted to assist either side and the Council has

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[1] Seneca Translated by Gummere *Ad Lucilium Epistulae Morales, XCV* (William Heinemann, London, 1918).

[2] Falk "Preface" in Wright and Falk (eds.) *The International Law of Civil War* (Johns Hopkins Press, Baltimore, 1971) Vol 1, xi at xi. See also Higgins "Internal War and International Law" in Black and Falk (eds.) *The Future of the International Legal Order: Conflict Management* (Princeton University Press, Princeton, 1969) Vol 3, 81 at 85 pointing out that identification of a conflict as civil or international is "essential to the correct application of the relevant legal norms", but also that is it often difficult to appraise a conflict as simply internal.

[3] Brownlie *Principles of Public International Law* (5th ed, Clarendon Press, Oxford, 1998) at 293. See also Kelsen *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Praeger, New York, 1966), Cot, Pellet, et al. *La Charte Des Nations Unies: Commentaire Article Par Article* (Economica, Paris, 1985) at 152.

[4] See the discussion of the traditional approach in Falk "Introduction" in Wright and Falk (eds.) *The International Law of Civil War* (Johns Hopkins Press, Baltimore, 1971) Vol 1, 1 at 11-16, Gray *International Law and the Use of Force* (Oxford University Press, Oxford, 2000) at 51 (note the 2nd edition of Gray (2004) is due for release shortly but the page numbers in this thesis refer to the first edition).

[5] Wilson *International Law and the Use of Force by National Liberation Movements* (Clarendon Press, Oxford, 1988)

[6] Article 2(4) of the 1945 Charter of the United Nations (San Francisco, 26 June 1945) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations". The prohibition has also crystallised as a general norm of international law according to the International Court of Justice decision in *Case Concerning Military and Paramilitary Activities in and around Nicaragua (Nicaragua v United States of America) (Merits)* (1986) ICJ Rep 14.

traditionally been restrained from intervening as well.[7] While some aspects of *jus in bello* – or humanitarian laws in armed conflict – norms do also apply to govern conduct during a civil conflict, these address how force is used during conflict without judging whether the recourse to force was legitimate in the first place.[8] The one exception is recourse to force to *repress* a claim of self-determination,[9] which has been argued by some commentators to be illegal.[10]

As Moore put it,

> The normative standards for differentiating permissible from impermissible resort to force have, like the other principal strands in the international law of conflict management, largely evolved in response to conventional warfare across national boundaries. Thus, for the most part, they provide only minimal guidance, if any, to normative judgment concerning conflicts purely within national boundaries.[11]

In fact, this issue has tended to be dismissed without debate, and often in a formulaic fashion.[12] In 1963 Lauterpacht stated without further discussion, "the Law of Nations does not treat civil war as illegal".[13] Similarly, Akehurst states "There is no rule in international law against civil wars. Article 2(4) of the United Nations Charter prohibits the use or threat of force in *international* relations only.[14] It is possible that each side will regard the other side as traitors from the point of view of municipal law, but neither the insurgents nor the established authorities are guilty of any breach of international law."[15] This line of thought is reflected in Starke's comment "It is trite law that civil wars are not prohibited by any international legal rules".[16] The assumption that there is no international law

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[7] See for eg: Committee of Enquiry into Breaches of International Law *Report and Findings of Committee of Enquiry into Breaches of International Law Relating to Intervention in Spain* (The Committee, London, 1936), S/32 and S/34 SCOR, 1.1 Supp 2 at 54-55, Security Council, April 17, 1946, SCOR 1.1 N2, 167, Komarknicki "L'Intervention en Droit International Moderne" (1956) Revue Generale de Droit International Public 521, Farer "Harnessing Rogue Elephants: A Short Discussion on Foreign Intervention in Civil Strife" (1969) Harv LR 82, Moore "Toward an Applied Theory for the Regulation of Intervention" in Moore (ed.) *Law and Civil War in the Modern World* (Johns Hopkins University Press, Baltimore, 1974) 1.

[8] The conduct of civil conflicts is subject to some limited regulation via Common Article 3 of the 1949 Geneva Convention and 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, as well as those norms which have become customary.

[9] Conflicts of self-determination have been treated as a special case of quasi-international conflict.

[10] See Bowett "The Interrelation of Theories of Intervention and Self-Defense" in Moore (ed.) *Law and Civil War in the Modern World* (Johns Hopkins University Press, Baltimore, 1974) 38.

[11] Moore "Introduction in Law and Civil War in the Modern World" at xiii.

[12] One exception to this trend is a short but noteworthy article by Wedgwood that raised the question of whether international law should extend *jus ad bellum* to "bar large-scale military force in the pursuit of domestic political objectives", and concluded that irrespective of the many theoretical and moral difficulties arising from such a notion, "an international norm against use of force in questions of ethnic secession is worthy of debate" Wedgwood "The Use of Force in Civil Disputes" (1996) 26 Israel Yearbook on Human Rights 239 at 239 and 251.

[13] Oppenheim and Lauterpacht *International Law, Vol II Disputes, War and Neutrality* (7th ed, London, 1963) at 249. Note that later editions did not update the volume of Oppenheim addressing this issue.

[14] The San Francisco debates on the UN Charter do not discuss how to address civil conflicts. These were apparently not considered to be a threat to international peace and security at the time.

[15] Akehurst *A Modern Introduction to International Law* (6th ed, George Allen & Unwin, London, 1992) at 281-282.

[16] Shearer and Starke *Starke's International Law* (11th ed, Butterworths, London, 1994) at 489, Starke *Introduction to International Law* (10th ed, Butterworths, London, 1989) at 540.

addressing recourse to force is also consistent with a general lack of detailed discussion of the issue in many major texts.[17]

However, the practice of the international community[18] since the 1990s seems to be in direct contradiction to the general theoretical position. Increasingly, States, regional organisations and the UN are involved in civil conflicts. They condemn them, call on parties to cease fighting and to resolve their disputes by peaceful means, and impose sanctions or intervene forcefully. These interveners have also formulated a series of rationales for their actions, ranging from rejecting violence against civilians to rejecting the use of force against democratic governments.

For many years such responses of the international community to civil conflicts took place in the Cold War context, and thus were presumed to be governed by geopolitical ideology and superpower motives, rather than new norms. In addition, at that time, Council involvement was sporadic – the Council generally only intervened once the parties had come to accept the need for a negotiated peace agreement, and the peacekeeping forces sent to monitor such agreements were there with the apparent consent of the parties the parties and sought to maintain strict neutrality. However, since the end of the Cold War, a dramatic shift can be seen in the response of the international community to civil conflicts, and it is timely to reopen the question of the emergence of norms of *jus ad bellum internum* in this context.

The thesis considers the question of whether this practice reflects a change in the legality of recourse to force in civil conflict. It reviews the accumulating international community practice rejecting and condemning civil conflict, which has up to now not been systematically analysed, and seeks to explore what changes it evidences – or foreshadows – in the relationship between civil conflict and international law, and the emergence of possible norms of *jus ad bellum internum*.[19]

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[17] See for instance the reasoning in Falk "Introduction in the International Law of Civil War" at 11, Gray *International Law and the Use of Force* (other than in the context of self-determination), Moir *The Law of Internal Armed Conflict* (Cambridge University Press, Cambridge, 2002). Similarly, in the report on law in civil conflicts, undertaken by the American Society of International Law, the discussion focused on the right to intervene in civil conflicts and did not consider the legality of the waging of the conflict itself. Moore (ed.) *Law and Civil War in the Modern World* (Johns Hopkins University Press, Baltimore, 1974).

[18] The term "international community" is used in this thesis for convenience as a shorthand term to encapsulate a variety of different actors on the international plane which would be relevant to a discussion of emerging customary norms: it includes States, regional organisations and United Nations bodies, particularly the General Assembly, the Security Council, and the Secretary-General.

[19] Note this question is different to that of whether a *response* by a State or regional body *is legal*, which would go to the question of whether new rules governing intervention into civil conflicts are emerging. That question has been extensively, albeit inconclusively, debated in the literature, and there is no intention to reopen it here. See for eg Friedmann "Intervention, Civil War and the Role of International Law" (1965) 59 ASIL 67, Farer "Intervention in Civil Wars: A Modest Proposal" (1967) 67 Col L Rev 266, Moore "Toward an Applied Theory for the Regulation of Intervention" in Moore (ed.) *Law and Civil War in the Modern World* (Johns Hopkins University Press, Baltimore, 1974) 1, Damrosch *Enforcing Restraint: Collective Intervention in Internal Conflicts* (Council on Foreign Relations Press, New York, 1993), Ofodile "The Legality of ECOWAS Intervention in Liberia" (1994) 32 Columbia Journal of Transnational Law 381, Mayall *The New Interventionism 1991-1994: United Nations Experience in Cambodia, Former Yugoslavia and Somalia* (Cambridge University Press, Cambridge, 1996), Meron *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, Oxford, 1989), Fielding "Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy" (1995) 5 Duke J Comp & Int'l L 329, Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd ed, Transnational publishers, Dobbs Ferry, 1997), Chesterman *Just War or Just Peace?: Humanitarian Intervention and International Law* (Oxford University Press, Oxford, 2001).

The thesis adopts a two part structure. Part I reviews and categorises the practice of the international community (particularly that of the Council, States and regional organisations) in response to civil conflict. Part II seeks to analyse this practice and investigates whether it evidences the emergence of new norms of *jus ad bellum internum* prohibiting certain forms of civil conflict.

This review establishes that there is a substantial and growing amount of international community intervention in civil conflicts, contrary to what could be expected given its domestic nature. The thesis then turns to an analysis of this practice, which essentially requires an evaluation of the impact that condemnatory practice by States and regional actors and the Security Council can have on international law. In general terms, an evaluation of whether this practice should be characterised as a policy – or non-binding – response, or whether its existence and repetition evidences, or anticipates, the emergence of international law rules, such as the emergence of new customary law norms of *jus ad bellum internum.*

In order to address this issue, it became clear that a number of methodological questions that have not up to now received much attention in the literature would need to be considered: in particular the role the Security Council plays in shaping new international law. This role is markedly under-theorized – in contrast to that of the General Assembly practice in customary law formation which has been widely debated – but is central to the thesis because of the remarkable scope of Security Council practice in response to civil conflicts. Following the examination of this question, the thesis takes the view that Security Council practice is relevant evidence of the practice of States and of the collective attitude of the international community. It also influences the conduct and attitude of States. In addition, where the Security Council regularly condemns certain conduct in a range of similar situations and seeks to enforce its condemnation, it can create a quasi-legislative prohibition against that conduct.

Before turning to an overview of the practice, this Introduction sets out useful terminology and then undertakes an overview, as background, of how, and the extent to which, international law addresses civil conflict.

1 TERMINOLOGY

1.1 CIVIL CONFLICT

The term 'civil conflict' does not yet have an accepted specialised meaning in international law. Some commentators have used the term 'civil wars', others refer to 'internal wars', 'non-international wars', 'guerrilla wars', 'revolutions', 'belligerencies', 'rebel wars', or 'wars of self-determination'.

'Civil conflict' has been adopted here to refer to non-international violent conflict involving a government and one or more non-State actors.[20] This definition is intended to be inclusive of all civil disturbances within States that reach a particular level of intensity. The term 'rebel' is used generically to refer to a non-governmental party involved in civil conflict. The term is not intended to impart any judgement, such as the notion that rebels "unjustly" take up arms, as de Vattel uses the term.[21]

The category of violent 'conflict'[22] considered here is that which is more than "merely limited local unrest".[23] The conflict must be of a sufficient scale and degree of intensity to differentiate it from riots and sporadic violence.[24] Nonetheless, *coups d'état*, which may not involve sustained violence but rely on the threat of violence and involve the attempted overthrow of a government by rebel forces.

It should be noted that the line between strictly internal and international conflicts is becoming increasingly blurred. Civil wars often evolve from strictly internal affairs to internationalised conflicts directly or indirectly involving other States. Moreover, under international law, certain categories of conflicts are taking on quasi-international status.[25] Wars of self-determination are one example of this trend. Another example is that of an internal conflict where third States have intervened.[26] Certain separatist conflicts have also been re-categorised as international through the recognition of breakaway territories as new States.[27] This phenomenon of internationalisation is an integral aspect of the current investigation, and hence such wars are included within the term 'civil conflict'.

Finally, civil conflicts encompass a wide spectrum of conflicts and involve armed groups with different aims and approaches. Part of the complexity that confronts the analysis of such conflicts arises from the very diversity of contexts in which they occur.[28] In addition, the nature of civil war has changed dramatically over the last 50 years. Initially the post World War II literature dealing with rebels focused on armed forces that continued to fight once the State had admitted defeat (there was much discussion of German forces acting as rebels and of groups fighting outside invading forces

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[20] Note this is not intended to include the global issue of terrorism and the "War on Terror".

[21] De Vattel "The Law of Nations or the Principles of Natural Law, Originally Printed in 1758" in Falk (ed.) *The Vietnam War and International Law* (Princeton University Press, Princeton, 1968) 1, 17 at 17.

[22] The term conflict is not intended to convey the somewhat dated and complex rules developed to deal with the legal recognition of the existence of a state of 'war' between nations. (According to a traditional definition civil war only occurs once recognition of belligerency is made which gives international recognition to the non-State party.) See Oppenheim and Lauterpacht *International Law, Vol II Disputes, War and Neutrality* at 209. See Burke "The Legal Regulation of Minor International Coercion: A Framework of Inquiry" in Falk (ed.) *The Vietnam War and International Law* (Princeton University Press, Princeton, 1968) 1, 79 at 80 emphasising the confusion and complexity of the terminology. Detter *The Law of War* (2nd ed, Cambridge University Press, Cambridge, 2000) at 3-25.

[23] Gray *International Law and the Use of Force* at 58.

[24] See discussion of different levels of conflict in Wilson *International Law and the Use of Force by National Liberation Movements* at 23, Gray *International Law and the Use of Force* at 58.

[25] Roberts and Guelff *Documents on the Laws of War* at 22-23.

[26] See for instance the discussion in *Prosecutor v Dusko Tadic* (1999) IT-94-1 Judgement of the Appeals Chamber of the ICTY (15 July 1999) at para 84: an internal conflict may become international "if (i) another State intervenes in that conflict through its troops, or alternatively (ii) some of the participants in the internal armed conflict act on behalf of that State".

[27] As occurred in the break-up of Yugoslavia for instance.

[28] See a review of different contexts and different types of conflicts in Falk "Introduction in the International Law of Civil War" at 17-22. See Higgins categorisation of conflicts in 1969: Higgins "Internal War and International Law" at 82-83.

amounting to rebels).[29] By the 1950s and 1960s, however, the dominant civil war type was the post-colonial war of liberation, which raised issues of self-determination and anti-colonialism.[30] The contemporary world arena, in contrast, is dominated by civil wars with ethnic cleansing or religious aims – such as in Rwanda or the former Yugoslavia – or wars with clear financial incentives for the rebels such as those in Sierra Leone, Congo, Sudan, or Columbia.

1.2 RECOURSE TO FORCE AND VIOLENCE AND *JUS AD BELLUM INTERNUM*

The terminology of '*jus ad bellum internum*', 'recourse to force' and 'recourse to violence' in internal conflicts as used in this thesis must be distinguished from similar terminology and concepts used in international conflicts. In the international context *jus ad bellum* governs the legitimacy of direct use of force against the sovereignty and territorial integrity of a State, and possibly extends to indirect violence through support for subversive or terrorist armed activities within another State.[31] (The terms of 'force' and 'violence' are considered to have the same meaning in this thesis.)

In the civil context, however, force includes both force by the government, directed at a rebel faction or the civilian population, and force by a rebel group directed at the government or the civilian population. Forceful coups are also included. It is also essential to keep in mind the distinction between the use of force by a third party intervening in a civil conflict, and the use of force by the parties to the civil conflict. While the purpose of this thesis is to investigate the rules governing the latter, the former constitutes relevant practice as a response to the conflict.

1.3 REBELLION, INSURGENCY AND BELLIGERENCY

Finally, it is useful to review the terminology of 'rebellion', 'insurgency' and 'belligerency' used to categorise different levels of civil strife for the purposes of the law of neutrality. These constituted the basis of the original rules governing intervention. This terminology has, however, fallen into disuse even in that context.

Traditionally, international law dealt with civil wars according to their level of intensity and the extent of territorial control by rebels. According to these principles the lowest intensity category of civil disruption, a rebellion, defined as involving temporary or sporadic acts of violence, was the exclusive domestic concern of the State against which it was fought.

Insurgency falls between rebellion and belligerency. It arises when it is not yet appropriate for third States to treat rebels as "having the full rights and obligations of a belligerent, or to regard third states

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[29] See for instance Trainin "Questions of Guerrilla Warfare in the Law of War" (1946) 40 AJIL 534, Nurick and Barrett "Legality of Guerrilla Forces under International Law" (1946) 40 AJIL 563.

[30] Eg Wilson *International Law and the Use of Force by National Liberation Movements*.

[31] *Nicaragua v United States of America* para 191.

as subject to the obligations of neutrality".[32] However, the conflict "may have such scope, and be accompanied by a sufficient degree of organisation on the part of the rebels, that they can no longer be treated as private individuals committing unlawful acts."[33] At a minimum, therefore, insurgency requires rebel control over territory and "sufficient military might for the interests of foreign States to be affected".[34]

Belligerency, the state of civil disorder closest to international war, arises, according to Lauterpacht, when rebel forces occupy territory, have a measure of orderly administration, observe the rules of warfare, and there is a practical necessity for third States to define their attitude to the war.[35] Once a party is recognised as a belligerent all the rules of international law with respect to warfare apply to it.[36]

Ultimately, this terminology is not relied upon as a primary approach to the issue of civil conflicts in this thesis, although its relevance is referred to in some instances. It has been criticised for being self referential and discretionary, relying on it being a practical necessity for the State to define its attitude to the rebels.[37] Moreover, the practice of explicit recognition of belligerency has largely fallen into disuse; although Oppenheim suggests that a recognition of belligerency in ways other than by formal declaration is permissible and not an infrequent occurrence,[38] Wilson calls it "more theoretical than real", and points out that not a single recognition of belligerency has occurred since World War II.[39]

2 THE TRADITIONAL LEGAL POSITION ON CIVIL CONFLICT

In order to trace changes in international law it is necessary to begin from an understanding on how international law currently views civil conflict.

2.1 INTERVENTION PROHIBITED

As the one exception to the otherwise substantially underdeveloped international law governing civil conflict, the law governing intervention in civil conflict provides a useful background of received ideas. In theory, intervention by outside States into civil conflicts is largely prohibited. This derives

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[32] Jennings, Watts, et al. *Oppenheim's International Law* at 165-166.
[33] Ibid at 165-166.
[34] Wilson *International Law and the Use of Force by National Liberation Movements* at 24, Falk "Introduction in the International Law of Civil War" at 11, Higgins "Internal War and International Law".
[35] Oppenheim and Lauterpacht *International Law, Vol II Disputes, War and Neutrality* at para 76.
[36] Ibid at 249. See also Jennings, Watts, et al. *Oppenheim's International Law* at 165 cross referencing Oppenheim and Lauterpacht *International Law, Vol II Disputes, War and Neutrality* paras 55, 76, 76a, Wilson *International Law and the Use of Force by National Liberation Movements* at 24.
[37] Franck and Rodley "Legitimacy and Legal Rights of Revolutionary Movements with Special Reference to the People's Revolutionary Government of South Viet Nam" in Falk (ed.) *The Vietnam War and International Law* (Princeton University Press, Princeton, 1972) 3, 723 at 724 Cassese calls the rules "rather confused and rudimentary", Cassese *International Law* at 67. See also Falk "Introduction in the International Law of Civil War" at 11, rejecting the Lauterpacht and Oppenheim view that an improper recognition would amount to an illegal interference in the affairs of a State.
[38] Oppenheim and Lauterpacht *International Law, Vol II Disputes, War and Neutrality* at 250-251.
[39] Wilson *International Law and the Use of Force by National Liberation Movements* at 27.

from the well-established duty of States not to intervene or interfere[40] in the internal affairs of other States. Even consensual intervention is restricted. States may invite intervention only until a civil disturbance reaches the level of intensity of a civil conflict, at which point third party States may no longer intervene to assist the government, irrespective of consent.[41] In the words of Oppenheim's International Law, "when there exists a civil war and control of a State is divided between warring factions, any form of interference or assistance (except probably of a humanitarian character) to any party amounts to intervention contrary to international law."[42]

Assistance to rebels is also prohibited irrespective of the level of conflict or the purpose of the war.[43] The International Court of Justice in *Nicaragua* rejected any exceptions to this rule based on the rebel's aims or political or moral values, although it did not address the case of assistance to liberation movements.[44]

In reality, however, the practice has diverged starkly from the theoretical prohibition on intervention. Intervention into civil conflicts is widespread and consistent. Falk goes so far as to consider the restatement of the general rule in General Assembly resolutions as a "hypocritical normative assertion since it contradicts the attitudes and policies of many governments."[45] Higgins argues "If one would look behind the legal rhetoric to the reality (and it is only by doing this that a more realistic legal order can be built), it is clear that the law has to be restated."[46]

This extensive practice of intervention into civil conflict, which contradicts the traditional legal position that such intervention is prohibited, has been extensively debated from the perspective of whether it supports the emergence of new norms permitting intervention into such conflicts. However, the question of whether this practice reflects a change in perception about the legality of civil conflict itself has been overlooked.

2.2 SELF-DETERMINATION

Wars of self-determination have been accorded special status with respect to the norms of *jus in bello*. National liberation wars are "upgraded" to the equivalent of international wars through the 1977 Geneva Additional Protocol I. Moreover, it has been suggested that such wars may constitute an exception to the prohibition on intervention to assist rebel forces. The International Court of Justice in

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[40] Both terms are used in the relevant General Assembly Declarations.
[41] See eg *International Law and the Use of Force* at 51-52, Wilson *International Law and the Use of Force by National Liberation Movements* at 30-32, Bowett "The Interrelation of Theories of Intervention and Self-Defense" in Moore (ed.) *Law and Civil War in the Modern World* (Johns Hopkins University Press, Baltimore, 1974) 38 at 42, Institut De Droit International "Resolution" (1975) 56 Annuaire de L'Institut de Droit International 544 at 546.
[42] Jennings, Watts, et al. *Oppenheim's International Law* at 438.
[43] Higgins "Internal War and International Law", Cassese *International Law* at 66-69, O'Connell "Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy" in Charney, Anton, et al (eds.) *Politics, Values and Functions: International Law in the 21st Century* (Kluwer Law International, The Hague, 1998) 443 at 448.
[44] *Nicaragua v United States of America* para 209.
[45] Falk "Introduction in the International Law of Civil War" at 7. See also Farer "Intervention in Civil Wars: A Modest Proposal" at 516.
[46] Higgins "International Law and Civil Conflict" at 183.

Nicaragua deliberately kept this option open when it excluded such wars from its judgment prohibiting assistance to rebel forces.[47]

However, according to Wilson, the recourse to force even in those conflicts is not governed by international law. She noted that the resort to force in such conflicts "remained a matter of self-help beyond the purview of international law",[48] although she concluded that there was a trend towards the extension of the authority to use force to national liberation movements.[49] Nonetheless, Bowett maintains that denial of self-determination is an international wrong,[50] and accordingly that forceful intervention is permissible, at least where the Council or General Assembly has confirmed the denial of the right to self-determination and has authorised the intervention.[51]

2.3 SECESSION

The generally accepted position is that international law does not recognise a unilateral right to secession.[52] The doctrine of *uti possidetis,* which provides that colonial boundaries will become international boundaries on independence,[53] seems to have played a role in preventing the emergence of a right to secession via self-determination.[54] Although, once the new State is established, the principle of *uti possidetis* should give way to the principle of territorial integrity.[55]

It would appear that, as the Canadian Supreme Court held in the *Quebec Secession Case*, international law leaves the question of secession to be determined by the State.[56] The Court did suggest that the right to self-determination may ground a right to unilateral secession "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession."[57] However, the matter did not ultimately arise for resolution in that case.[58]

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[47] *Nicaragua v United States of America* at para 206. Note that Judge Schwebel rejected this aspect of the majority judgment. Ibid at 351 para 179-80. But see Cassese "Le Droit International Et La Question De L'assistance Aux Mouvements De Libération Nationale" at 325, Bowett "The Interrelation of Theories of Intervention and Self-Defense" at 43. See also Jennings, Watts, et al. *Oppenheim's International Law* at 445-446, who limit the permissible assistance to humanitarian or economic.

[48] Wilson International Law and the Use of Force by National Liberation Movements at 28.

[49] Ibid at 136.

[50] Bowett "The Interrelation of Theories of Intervention and Self-Defense" at 43

[51] Ibid at 44.

[52] *Reference Re Secession of Quebec* (1998) 2 SCR 217 at para 112. Crawford "State Practice and International Law in Relation to Secession" (1999) 69 British Year Book of International Law 85.

[53] See OAU resolution 16(1) in 1964 (Cairo) in which member States pledged to respect each others colonial frontiers at the moment of decolonialisation.

[54] For instance, the Yugoslav Arbitration Commission maintained in Opinion No 2 that "it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the states concerned agree otherwise" *Yugoslavia Arbitration Commission Opinion 2* (1992) 31 ILM 1497.

[55] *Burkina Faso and Mali (Frontier Dispute)* (1986) 91 ICJ Reports 554 at 565. For a discussion of this doctrine see Hensel, Allison, et al. *The Colonial Legacy and Border Stability: Uti Possidetis and Territorial Claims in the America* (2004).

[56] *Reference Re Secession of Quebec* at para 112.

[57] Ibid at para 135 and 138.

[58] Ibid at para 135. See also Crawford "State Practice and International Law in Relation to Secession". Crawford maintains that as "international law does not confer any right to unilateral secession outside the colonial context" and points out that "Since 1945 the international community has been extremely reluctant to accept unilateral secession of parts of independent states, in situations where the secession is opposed by the government of that state." And that in fact since 1945 no such State has been admitted to the United Nations against the wishes of the predecessor State, and there are many examples of attempted secession that have failed. At para 10, 26. See also the Commission of Jurists appointed by the League of Nations to examine the Aaland Islands situation. "Positive International law does not recognise the right of national groups, as such, to separate themselves from the State of which they form a

2.4 HUMANITARIAN LAWS IN ARMED CONFLICT

Some *jus in bello* norms, also known as humanitarian laws in armed conflict, address how force is used without judging whether the war was legitimate in the first place, and do apply in civil conflicts. The protection, so far as possible, of civilians from violence is a cardinal aspect of humanitarian law.[59] Initially only Common Article 3 of the 1949 Geneva Conventions applied to non-international conflicts, and even then only to situations recognised as "armed conflicts". The Article prohibits "Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture", against "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause"

Additional Protocol I extends a series of protections to conflicts involving self-determination against colonial or racist regimes[60] and Additional Protocol II aims to apply to all other armed conflicts involving armed forces of organized groups under responsible command and exercising control over a part of the territory.[61] According to this Protocol "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[62]

The *jus in bello* norms are increasingly being applied to all civil conflicts, both through the creation of the International Criminal Tribunals,[63] and following the International Criminal Tribunal for the Former Yugoslavia decision in *Tadic,* which held that Article 3 of the Geneva Conventions was part of customary law and thus applicable to all conflicts. In *Tadic*, the Court of Appeal also found that the grave breaches provisions of the Geneva Conventions could apply in the conflict in the former Yugoslavia as a conflict could be internationalized if another State intervenes through its troops or if participants in the conflict act on behalf of another State.[64]

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part by the simple expression of a wish." Commission of Jurists "Aaland Islands Situation" (1920) Sp Supp 3 League of Nations Official Journal at 5.

[59] See Roberts and Guelff *Documents on the Laws of War* at 615-617, and Rome Statute of the International Criminal Court, Article 8.

[60] See Article 1(4), 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.

[61] See Article 1(1), 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.

[62] See Additional Protocol II Article 13.

[63] Note that while the International Criminal Tribunal for Yugoslavia provides for prosecution of the laws or customs of war, in the case of Rwanda, the Statute appears to provide only for prosecution of violations of Common Article 3 or of Additional Protocol II. See Article 4 of the Statute of the International Tribunal for Rwanda. It does however extend international criminality to such violations.

[64] *Prosecutor v Dusko Tadic (Jurisdiction)* (1995) Case No. IT-94-1-AR72, Appeal on Jurisdiction (2 October 1995) at 67-68, para 127, and *Prosecutor v Dusko Tadic* (1999) IT-94-1 Judgement of the Appeals Chamber of the ICTY (15 July 1999).

PART I: THE PRACTICE

Part I of this thesis reviews a range of practice representing the response of the international community to civil conflict. Within this part, chapter 1 focuses on the practice of the Security Council across a broad range of conflicts, whereas chapter 2 reviews the practice of States, regional organisations and the Secretary-General as well as the Council in three key recent case studies.

This review reveals in a striking fashion that the received picture about civil conflict is out of step with the practice. The level of concern, condemnation, and intervention by the international community in civil conflict is in direct contradiction to the theoretical view of such conflicts as domestic matters beyond the reach of the international community and international law. This raises the question of how this practice should be analysed, and what impact it has on the emergence of norms affecting the legality of civil conflict. In this part, the focus is on whether the practice reveals that certain principles are gaining acceptance in the international community whereas the question of how to characterise any such emerging principle is considered separately in Part II of the thesis.

CHAPTER 1: THE RESPONSE OF THE COUNCIL TO CIVIL CONFLICTS

The Council has been involved in civil conflicts virtually since its inception and has accumulated a considerable amount of practice. This practice has never been analysed in a systematic way, and its possible role in the formation of international law has been largely overlooked.[65]

This chapter undertakes a review of the resolutions of the Council in the thirty two civil conflicts it has been involved in to date,[66] as well as the lack of Council practice in a number of other conflicts. The purpose of the discussion is to investigate the existence of principles implicit in the practice. The term 'principle' is used in this context as a descriptive term identifying rules that are formulated and supported through Council practice but without pre-empting a discussion of their legal nature.

At the core of this investigation is the question whether the Council is merely making *ad hoc* pragmatic decisions, or whether it is creating and enforcing particular principles. To assist this process, the practice is divided into three tiers of significance: demands and statements, economic or military embargoes, and forceful intervention. A gradient from condemnations and demands to sanctions and enforcement actions is taken to indicate increasing seriousness, with a stronger response

[65] Some exceptions include Teson's work considering the role of the Security Council in relation to humanitarian intervention. Teson "A Symposium on Re-Envisioning the Security Council: Collective Humanitarian Intervention". See also Taulbee's work on Security Council practice in discussing the prohibition on the use of force under Article 2(4), although he focused mostly on the practice of States. Taulbee "Governing the Use of Force: Does the UN Charter Matter Anymore?"

[66] As at 30 September 2003.

implying a strongly held view. Nonetheless, explicit condemnation of particular conduct has special weight as it provides clear indication of the response of the Council to that conduct.[67] Counter examples are taken into account and given most weight where they are shown to go directly against a particular principle; keeping in mind that a failure to act or intervene may not undermine the principle itself if it merely reflects the political nature of the institution and geopolitical pressures.

This chapter seeks to determine the principles that are being enforced through the Council practice. It asks the question whether certain forms of civil conflict (or recourse to force in such conflicts) are consistently rejected. Essentially, the question considered is do Security Council interventions aim to stop or prevent a certain sort of conduct, that the Council rejects on behalf of the international community?

A distinction is drawn between what is *disapproved of*, in the sense of what is condemned and rejected through the practice, and what is *illegal* under international law. The first is a descriptive statement, based in practice and recognising that certain conduct is condemned and subject to attempts to stop it. This may be a policy principle rather than a legal principle. The question of the characterization of the emerging principles is delayed until chapter 4.

1 PRELIMINARY ISSUES

1.1 THE RELEVANCE OF RESOLUTIONS

1.1.1 Textual Interpretation

Before turning to a substantive discussion of the practice, the question of whether it is useful to investigate the practice of the Council on the basis of its resolutions must be addressed. The question follows from the highly political nature of the Council. Is the text of a resolution a good indication of the intentions of the Council or should it be discounted as merely the result of a series of compromises and deals?

The literature has touched on rules of interpretation of Council resolutions, relying primarily on the Courts pronouncement in Namibia, and the Vienna Convention on the Law of Treaties.[68] The parallels between Council resolutions and treaty text – particularly their nature as documents which result of a carefully negotiated process – suggest that treaty interpretation should be relevant. Accordingly, a resolution should be "interpreted in good faith, in accordance with the ordinary meaning to be given to the terms [...] in their context and in the light of its object and purpose".[69] The preamble of Council

[67] For a more detailed discussion of methodological issues see Chapter 4 in part II.
[68] For a thorough discussion of the general principles to be applied to the interpretation of Council resolutions see Wood "The Interpretation of Security Council Resolutions" (1998) 2 Max Plank Yearbook of United Nations Law 73
[69] Article 31 1969 Vienna Conventions on the Law of Treaties, see also Wood "The Interpretation of Security Council Resolutions"

resolutions is similar to the preamble to a treaty, which constitutes relevant context. However, supplemental means of interpretation, (which in the case of a treaty includes preparatory work and circumstances surrounding its negotiation, and in the case of Council would include the political context), is only relevant where the text "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable".[70] In the case of evidence of *opinio juris* the approach has been to focus on what States claim, rather than what they may mean. There is some divergence on the point,[71] but according to the Court in *Nicaragua*, what counts is what States claim customary law to be, not their underlying motivations.[72] In the case of General Assembly resolutions,[73] the focus has also explicitly been on the wording of the resolution. It is from the text that the intention is to be derived. Thus, in *Nicaragua*, the Court explicitly referred to the text and formulation to determine whether Resolution 2625 (XXV) intended to articulate legally binding principles.[74]

According to all of these approaches, the text of the resolution is central, and the political context is only secondary at most. By analogy, this would suggest that the focus of the enquiry of Council resolutions must be on the text of the resolutions rather than geopolitical motivations. In any event, a search for political reality is unlikely to be helpful in the interpretation of resolutions – such an investigation is at best conjecture and hypothesis.[75] This is consistent with the fact that Council texts have been treated as binding legal documents, with extended debates surrounding the particular wording of a resolution, and later discussions of mandate relying on the text again.[76] The decision of the International Court of Justice in *Namibia* supports the view that the intended meaning of a resolution must be determined in each case, taking into account the language of the resolution, the discussions leading to it, the Charter provisions invoked, and all surrounding circumstances.[77] Thus, this thesis adopts the position that individual Council resolutions must be interpreted based on their text and wording, in the light of their subject matter, preamble and the debates in the Council (where these are published).

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[70] Article 32, Vienna Conventions on the Law of Treaties.

[71] See Gray's approach in Gray *International Law and the Use of Force* at 18, as opposed to Teson's position which seeks to re-interpret their actions in light of justifications that could have been given. See Teson *Humanitarian Intervention: An Inquiry into Law and Morality* at 175-266, also Franck "Who Killed Article 2(4)".

[72] In *Nicaragua*, the formal grounds relied upon by States in explaining their actions were to be taken at face value for the purposes of customary law. Thus, statements discussing domestic policies, ideology or other political factors would not be taken to be statements of international law but of international policy. *Nicaragua v United States of America* at 109 para 207. See also Akehurst "Custom as a Source of International Law" 36-37.

[73] Regarding General Assembly resolutions see Akehurst "Custom as a Source of International Law" at 6-7. Bowett, Sands, et al. *Bowett's Law of International Institutions* at 291. Higgins *Problems and Process: International Law and How We Use It* at 27-28.

[74] *Nicaragua v United States of America* at 107.

[75] The realpolitik rationale for any resolution will vary depending on which actors are interviewed. In any event, in most cases such rationales are not expressed publicly. This is even more difficult in the case of the use of the veto blocking a resolution. In some cases the realpolitik rationale is known, because it is the intention of the vetoing state that it be known – such as China's veto of the continuation of the Macedonian peacekeeping mission in response to Macedonia's recognition of Taiwan – but frequently the true rationale for the veto is not directly expressed. In such circumstances, the conclusion that the principle under consideration was rejected would be entirely artificial if in fact it was evident that the reasons for the veto were geopolitical.

[76] Consider for instance formulation of the mandate in SC Res 1244 (1999) or the discussion surrounding the various Iraq resolutions.

[77] In that case the issue was the binding nature of a resolution. *Advisory Opinion on Namibia* (1971) ICJ Rep 16.

1.1.2 When are Resolutions Binding?

Although the International Court of Justice expressly considered the binding nature of Council resolutions in the *Namibia Advisory Opinion,*[78] this remains a difficult and controversial topic.[79] Two issues in particular arise in this thesis: whether Council resolutions can bind non-State actors; and the extent to which resolutions authorised under chapter VI of the Charter of the United Nations addressing the "Pacific Settlement of Disputes" can impose binding obligations.

While the Council appears to consider itself to have power to bind all parties to all conflicts (including civil conflicts) with or without relying on Chapter VII, an interesting distinction appears to be emerging in the practice between resolutions addressing parties and those addressing the greater United Nations Membership. In fact, despite the reasoning in *Namibia,* the Council has rarely imposed demands on the greater United Nations membership outside of Chapter VII, whereas it has done so frequently in the case of parties to a dispute. This differential approach to parties to a dispute seems to reflect the wording of the Charter, and is consistent with the scheme of the Charter which places the responsibility to maintain peace and security in the Council.

Non-Chapter VII Resolutions

In the *Advisory Opinion on Namibia*[80] the International Court of Justice considered the legal consequences of a Council resolution that declared South Africa's presence in Namibia illegal and invalid. This resolution was not passed under Chapter VII of the Charter, according to which the Council "may call upon the Members of the United Nations to apply such measures",[81] which would have rendered it binding, nor did it refer to the situation as amounting to a threat to international peace and security. Nevertheless, the majority held that Member States were under an obligation to accept and carry it out:

> A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end.[82]

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[78] *Advisory Opinion on Namibia* (1971) ICJ Rep 16.

[79] The discussion in the most recent Simma commentary, for instance, is testimony to the ongoing confusion and difficulty. See the discussion of Article 25 by Delbrück, Simma and Mosler *The Charter of the United Nations: A Commentary* at 452.

[80] *Advisory Opinion on Namibia.* For a discussion of this case see Mori "Namibia Opinion Revisited: A Gap in the Current Arguments on the Power of the Security Council" (1997) 4 ILSA J Int'l & Comp L 121 Higgins "The Advisory Opinion on Namibia: Which UN Resolutions Are Binding under Article 25 of the Charter?" (1972) 21 ICLQ 270 at 286.

[81] Article 41, 1945 Charter of the United Nations (San Francisco). See also Articles 48 and 49.

[82] *Advisory Opinion on Namibia* at 54.

The Court rejected the view that only resolutions under Chapter VII could be binding on the basis that to limit Article 25[83] to enforcement actions under Chapter VII would render it "superfluous", as Articles 48 and 49 already assure the same effect.[84] This approach was strongly opposed by the minority, who argued that Article 25 could not have the effect of evading the conditions in Chapter VII.[85]

The *Namibia* decision provides that binding resolutions may be passed without reliance on Chapter VII and that the question of whether a resolution is binding is to be determined in each case, taking into account the language of the resolution, the discussions leading to it, the Charter provisions invoked, and all surrounding circumstances. Despite this decision, however, the debate regarding the binding nature of resolutions continued unresolved in the literature.[86] Even the latest Simma commentary on the Charter is inconclusive on the issue. While Delbrück in that commentary leans towards the view that some resolutions outside of Chapter VII may be binding, he suggests that the scope for such resolutions is extremely limited because resolutions under chapter VI cannot impose binding obligations but merely repeat the duty of States to settle peacefully.[87]

Resolutions Addressed at Parties vs UN Membership

It is useful to distinguish resolutions addressed to parties to a dispute and those addressed to the general UN membership. It is clear, from even a brief overview of the practice of the Council, that a strikingly large number of resolutions addressed at parties to a dispute are formulated as binding, irrespective of whether they rely on Chapter VII or the finding of a threat to international peace and security.[88]

In contrast, the Security Council practice directed at the general UN membership rarely uses compulsory language unless the resolution is passed under Chapter VII. Most non-Chapter VII requests addressed to the UN Membership are general or ambiguous and do not seek to impose binding enforcement action or sanctions.[89]

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[83] Article 25, Charter of the United Nations provides that the Members "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

[84] *Advisory Opinion on Namibia* at 53.

[85] Separate opinion of Judge Petren, Ibid at 136. Dissenting opinion of Judge Fitzmaurice at 293, Judge Gros at 341.

[86] See for instance Mori "Namibia Opinion Revisited: A Gap in the Current Arguments on the Power of the Security Council" at 131 who also points out that the Travaux Preparatoires appear not to resolve the issue, although in her view the better approach is that only Chapter VII resolutions are binding. Riphagen "The Legal Consequence of Illegal Acts under Public International Law" (1973) 20 Neth Int L Rev 27 at 31, Herman "The Legal Status of Namibia and of the United Nations Council for Namibia" (1975) 13 Can YB Int L 306 at 316. Sonnenfeld *Resolutions of the United Nations Security Council* (PWN Polish Scientific Publishers, Warsaw, 1988) at 127-28. See Nafziger and Wise "The Status in United States Law of Security Council Resolutions under Chapter VII of the United Nations Charter" (1998) 46 Am J Comp L 421 at 428-429, and Bailey and Daws *The Procedure of the UN Security Council* (3rd ed, Clarendon Press, Oxford, 1998) at 263-273. On the interpretation of Article 25, see Kelsen *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1st ed, Stevens and Sons, London, 1950) at 444-50.

[87] See the discussion of Article 25 by Delbrück, Simma and Mosler *The Charter of the United Nations: A Commentary* at 452.

[88] See the practice of the Security Council discussed below for examples.

[89] Other than the resolutions in Namibia, there have been few examples of resolutions seeking to impose direct obligations without referring to Chapter VII. One possible example occurred in the conflict in Afghanistan (end the supply of arms and ammunition to both parties) SC Res 1076 (1996), and South Africa, where many explicit demands were made on the parties, without reference to Chapter

The emphasis on the responsibility of parties to a dispute to abide by the resolutions of the Council seems consistent with one interpretation of the Charter. Article 40 explicitly permits the Council to act with respect to parties before determining a threat to international peace and security under Article 39. The Council may "call upon the parties concerned to comply with such provisional measures as it deems necessary" and "shall duly take account of failure to comply [with such measures]",[90] suggesting that it may act to enforce a failure to comply.

Moreover, a terminological distinction between Article 40 and Articles 41, 42, and 43 further supports the view that the Council is able to make binding demands of parties to a conflict without relying on Article 39. Under Article 40 it may call upon "the parties concerned" to comply with provisional measures. However, in Articles 41, 42, and 43 the Council may call upon the "Members of the United Nations" to enforce its measures. The text implies, therefore, that under Article 40 the Council may make binding decisions against any party to a conflict threatening international peace and security.

Furthermore, it seems logical that a party to a dispute that is likely to endanger peace and security[91] would be expected to comply with resolutions of the Council that aim to prevent an aggravation of the situation. Their conduct jeopardizes the peace and security of the other States, and hence they have serious responsibility to comply with decisions of the Council seeking to maintain international peace and security.[92]

In this light, the thesis adopts the position that – at least in relation to resolutions addressed to parties to a dispute – the *Namibia* decision, which provides that a resolution will be held to be binding even if it is not passed under Chapter VII if its formulation evidences that the Council intends it to be binding, should be applied. Thus, while a Chapter VII resolution is clearly binding, a non Chapter VII resolution aimed at the parties to a dispute may also be binding if it is formulated in a binding fashion.

Non-State Actors?

To what extent do Council resolutions bind non-State actors? Arguably, chapter VI places obligations on all parties to a dispute, including non-State parties, and gives the Council power to call on all such parties to settle their disputes by peaceful means.[93] A literal reading of Article 33 supports this position as the Article uses the term 'parties' rather than States or Members (which are used to indicate State parties to the Charter in other provisions of the Charter). Nonetheless, the Goodrich and Hambro commentary on the Charter uses the terminology of 'members' or 'states' interchangeably

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VII, and a number of calls on other States to impose an arms embargo were also made. SC Res 1076 (1996) para 9. See also during the Yugoslav conflict, SC Res 713 (1991) para 7.

[90] Article 40, Charter of the United Nations.

[91] These are the parties subject to Ch VI and VII, see Article 33, Ibid.

[92] Article 24, Ibid.

[93] Article 33, Charter of the United Nations.

with 'parties', suggesting that it only anticipates State actor parties.[94] The later commentary on the Charter by Simma does note that the literal meaning of Article 2(3) includes disputes with non-State actors, such as international organisations, *de facto* regimes, ethnic communities or national liberation movements. However, it goes on to argue that "since the Charter is a multilateral treaty between the member States of the UN, and since Art 33(1) must be viewed as covering a sector from the larger scope of Art 2(3), it must be concluded that the members of the UN are the primary addressees here as well."[95]

On the other hand, it could be argued that under Chapter VII (and particularly Article 40) the Council does have power to bind parties, including non-State actors. This position would reflect the broad powers that the Council has under Chapter VII to "make recommendations, or decide what measures shall be taken"[96] to maintain and restore international peace and security. There is no explicit limit on the potential measures the Council may impose once Article 39 is activated; why would these be restricted to measures directed at State parties or even at the parties to the conflict?

The practice of the Council supports the view that non-State parties can be bound by resolutions. The Council habitually calls upon rebel groups, or sub-State groups involved in conflicts, to act in specific ways. The trend can be traced to the practice of the Council in Angola demanding that UNITA and Savimbi stop hostilities, and respect the result of the elections. The Council also imposed a military and petrol embargo on UNITA[97] demanding that it withdraw its troops from certain areas and condemning its breach of the peace accords.[98] The discussions in the Council which led to these resolutions support the view that the Council is entitled to bind UNITA despite it being a non-State party.[99] Other striking practice includes a resolution under Chapter VII which insisted that the Taliban "cease the provision of sanctuary and training for international terrorists and their organisations"[100] and a resolution demanding that "all parties and others concerned in the former Yugoslavia, and all

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[94] See Goodrich, Hambro, et al. *Charter of the United Nations: Commentary and Documents* at 260.
[95] Simma and Mosler *The Charter of the United Nations: A Commentary* at 585.
[96] Article 39, Charter of the United Nations.
[97] SC Res 864 (1993) paras 17-19.
[98] SC Res 864 (1993) paras 8-9. See also SC Res 1127 (1997), SC Res 1173 (1998).
[99] For instance, in meeting 3168, the representative for Angola pointed out that "In all civilized democratic nations, those who break the law and who commit crimes are penalized. In the modern world there are countries or individuals who are penalised for not fulfilling their international commitments." S/PV.3168 (1993) at 11-12. Brazil emphasised that it was important to take action against UNITA, as it would be interpreted as a measure of the willingness of the UN "in promoting the principle that conflicts must be settled peacefully and that the use of force must never be rewarded." S/PV.3168 (1993) at 26-30. In meeting 3182, the Russian Federation emphasised that "the time has come when the international community must immediately demonstrate responsibility and firmness in dealing with those forces which are ignoring the resolutions of the Security Council, and to that end, use must be made of every means available to individual States for exerting influence on UNITA." S/PV.3182 (1993) at 12. In meeting 3277, which led to the imposition of sanctions, the discussion similarly assumed that the Security Council was entitled to bind UNITA. The Russian Federation stated that it is only through "determined and forceful measures on the part of the international community that we can force UNITA to fulfil its obligations under existing agreements and to embark unreservedly on the process of seeking a peaceful settlement in the country." S/PV.3277 (1993) at 46. Nigeria agreed that the UN must "send out the strongest possible signals to the rebel party in Angola, UNITA, that enough is enough and that its patience is running out." S/PV.3277 (1993) at 3. Brazil specified that UNITA must "understand that the United Nations will not turn a blind eye to violations of Security Council resolutions and that this Organisation would be betraying its most basic principles if it were to allow force to prevail over the rule of law." S/PV.3277 (1993) at 27. It also emphasized that the international community will hold UNITA responsible and "will not tolerate its continued attempts to wage war on its own people in an effort to conquer militarily what it could not win in a democratic election." S/PV.3277 (1993) at 31.
[100] SC Res 1267 (1999) para 1.

military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law".[101]

1.2 THE LEGAL FRAMEWORK

The Council has the primary responsibility to maintain international peace and security pursuant to the powers granted in chapters VI, VII and VIII of the Charter.[102] However, its authority is limited when dealing with matters falling within the domestic jurisdiction of States. The Charter provides little guidance to the Council on how to address civil conflicts: the original debates suggest that the Charter did not anticipate the Council addressing civil conflicts; this is reinforced by the restrictions on the Council authority over matters considered domestic.[103]

1.2.1 Pacific Settlement of Disputes

Prima facie the powers granted to the Council under Chapter VI, addressing the pacific settlement of disputes, were not intended to apply to the civil conflict context.[104]

Article 33 provides that:

> 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

The word 'international' was deliberately inserted into Article 2(3), and thus implicitly into Article 33, at the San Francisco Conference "for the specific purpose of underlining the necessity of a transborder dimension."[105] This is reinforced by Article 2(7), which prohibits intervention into matters within the domestic jurisdiction of States.[106] Article 2(7) has been interpreted to prohibit any "recommendatory resolution addressed to a particular state [...] urging that state to change its policy in a matter regarded as domestic";[107] but not mere discussion or placement on the agenda.[108] It only prohibits intervention into matters "essentially" within the domestic jurisdiction, however. This has

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[101] SC Res 771 (1992) para 3. See also resolutions with respect to Sierra Leone rebels SC Res 1132 (1997), SC Res 1260 (1999) and the Rwandan civil war SC Res 812 (1994), SC Res 925 (1994).
[102] Article 24 (2).
[103] Article 2(7).
[104] For a general discussion of the power of the Security Council under Chapter VI see White *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* at 81.
[105] Simma and Mosler *The Charter of the United Nations: A Commentary* at 108, (1945) UNCIO III at 623.
[106] Article 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."
[107] Schachter "The United Nations and Internal Conflict" at 421.
[108] Ibid at 421, *Resolution of the Institute de Droit International* (29 April 1954), see also Goodrich, Hambro, et al. *Charter of the United Nations: Commentary and Documents*, Gordon "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond" at 536.

been taken to narrow the domestic jurisdiction of States,[109] although on its face the clause was "designed to reinforce and widen the scope of the domestic jurisdiction clause".[110]

1.2.2 Intervention under Chapter VII

Under Chapter VII, the Council can impose enforcement measures in relation to a "threat to the peace, breach of the peace, or act of aggression".[111] The drafters of the Charter "clearly did not intend this phrase to encompass internal conflicts".[112]

There has been an extensive debate over whether the Council has complete discretion in determining a threat to international peace and security.[113] Various arguments seeking to limit the Council's authority have been made: Fielding argues, "the Charter does not contemplate that UN armed force should be used in order to put down internal rebellion";[114] Schachter similarly maintains that international peace and security "does not include the elimination of internal conflicts *per se*",[115] and that the UN is not entitled to use force "to bring about the victory of one faction or another in an internal conflict."[116]

In practice, however, the Council has intervened repeatedly in situations that could be considered purely domestic, on one or other side of the conflict.[117] This has generally been justified in the literature on the basis of some internationalising factor such as significant refugee flows, regional disruption, the likelihood of intervention by outside States,[118] and self-determination[119] - or the impact

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[109] Simma and Mosler *The Charter of the United Nations: A Commentary* at 158.

[110] See Simma and Mosler *The Charter of the United Nations: A Commentary* at 158. According to Goodrich, Hambro, et al. *Charter of the United Nations: Commentary and Documents* at 63 the term "essentially" was substituted for the term "solely" because "in the modern world it was not easy to find a matter that was 'solely domestic'.

[111] Article 39.

[112] Fox "International Law and Civil Wars" at 638.

[113] It is likely to be limited by some "substantive notion" of what would amount to such a threat. O'Connell "Continuing Limits on UN Intervention in Civil War" (1992) 67 Ind LJ 903 at 911. See also Fielding "Taking a Closer Look at Threats to Peace: The Power of the Security Council to Address Humanitarian Crises" (1996) 73 U Det Mercy L Rev 551 at 558. For a discussion of the legitimacy of Security Council decisions from a procedural standpoint, see also Caron "The Legitimacy of the Collective Authority of the Security Council" (1993) 87 AJIL 552, and Brownlie *The Rule of Law in International Affairs*. Kirgis "The United Nations at Fifty: The Security Council's First Fifty Years" at 516. For a view of it does having wide discretion see Kooijmans "The Enlargement of the Concept 'Threat to the Peace'" in Dupuy (ed.) *Peace-Keeping and Peace-Building, the Development of the Role of the Security Council* (Nijhoff, The Hague, 1992) 111, Reisman "Comment, Summing Up" in Dupuy (ed.) *Peace-Keeping and Peace-Building, the Development of the Role of the Security Council* (Nijhoff, The Hague, 1992) 140, Sur "Comment, Summing Up" in Dupuy (ed.) *Peace-Keeping and Peace-Building, the Development of the Role of the Security Council* (Nijhoff, The Hague, 1992) 140, Taulbee "Governing the Use of Force: Does the UN Charter Matter Anymore?" at 7.

[114] Fielding "Taking a Closer Look at Threats to Peace: The Power of the Security Council to Address Humanitarian Crises" at 563, Schachter "Authorized Uses of Force by the United Nations and Regional Organisations" in Damrosch and Scheffer (eds.) Law and Force in the New International Order (Westview, Oxford, 1991) 86.

[115] Schachter "The United Nations and Internal Conflict" at 404.

[116] Ibid at 423.

[117] Damrosch "Changing Conceptions of Intervention in International Law" in Reed, Kaysen, et al (eds.) *Emerging Norms of Justified Intervention: A Collection of Essays from a Project of the American Academy of Arts and Sciences* (Committee on International Security Studies, American Academy of Arts and Sciences, Cambridge, Mass., 1993) 105.

[118] See Chip "A United Nations Role in Ending Civil War" (1981) 19 Columbia J Transational Law 15, Franck "United Nations Law in Africa: The Congo Operation as a Case Study" (1962) 27 Law & Contemp Probs 632.

[119] Szasz "Role of the United Nations in Internal Conflicts" (1983) 13 Georgia Journal of International and Comparative Law 345-54 at 347-51. See Gordon "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond" (1994) 15 Michigan Journal of International Law 519 at 537-538.

on the broader international community.[120] As Goodrich and Hambro maintains "There has been a reluctance to dismiss any dispute or situation even when the danger to peace, or indeed the international character of the question, has seemed highly doubtful."[121] However, that approach does not really limit the scope for intervention as it is always possible to find some consequential impact, on the region if not on the world, arising from a civil conflict.[122]

1.2.3 Peacekeeping Forces

Finally, the authority to send peacekeeping forces (to any conflict, not only a civil conflict) is not explicitly provided for in the Charter. Such operations have been acknowledged as legal by the International Court of Justice in the *Certain Expenses Advisory Opinion.*[123] However, they are considered to rely on the consent of the parties,[124] which does raise additional questions about their legitimacy in civil conflicts given the contested nature of the government in such conflicts. As White points out, consent is usually obtained from the governments concerned.[125] However, the authority of the government is put into question in a civil conflict, which may result in it no longer being a meaningful gauge of the will of the State.[126] Thus, it may be that only peacekeeping operations with the consent of all factions in a civil war can be justified according to traditional theory.

1.2.4 Conclusion

Although there is little legal guidance in the Charter on the role of the Council in civil conflict, as is shown in the remainder of this chapter, there is extensive Council practice responding to civil conflicts.

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[120] O'Connell comments that "the Charter meant to restrict the Council's authority to intervene in civil war despite such wars being breaches of 'peace'." O'Connell "Regulating the Use of Force in the 21st Century" at 450-451.

[121] Goodrich, Hambro, et al. *Charter of the United Nations: Commentary and Documents* at 268. Cot and Pellet take a similar view. Cot, Pellet, et al. *La Charte Des Nations Unies: Commentaire Article Par Article* at 572.

[122] Serious human rights violations, for instance, have been used to justify intervention, despite their not being a threat to international peace and security in a traditional sense. Schachter "The United Nations and Internal Conflict" Kirgis reviews the discussions surrounding the resolutions finding a threat to international peace and security in Somalia, Haiti and Angola and concludes that these "lead unavoidably and quite properly to a much expanded definition of 'threat to international peace' than could have been intended fifty years ago". Kirgis "The United Nations at Fifty: The Security Council's First Fifty Years" at 517.

[123] The Court held that the power to send peacekeeping forces was implied even when the Security Council did not resort to enforcement action against a State. *Certain Expenses of the United Nations* (1962) ICJ Rep 151, White *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* at 224.

[124] Former UN Secretary-General Boutros Boutros-Ghali defined peacekeeping as "The deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well." *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, Report of the Secretary-General (1993) S/25996. See also White *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* at 207, *United Nations The Blue Helmets: A Review of United Nations Peace-Keeping* (3rd ed, United Nations Department of Public Information, New York, 1996). O'Connell "Regulating the Use of Force in the 21st Century" at 451. For a comprehensive discussion of peacekeeping see White *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* at 172-176.

[125] White *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* at 232.

[126] See discussion in Wippman "Treaty-Based Intervention: Who Can Say No?", White *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* at 232, also at 610.

2 THE PRACTICE OF THE COUNCIL

In order to undertake an analysis of the Council practice, a multi-step analysis was adopted. First, the practice of the Council in the relevant 32 civil conflict was identified. An overview of that practice revealed that certain responses were typical and repeated, and provided the basis for categorisation according to possible emerging principles. The practice was thus tabulated according to conflict and type of response.[127] Second, the table was analysed to identify the principles which received repeated support across different conflicts.

This section is the result of that analysis and considers the practice under 5 headings: Rejecting Recourse to Force to Gain Political Power, Rejecting the Forceful Overthrow of Democracy, Demanding Peaceful Settlement, Demanding the Protection of Civilians, and Reliance on a Breach of a Peace Agreement.

The significance of this practice must be assessed in the light of whether the resolutions are binding or aspirational, and whether they are restricted to the particular conflict or are of a more general application.

2.1 REJECTING RECOURSE TO FORCE TO GAIN POLITICAL POWER

The first point to make is that the Council has repeatedly condemned recourse to force in civil conflicts, and demanded that parties stop such force. The rejection of recourse to force by the Council is not surprising from a policy perspective. However, given that civil conflicts have been considered to be neither permitted nor prohibited by international law, such practice raises fundamental questions about the permissible nature of civil conflicts. Is the Council prohibiting a form of civil conflict? Is the Council formulating binding principles in its rejection of the recourse to force?

In order to determine what principles are emerging from the Council practice, a number of questions must be addressed: What sort of recourse to force is being rejected: that of rebels (which would suggest a State centric *status quo* approach), or that of both parties? Are only specific types of force rejected (eg recourse to force to gain political power, force following the signing of a peace agreement, violence against civilians)? Has the Council tended to condemn the force as soon as it becomes involved in the conflict? Are these demands and calls to renounce force binding? Does the Council expect them to be followed? Have the condemnations and calls to stop using force been formulated in a broad fashion – ie rejecting all recourse to force in civil conflict – or are they a response to the particular situation considered by the Council? Can trends be identified?

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[127] The categories adopted were resolutions expressing: "Concern, comments and acknowledgements"; "Condemnation"; "Resolutions calling for, or demanding, particular actions or outcomes"; "Sanctions", the sending of "Observer or Peacekeeping forces"; "Authorisations of use of force"; "Encouragement or authorisation of third party actions"; the "Applicability of humanitarian laws of war", issues of "Sovereignty and territorial integrity"; and findings of "Threats to international peace and security"

2.1.1 Overview of the practice

During the 1990s, it became increasingly usual for the Council to condemn the recourse to force and then call on parties to stop fighting. The explicit rejection of force to resolve conflict has been a central aspect of the Council practice in relation to many conflicts.[128] The Council has also repeatedly rejected the use of "violence", which seems to be used as a synonym for "force".[129]

On the whole the most illuminating practice is the most recent, even in relation to long-standing conflicts. However, one instance of early practice is worth highlighting because it did pre-empt the principles emerging in the 1990s: The practice of the Council in Congo Brazzaville in 1961[130] explicitly aimed to prevent civil conflict. The Council sent a peacekeeping force to "prevent the occurrence of civil war".[131] It highlighted the threat to international peace and security and went on to urge the forces to "take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes and the use of force if necessary in the last resort".[132] For many years after this intervention, the Council seemed to have retreated from this principle, and failed to intervene in further civil conflicts. However, the practice of the last decade and a half seems to be re-instating the principles underlying that early intervention.

Two sets of conflicts are worth investigating in more detail in relation to the emergence of these trends, those in the Balkans and those in Western Africa. These conflicts have elicited the entire range of Council responses (from condemnation to intervention) and provide the greatest insight into the formulation and justification of the emerging principles. In the Balkans a progression is visible from

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[128] In Georgia, it demanded that all parties "refrain from the use of force", [SC Res 876 (1993), see also SC Res 881 (1993), para 3] and also explicitly welcomed the "commitment of the parties not to use force for the resolution of any disputed questions" and to refrain from "propaganda aimed at the solution of the conflict by force" [SC Res 1311 (2000) para 5]. In Afghanistan, it called on all parties to "renounce the use of force" [SC Res 1076 (1996) para 1, see also SC Res 1193 (1998) para 2, SC Res 1214 (1998) para 1]. In Burundi, it also specifically demanded that all parties refrain from "seeking to destabilize the security situation or depose the Government by force or by other unconstitutional means" [SC Res 1049 (1996) para 3].

[129] Similar demands, with varying formulations, were made in Lebanon: The Security Council condemned the violence and called on "all those involved in hostilities in Lebanon to put an end to acts of violence" [SC Res 436 (1978) para 1, SC Res 490 (1981) para 1, SC Res 512 (1982) para 1, see also SC Res 513 (1982) para 1 with respect to violence against civilians]. In Rwanda, the Security Council did ultimately demand "an end to the mindless violence and carnage which are engulfing Rwanda" [SC Res 912 (1994) para 6, SC Res 918 (1994), SC Res 925 (1994).] Similarly in Cambodia, [see SC Res 880 (1993) para 5] in Burundi, [see SC Res 1049 (1996) para 3 and 4, and SC Res 1072 (1996)] including demands that parties refrain from incitement to violence, [SC Res 1049 (1996) para 3 and 4]. See also in the DRC expressing concern at "acts of and incitement to ethnic hatred and violence by all parties to the conflict", [SC Res 1234 (1999)] in Sierra Leone the resolutions were passed pursuant to Chapter VII and were thus explicitly binding, [SC Res 1132 (1997) para 2.]. In Albania the explicit calls to end violence were made after determining that the situation amounted to a threat to international peace and security, [SC Res 1101 (1997) para 1, this formulation was repeated in SC Res 1114 (1997) para 1]. See Albania [SC Res 1101 (1997) preamble] and see East Timor, [repeatedly condemned "all acts of violence in East Timor" and called for their immediate end. SC Res 1264 (1999) para 1, acting under Chapter VII, see also SC Res 1246 (1999) para 11, SC Res 1272 (1999) para 12, 16]. See the Central African Republic: The Security Council called on the Government "to take urgent steps to bring an end to all acts of violence." [Statement of the President S/PRST/2001/18 (2001).].

[130] Note that the practice of the Security Council in relation to the more recent civil uprising in 1997 has been very limited. It did not send peacekeepers despite requests by the OAU and the Congolese government. It did find that the factional fighting, the plight of civilians, and the severe humanitarian conditions were "likely to endanger peace, stability and security in the region". However, it maintained that a force would only be sent if there was "complete adherence to an agreed and viable ceasefire, agreement to the international control of Brazzaville airport and a clear commitment to a negotiated settlement covering all political and military aspects of the crisis". S/PRST/1997/43.

[131] SC Res 161 (1961) para 1.

[132] SC Res 161 (1961) para 1.

the practice in the early 1990s (the former Yugoslavia in 1991, Bosnia Herzegovina, and Croatia) to the practice in the late 1990s (Kosovo and the Former Yugoslav Republic of Macedonia). The practice in Western Africa similarly can be traced from the intervention in the mid 1990s in Sierra Leone, to the most recent interventions in Côte d'Ivoire and Liberia in the early 2000s. The practice in the Balkans is reviewed here, whereas the practice in Western Africa is reviewed as part of the more comprehensive case studies in the next chapter.

The Balkans

The Council practice in the Balkans involved condemnations and calls to cease the violence. Much of that practice was interlinked, arising from the break-up of the former Yugoslavia,[133] and taking place against the backdrop of intense European involvement. Early in the conflict, in June 1991 the European Community, the OSCE and the US maintained that they would not recognise Slovenia or Croatia as international subjects.[134] The EC sought a mediated solution to the crisis in June 1991, leading to a form of interim peace agreement.[135] However, this broke down immediately and it became clear that Serbia aimed to exploit the situation to create a "greater Serbia". One international commentator, the International Crisis Group (ICG) points to this as the time when the "United States and Germany switched positions from insisting on the maintenance of territorial integrity to an opposition to the use of force to maintain such integrity" [136] On 27 August 1991, the European Community established the Yugoslav Peace Conference to attempt a peaceful resolution of the conflict. It also created the Arbitration Commission to resolve disputes arising during the negotiations.[137]

Against this backdrop, the Council intervened on 25 September through resolution 713 (1991). It noted the principle from the declaration coming out of the OSCE conference of 3 September 1991 that "no territorial gains or changes within Yugoslavia brought about by violence are acceptable" It also emphasised its alarm at the violations of the cease-fire and the continuation of the fighting.

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[133] The break-up of the former Yugoslavia in the early 1990s evolved as a series of civil conflicts and led to the creation of a number of new states. At least the early stages of the complex series of disintegrations resulting from the break-up of the former Yugoslavia can be viewed as a civil war within the former Yugoslavia. This was later internationalised when the breakaway entities were accorded international recognition. Slovenia (July 1990 declaration of Sovereignty, referendum December 1990), and Croatia were the first to seek to secede. They were followed by Bosnia Herzegovina and Macedonia. The European Community nations extended recognition to these Yugoslav republics seeking independence subject to certain conditions. Kosovo, however, was not included in these arrangements. Bosnia and Herzegovina claimed independence from Yugoslavia in October 1991 and voted by a referendum for independence in 1992. The Bosnian Serbs responded with armed resistance aimed at partitioning the republic along ethnic lines and joining Serb-held areas to form a "greater Serbia." By 1992, the Security Council considered that the Socialist Federal Republic of Yugoslavia had ceased to exist and the remaining republics of Serbia and Montenegro declared a new Federal Republic of Yugoslavia under President Milosevic.

[134] U.S. Department of State, Press Release, "Yugoslavia: Croatian and Slovenian Unilateral Assertions of Independence," 26 June 1991, See ICG *Current Legal Status of the Federal Republic of Yugoslavia and of Serbia and Montenegro, ICG Balkans Report N° 101* (Washington/Brussels, 2000).

[135] Where independence would be suspended for 3 months.

[136] ICG *Current Legal Status of the Federal Republic of Yugoslavia and of Serbia and Montenegro, ICG Balkans Report N° 101.*

[137] *Conference on Yugoslavia Arbitration Commission Opinions* (1992) 31 Intl Legal Mat 1488.

The Council held that the situation amounted to a threat to international peace and security, and "Appeal[ed] urgently to and encourage[d]" all parties to settle their disputes peacefully and through negotiation at the Conference on Yugoslavia.[138] Nonetheless, it decided under Chapter VII to impose a complete embargo on arms "for the purposes of establishing peace and stability in Yugoslavia".[139] Thus, while the Council adopted the principle of peaceful settlement of disputes as a policy objective, it sought to ensure "peace and stability" in Yugoslavia through enforcement measures. This required the Council to reject the recourse to civil conflict as an option for the parties. Nonetheless, these early resolutions are quite different to the way the Council later dealt with Kosovo. The focus here was on enforcing and abiding by the peace agreements and the principles put forward by the European Commission. The formulation rejecting recourse to force was tentative and seemed more policy driven than a binding principle. Moreover, the Council emphasised that the peacekeepers would not be sent until violence stopped,[140] implying a traditional view of their role in conflicts.

The EC continued to take the lead in those conflicts and reinforce the importance of peaceful settlement of these disputes and rejection of recourse to force. In December 1991, a Declaration on Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union was adopted. It decided that the EC would "recognise, subject to normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed *themselves in good faith to a peaceful process and to negotiations.*"[141] The criteria set out included a "Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes."[142] Serbia objected to these principles, asserting that they encouraged secession and civil strife.[143] Nonetheless, the declaration on the Formation of the Federal Republic of Yugoslavia, which set up the Federal Republic of Yugoslavia (FRY), provided that the FRY would not use force to settle questions related to the dissolution of Yugoslavia.[144]

The Council did become more determined in its calls for the rejection of recourse to force as time passed, although generally in parallel with calls on parties to enforce peace agreements or the

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[138] SC Res 713 (1991) para 5.
[139] SC Res 713 (1991) para 6.
[140] SC Res 721 (1991).
[141] Council of Ministers of the European Community: Declaration on Guidelines on the Recognition of New states in Eastern Europe and the Soviet Union, (16 December 1991). As extracted in the ICG report ICG *Current Legal Status of the Federal Republic of Yugoslavia and of Serbia and Montenegro, ICG Balkans Report N° 101.* Italics added.
[142] European Community Declaration on Yugoslavia, (16 December 1991). Emphasis added. The European Community then announced recognition of Slovenia and Croatia on 15 January 1992. On 6 April 1992 the European Community recognised Bosnia as an independent State. The European Community, however, denied recognition to Macedonia. European Community Declaration on Yugoslavia, Luxembourg, (6 April 1992). The United States then recognised Slovenia, Croatia and Bosnia as independent states on 7 April 1992.
[143] ICG *Current Legal Status of the Federal Republic of Yugoslavia and of Serbia and Montenegro, ICG Balkans Report N° 101.*
[144] Declaration on the Formation of the Federal Republic of Yugoslavia (27 April 1992).

principles that were decided at the Yugoslav conference.[145] It also called on parties and others "not to resort to violence".[146] Resolution 752 (1992) and the follow-on resolution 757 (1992) are particularly striking. In the first resolution the Council demanded that[147]

> all parties and others concerned in Bosnia and Herzegovina stop the fighting immediately, respect immediately and fully the cease-fire signed on 12 April 1992 and cooperate with the efforts of the European Community to bring about urgently a negotiated political solution respecting the principle that any change of borders by forces is not acceptable

In resolution 752 (1992), it explicitly warned that it would consider further steps to achieve a peaceful solution of the conflict in conformity with its relevant resolutions.[148]

Then in resolution 757 (1992) the Council sought to enforce these demands, highlighting that its demands in 752 had not been complied with, and "affirming its determination to take measures against any party or parties which fail to fulfil the requirements of resolution 752 (1992) and its other relevant resolutions". It specified that it was "Determined in this context to adopt certain measures with the sole objective of achieving a peaceful solution and encouraging the efforts undertaken by the European Community and its member States", it went on to apply various Chapter VII sanctions, including a trade embargo on the FRY. By resolution 770 (1992), the Council was making demands under Chapter VII that "all parties and others concerned in Bosnia and Herzegovina stop the fighting immediately".

Resolution 847 (1993) spoke of "the overwhelming importance" of seeking "comprehensive political solutions to the conflicts". It also "strongly" condemned continuing military attacks within the territory of the Republics of Croatia and of Bosnia Herzegovina.

Thus, between the beginning of the violence in that region, in 1991, and the US mediated General Framework for Peace in Bosnia and Herzegovina (The Dayton Peace Accord) on 21 November 1995, the Council repeatedly upheld the principle of peaceful resolution of the conflicts and called on all parties "not to resort to violence".[149] This practice did at times rely on individual peace agreements rather than adopting a generic principle. In any event, the fact that these principles were adopted explicitly and sought to be enforced under Chapter VII suggests that they were considered important

[145] SC Res 740 (1992) para 7: "Calls upon the Yugoslav parties to cooperate fully with the Conference on Yugoslavia in its aim of reaching a political settlement consistent with the principles of the Conference on Security and Cooperation in Europe".
[146] SC Res 749 (1992) para 5.
[147] SC Res 752 (1992) para 1.
[148] SC Res 752 (1992) para 14.
[149] The former Yugoslavia, SC Res 749 (1992), para 5.

and binding on the parties. After the Dayton Peace Accord the Council was even more determined in its resolutions to reject any "attempt to resolve the conflict [...] by military means".[150]

Moreover, in Croatia,[151] the Council called "upon the Government of the Republic of Croatia and the local Serb authorities to refrain from the threat or use of force and to reaffirm their commitment to a peaceful resolution of their differences"[152] and backed up these demands by a statement under Chapter VII that parties were to comply or face coercive enforcement.[153]

In summary therefore, in this early 1990s practice the Council relied on the existence of peace agreements and European Community decisions and declarations as justifications on which to base its calls for the rejection of recourse to force and demand for peaceful resolution of the disputes. However, there is a sense of increasing determination to the practice of the Council, which demanded that the parties respect its resolutions or face coercive action.

Kosovo

The response to Kosovo is particularly instructive, and should be considered separately to the remainder of the Balkan practice as it did not actually result from the initial process of disintegration of the former Yugoslavia.[154] In Kosovo, the Council involvement dates from 1998. In 1992, Kosovo's Albanian majority had voted to secede from Serbia and Yugoslavia, and indicated a desire to merge with Albania, but were repressed. In 1997, the Kosovo Liberation Army (KLA), then a small militant group, began killing Serb policemen and others who collaborated with the Serbs. In February 1998, Milosevic sent troops into the areas controlled by the KLA. The killing provoked riots in Pristina, the Kosovar capital. It turned the conflict into a guerrilla war and set off ethnic cleansing by the Serbs.

In March the Council passed resolution 1160 (1998) which called on the FRY under Chapter VII to "take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue" [155] It also called, under Chapter VII, on "the Kosovar Albanian leadership to condemn all terrorist action, and emphasizes that all elements in the Kosovar Albanian community should pursue their goals by peaceful means only" [156] It is clear from its formulation that the Council decision was

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[150] Bosnia and Herzegovina, SC Res 1004 (1995) preamble.

[151] Croatia was the first of the republics to break away from the former Yugoslavia. After its declaration of independence in 1991, Croatia was admitted to the United Nations in 1992, but armed conflict within Croatia continued. Any characterisation of the conflict as strictly civil or international during this period may seem arbitrary given the complexity of the conflict. The continued conflict after independence could be considered partly international, given that local Serb forces were assisted by outside forces from Serbia, but on the other hand the fighting involved the very issue of independence, and was certainly in essence civil.

[152] SC Res 981 (1995) para 8.

[153] See SC Res 994 (1995) para 10, SC Res 994 (1995). "Demands that the parties refrain from taking any further military measures or actions that could lead to the escalation of the situation and warns that in the event of failure to comply with this demand it will consider further steps needed to ensure such compliance."

[154] The conflict in Kosovo took the form of a conflict of secession from the Federal Republic of Yugoslavia, fought between the Kosovo Liberation Army (KLA) rebel forces and FRY Serb troops. There are many excellent and detailed accounts of this conflict. See International Crisis Group *'Kosovo: Lets Learn from Bosnia: Models and Methods of International Administration' ICG Balkans Report* (1999), O'Neill *Kosovo: An Unfinished Peace* (Lynne Rienner, Boulder Colorado, 2002).

[155] SC Res 1160 (1998) para 1.

[156] SC Res 1160 (1998) para 2.

intended to be binding on the parties. This is reinforced by the fact that it was passed under Chapter VII. The resolution appeared to extend the obligation to settle conflicts by peaceful means to the civil conflict situation in Kosovo.

The Council resolution followed and welcomed the OSCE decision. The OSCE had found that the crisis in Kosovo "was not solely an internal affair of the Federal Republic of Yugoslavia because of violations of the principles and commitments of the [OSCE] on human rights and because it has significant impact on the security of the region" [157] That decision had rejected any terrorist action and had called on "all concerned actively to oppose the use of violence to achieve political aims".[158] In any event, it is not evident where the OSCE principles were derived from, as the Helsinki Final Act of 1975 setting out the OSCE principles provides for the peaceful resolution of *international* conflicts, but not internal conflicts, and adopts the usual principle of non-intervention in internal affairs.[159]

In resolution 1199 (1998) in September, the Council again condemned "all acts of violence by any party". It also emphasised the humanitarian crisis that was being caused by this recourse to force. The resolution stated:

> Acting under Chapter VII of the Charter of the United Nations,
>
> 1. Demands that all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo, Federal Republic of Yugoslavia, which would enhance the prospects for a meaningful dialogue between the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership and reduce the risks of a humanitarian catastrophe;

The Council called on the President of the FRY to implement his commitment of 16 June to resolve the problems by political means, and also insisted that the KLA "should pursue their goals by peaceful means only". The Council went on to impose an arms embargo "for the purposes of fostering peace and stability in Kosovo" [160] In the later resolution of 1203 (1998), after the cease-fire agreement, it demanded compliance by both the KLA and the FRY with SC Res 1160 and 1199, under Chapter VII.[161]

In summary, therefore, the principles that the Council sought to enforce in Kosovo did not derive from a peace agreement or a regional agreement, although they were in line with the view of the OSCE member states. While there was a strong underlying concern about the humanitarian impact of the conflict, particularly suggestions of ethnic cleansing, these were not explicitly relied on to justify

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[157] Decision 218 on the situation in Kosovo, Adopted at the special session of the Permanent Council of the Organisation for Security and Cooperation in Europe, on 11 March 1998. S/ 1998/246

[158] Decision 218 on the situation in Kosovo, Adopted at the special session of the Permanent Council of the Organisation for Security and Cooperation in Europe, on 11 March 1998. S/ 1998/246

[159] 1975 Conference on Security and Co-Operation in Europe, Final Act (Helsinki Accord).

[160] SC Res 1160 (1998) para 8.

[161] SC Res 1203 (1998) para 3 and 4.

or shape the calls for a political and peaceful resolution. The Council simply condemned the violence in that conflict and demanded an end to recourse to force for political aims.

Former Yugoslav Republic of Macedonia

By the time the Council considered the recourse to force in the Former Yugoslav Republic of Macedonia in 2001, on the heels of the Kosovo crisis, a more determined support for a principle rejecting recourse to force in civil conflicts can be seen. The Council intervened before any peace agreement was negotiated, [162] calling on

> all political leaders in the former Yugoslav Republic of Macedonia and Kosovo, Federal Republic of Yugoslavia, who are in a position to do so to isolate the forces behind the violent incidents and to shoulder their responsibility for peace and stability in the region." [163]

It also highlighted that the Government of the Macedonia was entitled to address the recourse to force against it, but it should do so with "an appropriate level of restraint and to preserve the political stability of the country".[164] In resolution 1345 (2001) of 21 March 2001, the Council again emphasized that the government should "end the violence in a manner consistent with the rule of law"

Before the peace agreement, the Council condemned recourse to force by armed ethnic extremists and the killing of soldiers.[165] The Council explicitly demanded that those that were engaged in armed action against the State must "immediately cease all such actions, lay down their weapons and return to their homes".[166] Even following the peace agreement, which was entered into on 13 August 2001,[167] the Council refers to the Framework Agreement, but does not rely on it as the source of its authority to condemn the recourse to force.[168]

In SC 1371 (2001) the formulation chosen is particularly strong and explicitly rejects recourse to force for political aims:

> [The Council] rejects the use of violence in pursuit of political aims and stresses that only peaceful political solutions can assure a stable and democratic future for the Former Yugoslav Republic of Macedonia.[169]

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[162] 7 March 2001.
[163] S/PRST/2001/7.
[164] S/PRST/2001/7.
[165] Statement of the President S/PRST/2001/7 (2001), also 1345 (2001) para 1.
[166] SC Res 1345 (2001) para 8.
[167] The agreement was negotiated by the EC and US and provided for various constitutional amendments and minority protections as well as a NATO arms collections force. Signing of the political agreement was the main precondition set by NATO, which undertook to send 3,500 troops to Macedonia to collect the weapons of the ethnic Albanian rebels.
[168] See SC Res 1371 (2001).
[169] SC Res 1371 (2001) para 3.

Other Practice

The practice of the Council directly condemning the recourse to force is striking it its breadth. In some conflicts the Council has condemned all recourse to force by all sides (Albania, Croatia, Cyprus, DRC, East Timor, Georgia, Kosovo, Somalia) and called on all parties to renounce force (Afghanistan, Albania, Bosnia Herzegovina, Burundi, Cambodia, Congo (Brazzaville), Croatia, DRC, East Timor, Former Yugoslavia, Georgia, Haiti, Kosovo, Lebanon, Liberia, Rwanda, Somalia). Some resolutions have mainly focused on the rebel groups or elements of the government. For instance, the RUF, UNITA, Albanian Extremists, and Serbian police have been singled out and condemned for their recourse to force.

It is implicit in all these condemnations that what is being condemned is recourse to force for political aims. The Council has expressed this explicitly in some conflicts (Burundi, Cambodia, Côte d'Ivoire, CAR, Former Yugoslav Republic of Macedonia, Haiti and Lebanon). In Haiti,[170] for instance, it called "upon all factions in Haiti explicitly and publicly to renounce, and to direct their supporters to renounce, violence as a means of political expression".[171] Similarly, in Cambodia,[172] it demanded that all parties "put an end to all acts of violence and to all threats and intimidation committed on political or ethnic grounds" [173] Generally, however, it has rejected the political dimensions of the recourse to force implicitly, rejecting the force generically but in the context of civil conflicts which inherently represent a struggle over political power.[174]

2.1.2 Analysis

Does this practice represent an *ad hoc* response to particular circumstances or does it support the emergence of a principle rejecting recourse to force in civil conflict? This must be determined in light of the general trends in the practice, taking into account whether the principles are formulated as binding or recommendatory, and the impact of any contrary practice.

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[170] In 1990 decades of dictatorship ended in Haiti with the election of a democratic president. However, President Aristides was overthrown in a military coup in 1991 followed by a wave of violence and instability in the country. The Security Council intervened in 1993, but a new constitutional crisis arose in 2004.

[171] SC Res 867 (1993) para 8.

[172] The Khmer Rouge civil war in Cambodia began in the early 1970s and caused horrific casualties with over one million deaths. The Security Council only intervened in 1993 after the parties agreed to UN-sponsored elections.

[173] SC Res 810 (1993).

[174] In Angola, the Council demanded that UNITA stop armed attacks, [SC Res 834 (1993) para 4] whereas, in Sierra Leone it demanded that the RUF "lay down their arms immediately" [SC Res 1181 (1998) para 1, see also SC Res 1171 (1998)] and disband [SC Res 1260 (1999) para 8, SC Res 1270 (1999)] and in Kosovo it demanded that parties "end immediately all offensive actions" [SC Res 1244 (1999) para 15]. It has also repeatedly called on parties to cease hostilities: In Congo (Brazzaville), this call related to the civil war which began in 1997 when the military uprising led by former military ruler Dennis Sassou Nguesso, assisted by Angolan troops, overthrew the democratically elected government [S/PRST/1997/47]. Cyprus, [SC Res 360 (1974) para 1]. Liberia [SC Res 911 (1994) para 5]. Angola, [SC Res 804 (1993), SC Res 811 (1993)]. In Rwanda, it repeatedly demanded "an immediate cessation of hostilities". [SC Res 912 (1994), SC Res 918 (1994), SC Res 925 (1994)]. In Somalia the parties were "strongly urged" to cease hostilities immediately [SC Res 733 (1992), SC Res 767 (1992), SC Res 751 (1992) para 9, SC Res 767 (1992) para 1, SC Res 886 (1993) para 6]. In the DRC parties were generally called upon to "cease hostilities" [in SC Res 1279 (1999) para 1], and the Security Council demanded, pursuant to Chapter VII, that the parties to the conflict in Ituri and Bunia "cease hostilities immediately" [SC Res 1484 (2003)]. In Kosovo, these demands were made pursuant to Chapter VII [SC Res 1199 (1998) para 1].

An emerging principle?

Two different factors must be weighed in determining whether the Council practice establishes a principle rejecting recourse to force in civil conflict. On the one hand it does not seem from the formulation adopted in the resolutions that the Council intended to enunciate a generic principle rejecting recourse to recourse to force in civil conflict; the practice focuses entirely on the particular conflict addressed. On the other hand, the Council has rejected the recourse to force in most of the civil conflicts it has addressed.

The previous section identified a progression in the approach of the Council through the early Balkan practice to the Kosovo and Macedonia practice where a principle rejecting recourse to force for political means is put forward more strongly by the Council without looking for other justifications for its practice (such as peace agreements). A detailed investigation of the practice of the international community, including the Council, in the three recent conflicts in Sierra Leone, Côte d'Ivoire and Liberia, reviewed in the next chapter, also supports this perspective.

The range and variety of those conflicts, and the different circumstances in which the Council has become involved suggests that even if the Council is not seeking to formulate a binding principle outside of any individual case, it is effectively applying a general principle rejecting civil conflicts, and requiring them to be resolved by peaceful means only.

Binding or Recommendatory?

In order properly to consider the significance of the statements rejecting recourse to force in civil conflict, it is essential to determine whether they are intended to be binding or merely recommendatory. As discussed above, it is accepted for the purposes of this thesis that while a Chapter VII resolution is clearly binding, a non Chapter VII resolution aimed at the parties to a dispute may also be binding if it is formulated in a binding fashion. Under this approach, the issue turns on whether the Council intended the resolution to be binding, taking into account the language used and relevant surrounding circumstances.

The language and formulation of many of the resolutions suggest that these are to be complied with strictly even when not passed under Chapter VII. A number of factors support this perspective. The Council has passed many resolutions either making demands of parties or calling on them to cease (or undertake) certain other behaviour, without relying on Chapter VII.[175] The use of "calls on" and

[175] The practice in Kosovo is a typical example. The Security Council passed SC Res 1004 (1995) specifying a list of demands under Chapter VII of the Charter, including that Serb forces cease their offensive, that the parties respect the safe area of Srebrenica, and that they release unharmed all UNPROFOR personnel. This resolution did not go on to impose any enforcement measures under Chapter VII and only used the terminology of "Demands", stressing once again the binding nature of the resolution. The demands were reiterated without reference to Chapter VII, however, in SC Res 1034 (1995). The Security Council went on to make further demands under Chapter VII in SC Res 1203 (1998) and SC Res 1244 (1999).

"demands" appears to imply a binding obligation[176] and can be contrasted with terms such as "urges" or "appeals to" and to "encourage" which do not.[177] Moreover, much of this practice is formulated in a direct and mandatory fashion.[178] Accordingly, the statements are more than merely recommendatory and must be taken to indicate principles that the Council wishes to impose on the parties.

The practice of the Council in Afghanistan[179] and in the former Yugoslavia reinforces this view. The formulation most frequently used is of the form: the Council "calls upon all parties immediately to cease all armed hostilities"[180] or "Demands that all parties fulfil their obligations and commitments" [181] In Afghanistan these demands, which were not passed under Chapter VII, were followed by a Chapter VII decision insisting that the parties "comply promptly with its previous resolutions".[182] The explicit reference to Chapter VII leaves in no doubt that the Council intended those aspects of its resolution to be binding. The fact that the Council explicitly stated that it expected the parties to comply with its previous resolutions, which had not been passed under Chapter VII, strongly suggests that it considered its previous demands to be binding as well.[183]

The practice in the former Yugoslavia also emphasises that the Council intends its resolutions to be complied with by the parties. In Resolution 771 (1992), it first listed a series of demands in the standard formulation,[184] it also reaffirmed that the parties were bound to comply with international humanitarian law,[185] and strongly condemned any violation of such law.[186] Explicitly, it decided that, acting under Chapter VII:[187]

> all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, shall comply with the provisions of the present resolution, failing which the Council will need to take further measures under the Charter.

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[176] The Security Council has used the terminology of "demands" and "calls on" following an explicit Chapter VII determination, suggesting that such words can convey binding requests. SC Res 1267 (1999) para 2, SC Res 1160 (1998) para 1 and 2, SC Res 1199 (1998), SC Res 871 (1993). Note that Article 41 of the Charter provides that the Security Council may "decide" what measures are to be applied and may "call upon" the members of the UN to apply them. NB: Therefore the terminology of "call upon" is recognised within the Charter as having a compulsory meaning.

[177] Eg SC Res 713 (1991).

[178] The use of the imperative "to cease all armed hostilities" can be contrasted with resolutions calling upon parties to "reconsider" for instance SC Res 855 (1993).

[179] The conflict in Afghanistan became a predominantly civil conflict between the Taliban and the government, after the defeat in 1989 of the invading Russian forces. The Security Council became involved in 1996 when the Taliban took Kabul and declared itself the government of Afghanistan. Following the bombing of the American Embassy in Kenya in 1999, however, and the suspected link between bin Laden and the Taliban, the attention of the Security Council has shifted from matters of civil conflict to those of terrorism. It is the civil conflict practice that is relevant to the discussion here.

[180] See for eg SC Res 1076 (1996) para 1.

[181] See for eg SC Res 1076 (1996) para 10, see also SC Res 1193 (1998), SC Res 1214 (1998).

[182] SC Res 1267 (1999) para 1.

[183] See also SC Res 1333 (2000) also under Chapter VII demanding that it comply with SC Res 1267 (1999).

[184] Para 3. "Demands that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law."
Para 4. "Further demands that relevant international humanitarian organisations, and in particular the International Committee of the Red Cross, be granted immediate, unimpeded and continued access to camps, prisons and detention centres."

[185] Para 1.

[186] Para 2.

[187] In SC Res 50 (1948) dealing with Israel a similar pattern can be seen, with a series of demands and calls being made on parties followed by explicit statement that if this "present resolution is rejected by either party or by both, or if, having been accepted, it is subsequently repudiated or violated", Chapter VII action would be considered.

The demands made directly pursuant to Chapter VII are unambiguously binding. However, it is difficult to discern a clear pattern or rationale as to when Chapter VII is relied upon. In some cases the Council has relied upon Chapter VII, and in others addressing similar circumstances and seemingly intending its resolutions to be binding, it has not.[188] Nonetheless, it is useful to highlight the principles that the Council has sought to emphasise through its reliance on Chapter VII. One example is the importance of a peaceful resolution of the dispute: the Council demanded under Chapter VII that the FRY "implement immediately the following concrete measures towards achieving a political solution to the situation".[189] In addition, a further statement was made, also under Chapter VII: that all parties are to pursue their goals by peaceful means only.[190]

Demands that parties renounce the recourse to force have also been passed under Chapter VII: The Council demanded that the FRY "put an immediate and verifiable end to violence and repression in Kosovo",[191] and reaffirmed "its demand that all parties and others concerned in Bosnia and Herzegovina stop the fighting immediately",[192] and that "any taking of territory by force cease immediately" [193] Similarly, following the military coup in Sierra Leone it explicitly demanded, under Chapter VII, the reinstatement of the democratically elected government.[194]

Overall, it can be seen that a large proportion of the resolutions are formulated as binding on the parties to the conflict, both through mandatory formulation and pursuant to Chapter VII.

Counter-Indications

There is some practice which contradicts the emergence of the principle discussed above. However, evaluating its impact is difficult. Any contrary practice would put into question the emergence of particular principles. However, explicit statements must be distinguished from failures to act. The

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[188] See Croatia: SC Res 802 (1993) no mention of Chapter VII, whereas in SC Res 807 (1993) demands made under Chapter VII, SC Res 871 (1993) relied on Chapter VII as did SC Res 1009 (1995), but neither SC Res 981 (1995) nor SC Res 994 (1995) did. Bosnia: SC Res 757 (1992) the condemnation of the FRY was expressed to be pursuant to Chapter VII, went on to impose trade sanctions. In SC Res 752 (1992) and SC Res 764 (1992) the demands to stop fighting were not related to Chapter VII. In SC Res 770 (1992), however, the same demands were made pursuant to Chapter VII. Similarly, in SC Res 787 (1992), SC Res 819 (1993), SC Res 820 (1993) relating to cessation of hostilities and the unacceptable practice of taking territory by force, no reference to Chapter VII was made, but in SC Res 824 (1993) the demand that the taking of territory by force stop was made under Chapter VII. East Timor: SC Res 1246 (1999) calling for the end of acts of violence whereas in SC Res 1272 (1999) acting under Chapter VII calling again for the end of violence and demanding that those responsible be brought to justice. Georgia: similarly, SC Res 858 (1993), SC Res 876 (1993), SC Res 881 (1993), SC Res 896 (1994), SC Res 906 (1994), SC Res 937 (1994), SC Res 1311 (2000); although SC Res 858 (1993) and SC Res 881 (1993) contain a finding that the situation amounts to a threat to international peace and security. Iraq/Kurds: SC Res 688 (1991) was not passed under Chapter VII but did refer to the demand of Iraq contributing to removing the threat to international peace and security in the region. Rwanda: SC Res 912 (1994) demanded cessation of hostilities without Chapter VII, also SC Res 918 (1994), SC Res 925 (1994). Although in SC Res 918 (1994) para 13 it has determined that the situation amounted to a threat to international peace and security and imposed an arms embargo under Chapter VII. Sierra Leone: acting under Chapter VII demanded that the junta step down, SC Res 1132 (1997), but the remaining calls and demands were not passed under Chapter VII, SC Res 1260 (1999), SC Res 1270 (1999), SC Res 1289 (2000). Somalia: SC Res 751 (1992), SC Res 767 (1992), SC Res 794 (1992) but the demands and calls in SC Res 837 (1993), SC Res 886 (1993), and SC Res 897 (1994) were formulated as acting under Chapter VII.

[189] SC Res 1199 (1998) para 4.

[190] SC Res 1199 (1998) para 6.

[191] SC Res 1244 (1999) para 3.

[192] SC Res 770 (1992) para 1.

[193] SC Res 824 (1993) para 2.

[194] SC Res 1132 (1997).

former would clearly undermine the emergence of principles whereas the latter do not necessarily do so.

There are a number of civil conflicts, or coups, which the Council has not addressed, particularly: Algeria, Burma, Chechnya, Colombia, Fiji, The Gambia, Ireland, Spain, Sri Lanka, and Sudan. These could suggest that the Council is precluded from intervening because of the domestic nature of the conflict,[195] or that no principle rejecting recourse to force for political gain is emerging, or they could reflect the realities of geopolitics in all international behaviour without undermining the existence of such a principle.

In 1936, the Security Council of the League considered that it was not entitled to intervene in the civil war in Spain because it was a domestic matter. The debate in the Security Council in 1946 assumed that Article 2(7) prohibited intervention into civil conflicts unless it constituted a threat to international peace and security. No resolution was passed, and no intervention permitted. Poland and Russia suggested that there was a threat to international peace and security, but this was rejected by the UK and the US.[196] However, that practice is out of step with the now overwhelming trend to consider such conflicts matters open to Council intervention.

Geopolitics may explain the failure to act in a number of conflicts. In Ireland,[197] despite significant violence and bloodshed and the extension of the conflict to the UK through terrorism, the Security Council has not intervened. An attempt to place the question on the Security Council agenda in 1969 was strongly rejected by the British Representative on the Security Council. The matter was not even put on the agenda, but would have undoubtedly faced a UK veto. The formal justifications given were that Article 2(7) prevented such intervention and that the conflict in Northern Ireland did not constitute a threat to international peace and security.[198] Since then the Council has clearly intervened in conflicts of similar intensity irrespective of Article 2(7). The conflict in Chechnya,[199] however, is another conflict that is described as a domestic matter by some.[200] This conflict involves many factors that have in other cases led to intervention,[201] and yet – unsurprisingly given Russia's veto power – no

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[195] See Teson "A Symposium on Re-Envisioning the Security Council: Collective Humanitarian Intervention" for a discussion of the interplay between Security Council intervention and Article 2(7). See also Higgins *The Development of International Law through the Political Organs of the United Nations* at 58-130.

[196] S/32 and S/34 SCOR, 1.1 Supp 2 at 54-55, Security Council, April 17, 1946, SCOR 1.1 N2, 167.

[197] Ireland's struggle for independence from the United Kingdom can be traced back to 1916. By 1921, 26 southern counties obtained independence from the UK, although the 6 northern counties remained part of Great Britain. This has sparked decades of civil conflict, both within Northern Ireland with violent clashes between loyalists and republicans, and in London through terrorist actions.

[198] UN doc S/9394 1969, SC Meeting 24 UN SCOR 1969.

[199] Chechnya's attempt to obtain independence from Russia in 1991 resulted in a vicious civil conflict between Russian troops and Chechen rebels. In 1996 the Khasavyurt Peace Accords were signed according to which Russia agreed to withdraw from Chechnya and discuss its independence after five years. In 1997 the Chechens chose a president and a parliament in democratic elections. In May 1997 the new president, Maskhadov, signed a peace treaty with President Yeltsin in Moscow. However, by 1999 Dagestan had become a serious destabilising force, and Chechen militants led by warlord Shamil Basayev were staging violent attacks. This led to Russian forces invading Chechnya for a second time in 1999.

[200] See comments of US and French Ministers reported in Dipaola "A Noble Sacrifice? Jus Ad Bellum and the International Community's Gamble in Chechnya" (1997) 4 Ind J Global Leg Stud 435 at 435.

[201] Particularly the overthrow of the democratically elected president and parliament in 1997 and the repeated breaching of the Peace Accords.

action has been taken. The conflicts in Algeria[202] and Tibet also involve veto powers, and have not been subject to Security Council action. Similarly, Cold War politics may explain the failure to act in a number of other conflicts, particularly in Africa and Latin America.[203]

Nonetheless, a small number of conflicts have not attracted Council attention seemingly in contradiction to the recent practice. Cambodia for instance seems out of step with more recent trends. The civilian massacre in that case did not elicit Security Council intervention for almost twenty years.[204] The Security Council only passed a first resolution dealing with Cambodia in 1991 in the run-up to United Nations sponsored elections. Ironically, this resolution stated that the Security Council was "Convinced of the need to find an early, just and lasting peaceful solution of the Cambodia conflict".[205] Algeria, Sri Lanka[206] and Colombia are the current major ongoing conflicts not on the Council agenda.[207]

In addition, in some instances the Council has suggested that regulation of force is a matter for the government[208] (or sometimes the parties)[209] rather than the international community. It has also made general and seemingly formulaic statements upholding the sovereignty, independence and territorial integrity of States. These are the more important practice as the Council has recognised State sovereignty in practically all conflicts considered, sometimes repeatedly in successive resolutions in a conflict. The formulation adopted varies little and is generally of the form recognising or affirming "the sovereignty, independence, territorial integrity and national unity" of the relevant State.[210] This

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[202] The most recent conflict in Algeria is a low-grade civil conflict sparked by the success of the fundamentalist FIS (Islamic Salvation Front) party in first round ballots in December 1991, which caused the army to intervene, crack down on the FIS, and postpone the elections.

[203] See for instance, Guatemala, El Salvador, Nicaragua, Colombia and Chile. Kenney-Pipe and Jones suggest that Nigeria, Sudan and Angola were proxy wars influenced by ideology. See Kennedy-Pipe and Jones "An Introduction to Civil Wars" (1998) Civil Wars Vol 1(1), 1. For a review of the conflicts in Nigeria and Pakistan, where there was also no action other than humanitarian assistance, see Andemicael *Peaceful Settlement among African States - Roles of the United Nations and the Organisation of African Unity* (UNITAR Study, 1972) at Pt D para 3.

[204] This is striking given the extreme violence towards civilians in this conflict, which began in the early 1970's and is believed to have caused over 1 million deaths from executions and starvation.

[205] SC Res 668 (1991) preamble.

[206] Sri Lanka is another such example, internal disruption begun in 1976 with the emergence of separatist tensions and the formation of Liberation Tigers of Tamil Eelam rebel group. The 1985 Peace Agreement, which provided for an Indian peacekeeping force, failed. Violence between the Sri Lankan army and separatists continued, and despite substantial international involvement by individual States (Norway had taken forward the latest peace agreement initiative) and pressure to bring the matter to the UN, (The European parliament adopted a resolution on 19 May 2000 urging the Sri Lanka issue to be taken up at the UN.) it has not been the subject of any Security Council resolutions.

[207] At the time of writing Sudan seemed to be finally receiving attention. Sudan has been torn by a series of vicious civil wars since at least 1962, aggravated by the discovery of oil in 1978. The latest conflict broke out in 1983 as the government in the North imposed Shari'ah law, and has continued unabated through serious famine. There have been international attempts to find a peaceful solution, and many broken peace accords. Moreover, individual States, including the United States, have imposed sanctions against Sudan. However, although the Security Council has passed a series of resolutions dealing with the harbouring of terrorists, it had not addressed the civil conflict until 2004. [See SC Res 1044 (1996), SC Res 1054 (1996), SC Res 1070 (1996) and addressing the conflict SC Res 1556 (2004), SC Res 1564 (2004).]

[208] Cyprus for instance is an example which took place before the principles discussed: the Council did not condemn the violence outright but called on the government to take responsibility to stop it. It emphasised that the government of Cyprus had the "responsibility for the maintenance and restoration of law and order". SC Res 186 (1964) is the very first of an ongoing series of resolutions with similar formulations on the war in Cyprus.

[209] In Afghanistan, however, it suggested that "the main responsibility for finding a political solution to the conflict lies with the Afghan parties" [SC Res 1076 (1996) para 2]. Similar statements were made in Armenia, where the Security Council stressed that "the parties to the conflict themselves bear the main responsibility for reaching a peaceful settlement" [SC Res 1236 (1999) para 5].

[210] Eg SC Res 1214 (1998).

would seem to support the view that these are matters for the State. However, these are frequently contradicted either by direct actions of the Security Council or other statements within the resolution.

This can be illustrated by the conflicts in Afghanistan and East Timor,[211] where the Security Council has particularly emphasised the sovereignty and internal aspect of the conflict. In Afghanistan, the Security Council made repeated statements "Stressing the importance of non-interference in the internal affairs of Afghanistan" and "Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan".[212] However, rather than leaving the matter of the civil conflict for the State to resolve, the Security Council strongly condemned the use of force in those conflicts and repeatedly demanded that the parties stop fighting, cease armed hostilities and renounce the use of force.[213] It also imposed a non Chapter VII arms embargo.[214]

In East Timor, the practice is similarly conflicting. The tone appears deferential to Indonesia. The Security Council began by stressing that it was Indonesia's responsibility to maintain peace and security in East Timor, "in order to ensure that the consultation is carried out in a fair and peaceful way and in an atmosphere free of intimidation, violence or interference".[215] However, this could be read either as deference to the State's authority, or a veiled warning not to encourage recourse to force. Given that the Security Council went on to insist that the government "take immediate additional steps, in fulfilment of its responsibilities, to disarm and disband the militia",[216] it seems that it did anticipate that the standard of conduct was to be set by the international community and not the individual State. Despite this, the Security Council only authorised intervening forces once the consent of Indonesia was secured,[217] although these were in fact authorised on the basis of a finding of a threat to international peace and security.[218]

Overall, however, this represents a comparatively small number of conflicts in which the Council has not intervened given the range and depth of the practice reviewed earlier in this chapter. Other than where geopolitics prevents intervention, it seems unlikely in the light of current practice that the Council would not intervene in a civil conflict to demand the end to violence. Moreover, the Council has clearly not recognized civil conflict as a legitimate option. Even the resolutions supporting sovereignty, which could be considered directly in contradiction to a new principle, are undermined

[211] Indonesia had annexed East Timor by force in 1975, however, the resulting conflict within East Timor seems to have been treated as civil. Following the consultation of the East Timorese people, which favoured independence, pro-integration militias, and possibly the Indonesian security forces, launched a campaign of violence.
[212] SC Res 1076 (1996) preamble, SC Res 1214 (1998), SC Res 1267 (1999).
[213] SC Res 1076 (1996), SC Res 1214 (1998), SC Res 1267 (1999).
[214] SC Res 1076 (1996).
[215] SC Res 1236 (1999) para 5, see also SC Res 1272 (1999) stressing the responsibility of Indonesia to ensure safe return of refugees.
[216] SC Res 1319 (2000) para 1.
[217] SC Res 1236 (1999) paras 1-3, SC Res 1264 (1999) para 3.
[218] SC Res 1264 (1999).

by other statements within the same resolutions, or the practice of the Council in response to those conflicts.[219]

2.1.3 Conclusion

The majority of the practice reviewed indicates that the Council has condemned recourse to force in practically all of the civil conflicts it has intervened in, particularly since the 1990s, and its formulation indicates that it intends its demands to renounce such force to be binding on the parties involved.

The Council has not up to now formulated a universal principle, however, and the analysis in favour of the emergence of such a principle relies on accumulating practice of condemnation and demands that such conduct stop. The fact that the Council has condemned the recourse to force and called for the end of such conduct, irrespective of the type of conflict or what led to it, suggests that a general principle may emerge by force of repetition and precedent. Further discussion of the impact of this practice on the emergence of norms of *jus ad bellum internum* is undertaken in chapter 4 following a theoretical investigation of the role of Council practice in international law formation in chapter 3.

2.2 REJECTING THE FORCEFUL OVERTHROW OF DEMOCRACY

One distinct sub-set of the practice consists of the Council's reaction to the forceful overthrow of democratic governments. This practice shows a high level of consistency in the Council's explicit rejection of such recourse to force. The same sorts of questions discussed above arise in this context, the key issue being whether a trend can be identified that evidences that the Council is applying a principle rejecting recourse to force to overthrow a democracy. Such a principle would be more limited than a rejection of force for political gain in all civil conflicts.

The Council has supported democratic governments threatened by force, although this has not always led to immediate or forceful action.[220] After the coup in Haiti, which overturned the newly elected President Aristide in 1991, the Council intervened following the failure of various diplomatic efforts to reinstate the government. In 1993 it reaffirmed that the international community was committed to resolving the crisis in Haiti and restoring democracy.[221] It underlined the importance of democratic issues[222] and deplored that the legitimate government had not been reinstated.[223] In response to mounting US pressure to act, it imposed an embargo aimed at resolving the crisis via a "comprehensive and peaceful settlement" and bringing about the reinstatement of the legitimate

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[219] The impact of sovereignty on the emergence of *jus ad bellum internum* norms is considered in more detail in chapter 4 below.
[220] Note that these conflicts and the practice of the international community, including regional actors and states are considered in more depth in Chapter 2.
[221] SC Res 862 (1993).
[222] SC Res 1048 (1996).
[223] SC Res 841 (1993).

government.[224] It also sent a multilateral force authorised under Chapter VII to ensure the departure of the military leadership and "the prompt return of the legitimately elected President.[225]

By 1997, when President Kabbah was overthrown in a coup in Sierra Leone a few months after winning elections that had been supervised by the United Nations, the Council explicitly rejected the coup. The previous military coups in Sierra Leone, which had toppled other military regimes, and years of civil war, had not attracted Council intervention. In 1997, however, it condemned the military coup outright,[226] deplored the fact that the junta had not allowed the restoration of the democratically elected government,[227] and acting under Chapter VII, demanded "the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically-elected Government".[228]

The Council explicitly imposed enforcement measures to bring about the restoration of the overthrown government. It imposed an arms and petrol embargo when the government was overthrown.[229] The resolutions had demanded under, Chapter VII, that the military junta relinquish power and restore the democratically elected government.[230] The embargo was later modified so that it only applied to non-governmental forces in Sierra Leone,[231] and a travel embargo on the members of the rebel group was passed.[232] The Council also imposed an import ban on diamonds not certified by the government.[233] The Council welcomed ECOMOG's forceful actions.[234] Ultimately, the Council did authorise a peacekeeping force under Chapter VII, and given its repeated calls on the rebels to step down, disarm and demobilise, it would appear that this force was sent to assist the democratic government maintain control and prevent a new uprising of the rebel forces.[235]

The practice of the Council in other conflicts is not entirely consistent, but does suggest the emergence of a trend evidencing stronger and more explicit rejection of recourse to force against democratic governments towards the mid 1990s.

The Council did not intervene in Burma in 1990 when the ruling military junta refused to hand over power after multi-party elections led to the main opposition party winning a decisive victory. Nor did it intervene in The Gambia, where the coup in 1981 followed weeks of violence, with a second coup

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[224] SC Res 841 (1993).
[225] SC Res 940 (1994) para 4.
[226] SC Res 1132 (1997).
[227] SC Res 1132 (1997).
[228] SC Res 1132 (1997) para 1.
[229] SC Res 1132 (1979) para 5 and 6.
[230] SC Res 1132 (1997).
[231] SC Res 1171 (1998) para 2.
[232] SC Res 1171 (1998) para 5.
[233] SC Res 1306 (2000).
[234] SC Res 1181 (1998) para 6.
[235] SC Res 1270 (1999) para 8, and further authorised the use force to protect civilians under SC Res 1270 (1999) para 14, SC Res 1289 (2000) para 10.

also taking place in 1994. In Chad,[236] other than a statement in 1982 "taking note" of the decision of the OAU to establish a peacekeeping force to maintain peace and security in Chad,[237] the Security Council has not intervened in or commented on the civil aspect of this conflict, even after the start of the rebellion against the democratic government in 1998.

However, since 1996 there have been a number of instances of Council practice responding to coups against democratic governments. In Burundi, in 1996 the Council did strongly condemn the "overthrow of the legitimate government and constitutional order",[238] although it did not take forceful action. In Congo (Brazzaville) in 1997, the Council expressed concern at the fighting and called on the parties to halt the violence.[239] In Guinea Bissau, it expressed its grave concern at the attempted coup in 1998,[240] and in 1999 after the successful coup, it welcomed the deployment of ECOMOG troops.[241] In the CAR, despite little involvement in the 1996 coup, the Council was explicit in its condemnation when rebel forces within the military again attempted an unsuccessful coup in 2001.[242] Similarly in Côte d'Ivoire, the first coup in 1999 elicited little attention, but the attempt in 2002 was condemned in clear terms.[243] In contrast, in Fiji the Council did not intervene in response to the military coup in May 2000 following democratic elections in 1999.

Nonetheless, in light of the compelling statements and action in Haiti and Sierra Leone, which were formulated in a binding fashion and sought to be enforced, it is arguable that a principle is emerging in the Council practice rejecting recourse to force to overthrow a democratic regime. This question is investigated in more depth in the next chapter in light of a broad trend in the practice of States and regional organizations rejecting such force.

2.3 DEMANDING PEACEFUL SETTLEMENT

Civil conflicts clearly fall outside the obligation to settle by peaceful means derived from chapter VI of the Charter, and yet there is extensive Council practice demanding that parties settle by peaceful means, which could emerge as a corollary to the rejection of the recourse to force for political purposes discussed above.

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[236] The Chad has been in a civil conflict practically since its independence from France in 1960. France, Libya and the OAU have at times intervened to support one or other side. Democratic elections were held in 1996 but heavy fighting restarted in 1998.
[237] SC Res 504 (1982).
[238] SC Res 1072 (1996) para 1.
[239] Statement of the President S/PRST/1997/43 (1997).
[240] SC Res 1216 (1998).
[241] SC Res 1233 (1999).
[242] Statement of the President S/PRST/2001/18 (2001).
[243] It condemned the "attempt to seize power by force of arms or to overthrow the democratically elected Government", Press Release AFR/506 SC/7558. Statement of the President 31 October 2002.

2.3.1 Overview of the Practice

The Council has explicitly supported undertakings by parties not to use force. In Angola, the Council welcomed the Angolan government's continued disposition to reach a peaceful settlement of the conflict in conformity with the peace accords.[244] The Council highlighted the CAR[245] President's commitment "to maintain peace in the Central African Republic through *dialogue and consultation*".[246] In Kosovo, it noted "the clear commitment of senior representatives of the Kosovar Albanian community to non-violence".[247] In Guinea-Bissau, the Council supported both the junta and President's undertaking "never again to resort to arms".[248] Similarly, in Georgia, it welcomed the "commitment of the parties not to use force for the resolution of any disputed questions".[249] In the Former Yugoslav Republic of Macedonia, the Council supported the efforts of the government "to end the violence in a manner consistent with the rule of law"[250] and welcomed "the efforts of the Government of Albania to promote peace in the region and isolate extremists working against peace".[251]

The Council has emphasised the importance of peaceful resolution of disputes. In Afghanistan, it emphasised the willingness of States "to facilitate the negotiations aimed at political settlement of the conflict". Moreover, it expressly stated, "the Afghan crisis can be settled only by peaceful means".[252] In the former Yugoslavia, it emphasised the "overwhelming importance of seeking, on the basis of the relevant resolutions of the Council, comprehensive political solutions to the conflicts in the territory of the former Yugoslavia".[253] It also affirmed "its commitment to a negotiated settlement of the conflict".[254] In the Former Yugoslav Republic of Macedonia, the Council underlined the "the need for all differences to be resolved by dialogue".[255] Similarly, in Croatia the Council stressed "the imperative need to find an urgent negotiated political solution".[256] Ultimately, it stated that its general policy was a commitment to "an overall negotiated settlement of the conflicts".[257] Other examples of similar practice include statements that parties must resolve their differences through political dialogue, in Kosovo, Georgia, Lebanon, Rwanda and Sierra Leone[258] or by national reconciliation, in

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[244] SC Res 864 (1993) para 4 and 5.
[245] The first of two military coups against the civilian government in the CAR took place in 1996. African countries mediated a truce resulting in the signature of the Bangui Agreements in 1997, which set up an inter-African force in the Central African Republic (MISAB). The second, which is relevant here, took place in May 2001 but was unsuccessful and sparked off ongoing disruption in the country.
[246] Statement of the President S/PRST/1999/7. Italics added.
[247] SC Res 1160 (1998) preamble.
[248] SC Res 1233 (1999).
[249] SC Res 1311 (2000).
[250] SC 1345 (2001) para 5.
[251] SC Res 1345 (2001) para 8.
[252] SC Res 1193 (1998) para 1, SC Res 1076 (1996) para 1.
[253] SC Res 847 (1993) preamble.
[254] SC Res 943 (1994) preamble, SC Res 1022 (1995) preamble, SC Res 1031 (1995).
[255] SC Res 1345 (2001) para 6.
[256] SC Res 764 (1992) preamble and para 8.
[257] SC Res 994 (1995) preamble, see also SC Res 981 (1995).
[258] Afghanistan SC Res 1076 (1996) preamble, Kosovo SC Res 1160 (1998) para 1, see also SC Res 1199 (1998) para 3 and 4, Lebanon SC Res 542 (1983) paras 3 and 4, Georgia SC Res 849 (1994), SC Res 896 (1994), SC Res 906 (1994) para 4, SC Res 937 (1994) para 2, SC Res 1311 (2000), Rwanda SC Res 1078 (1996) para 2, Sierra Leone SC Res 1162 (1998) para 3.

East Timor, Congo (Brazzaville), and the CAR.[259] It has stated that the seeking of "comprehensive political solutions" is of "overwhelming importance", in the former Yugoslavia, Croatia, Cyprus and Liberia.[260] In the DRC it has stated that it is determined to promote the peace process at the national level.[261] These statements are the equivalent of the expressions of concern in that they are not binding or coercive. Nonetheless, they do highlight the policy perspective that underlies the practice.

The Council has also adopted more explicit demands that parties adopt peaceful measures. It has directly called on parties to find a negotiated political solution to the conflict. In Kosovo, it called upon the FRY, under Chapter VII, "immediately to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue".[262] In Liberia, the Council called on the government and the rebels (under Chapter VII) "to enter without delay into bilateral ceasefire negotiations".[263] In Côte d'Ivoire, the Council called on the parties "to resolve the current crisis peacefully and to abstain from any actions or statements or demonstration that might jeopardize or otherwise hamper the search for a negotiated solution."[264] Similarly, in the DRC, the Council reaffirmed its readiness to consider active involvement "to assist in the implementation of an effective ceasefire agreement and in an agreed process for political settlement of the conflict".[265] In Afghanistan, the Council urged "all Afghan parties to resolve their differences through peaceful means and achieve national reconciliation through political dialogue".[266] It has frequently called on parties to engage in negotiations and seek a political settlement.[267]

The use of democratic elections as an alternative to violence to produce a "just and durable settlement" of a conflict has also been emphasised.[268] The Council has also called for the resolution of the conflict through a peace agreement, or a cease-fire agreement. For instance in Croatia, acting under Chapter VII, it called for an "immediate cease-fire agreement".[269] In the FRY the Council went so far as to take action to give the parties incentive to enter into a peace agreement; resolving to lift the sanctions imposed on the FRY if the latter signed the Dayton peace agreement.[270]

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[259] Central African Republic SC Res 1271 (1999), East Timor SC Res 1264 (1999) preamble, Congo (Brazzaville) Statement of the President S/PRST/1997/47.
[260] Former Yugoslavia SC Res 847 (1993) preamble, Croatia SC Res 764 (1992) preamble and para 8, Cyprus SC Res 367 (1974) para 2, Liberia SC Res 788 (1992).
[261] SC Res 1484 (2003).
[262] SC Res 1160 (1998) para 1, see also SC Res 1199 (1998) para 3 and 4.
[263] SC Res 1478 (2003) para 5.
[264] Statement of the President, press release AFR/506 SC/7558 (2002).
[265] SC Res 1234 (1999) para 15.
[266] SC Res 1076 (1996) preamble.
[267] Burundi SC Res 1049 (1996) para 3 and 4, Georgia SC Res 849 (1994), SC Res 896 (1994), SC Res 906 (1994) para 4, SC Res 937 (1994) para 2, SC Res 1311 (2000), DRC SC Res 1078 (1996) para 2, Congo (Brazzaville) S/PRST/1997/47, Sierra Leone SC Res 1162 (1998) para 3, SC Res 1171 (1998), Cote d'Ivoire, Press Release AFR/506 SC/7558, Statement of the President 31 October 2002.
[268] Cambodia SC Res 745 (1992) preamble, Congo (Brazzaville) SC Res 161 (1961), Statement of the President S/PRST/1997/47, Mozambique SC Res 957 (1994) para 3, Central African Republic SC Res 1159 (1998). In adopting the 1989 resolution on Central America, the Security Council recognised and gave support to the process of democratisation and reconciliation as the method for establishing firm and lasting peace in Central America, SC Res 637 (1989).
[269] SC Res 871 (1993).
[270] SC Res 1022 (1995) para 1.

Finally, in some instances, the Council has gone so far as to take measures seeking to enforce peaceful means of resolution. In the former Yugoslavia it imposed a complete arms embargo on all parties for the purpose of establishing peace and stability.[271] Further trade sanctions were passed to ensure that parties abide by its resolutions and achieve a peaceful solution and support the efforts of the European Community to resolve the conflict through peaceful means.[272] The preamble to the resolution provided:

> Determined in this context to adopt certain measures with the sole objective of achieving a peaceful solution and encouraging the efforts undertaken by the European Community and its member States,

Ultimately, the Council deployed a United Nations peacekeeping force to "create conditions of peace and security required for an [...] overall settlement of the Yugoslav crisis".[273]

2.3.2 Conclusion

There is a range of Council practice ranging from non coercive support for peaceful methods of resolution, to more explicit demands on parties to settle their conflict by peaceful means (and supporting elections, peace agreements and peacekeeping forces), to enforcement measures aiming to ensure the peaceful settlement of such conflicts. The emergence of a principle demanding peaceful resolution of such conflicts would be inherently linked to the notion of a rejection of recourse to force for political gain, and similarly to that principle it has at times been formulated in a binding fashion, although not universally. The cumulative impact of this practice is considered further in chapter 4.

2.4 DEMANDING THE PROTECTION OF CIVILIANS

A fourth aspect of the practice is the rejection of violence against civilians. The protection of civilians is a serious concern of the Council,[274] and the Council has strongly condemned breaches of the humanitarian laws of war[275] and of human rights.[276]

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[271] SC Res 713 (1991) para 6.

[272] SC Res 757 (1992) preamble.

[273] SC Res 743 (1992) para 5. This decision followed a finding that the situation continued to present a threat to international peace and security.

[274] Bosnia and Herzegovina SC Res 820 (1993), SC Res 836 (1993), Kosovo SC Res 1199 (1998) preamble. Haiti SC Res 917 (1994), Congo (Brazzaville) S/PRST/1997/47, Afghanistan SC Res 1076 (1996) preamble, SC Res 1193 (1998) refers to human suffering and refugees, SC Res 1076 (1996) para 6, deplores the creation of a great number of refugees and displaced persons, Burundi SC Res 1012 (1995), SC Res 1286 (2000). Armenia, call to prevent suffering of civilian population, statement of the President S/PRST/1995/21.

[275] Afghanistan SC 1193 (1998), SC Res 1214 (1998), Angola SC 811 (1993), SC Res 864 (1993), former Yugoslavia, SC Res 771 (1992), SC Res 780 (1992) SC 1034 (1995), Croatia SC Res 1009 (1995), SC Res 1019 (1995), Bosnia Herzegovina 764 (1992), SC Res 819 (1993), SC Res 820 (1993), Cambodia SC Res 880 (1993), East Timor SC Res 1272 (1999), Georgia SC Res 993 (1995), Israel SC Res 446 (1979), Liberia SC Res 788 (1992), SC Res 1001 (1995), Rwanda SC Res 812 (1993), SC Res 846 (1993), SC Res 918 (1994), Sierra Leone SC Res 1181 (1998), SC Res 1231 (1999), SC Res 1289 (2000), Somalia SC Res 733 (1992), SC Res 794 (1992).

[276] See East Timor, SC Res 1272 (1999). In Cote d'Ivoire, it called on all parties to respect human rights "in particular with respect to civilian populations": Press Release AFR/506 SC/7558. Statement of the President 31 October 2002). In Afghanistan it emphasised the importance of human rights standards, condemning the "discrimination against girls and women and other violations of human rights and international humanitarian law": SC Res 1076 (1996) para 11, see SC Res 1193 (1998) preamble, SC Res 1214 (1998) para 12. In

Early practice includes the arms embargo in South Africa which was justified in response to the "large-scale killings of unarmed and peaceful demonstrators".[277] However, the practice in the former Yugoslavia is a more typical example. The Council strongly condemned violence against civilians, both in its own right, and as a breach of the humanitarian laws of war. It condemned the reports of "mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants".[278] It also condemned "in the strongest possible terms" the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces, especially the "summary executions, rape, mass expulsions, arbitrary detentions, forced labour and large-scale disappearances".[279] It determined that the Geneva Conventions must be abided by, at a minimum, and maintained that all parties to the conflict were bound to comply with international humanitarian law.[280] Moreover, the creation of 'safe areas' in the Balkans aimed to protect civilians with force if necessary.[281]

In Rwanda[282] the peacekeeping force was sent to contribute to the security and protection of displaced persons and civilians.[283] The sanctions aimed to stop "the use of such arms and equipment in the massacres of innocent civilians".[284] In Sierra Leone, the arms and petrol embargo was imposed partly to stop the violence and loss of life.[285] Faced with the particularly brutal tactics of limb amputation of civilians, the Security Council also condemned the "atrocities perpetrated by the rebels on the civilian population", and urged the authorities to bring the perpetrators to justice.[286]

The aim of protecting civilians from violence can be seen directly through attempts to stop parties from killing civilians, and is reinforced through efforts by the Security Council to ensure that the parties abide by humanitarian law, major tenets of which are the protection of civilians, and the safeguarding of the provision of humanitarian assistance. In setting up the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Council emphasised that it aimed to bring to justice those responsible for the "widespread and flagrant violations of international humanitarian

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Croatia, it stated that full observance of human rights was essential to "the restoration of confidence between the parties and building durable peace": SC Res 994 (1995) preamble. In Kosovo, it listed as relevant the Universal Declaration of Human Rights, the international covenants and conventions on human rights, the Conventions and Protocol relating to the Status of Refugees, the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, SC Res 1239 (1999).

[277] SC Res 134 (1960) para 2 and 3, SC Res 181 (1963) para 2. The sanctions were imposed under Chapter VII in resolution SC Res 418 (1977).

[278] SC Res 771 (1992) preamble.

[279] SC Res 1034 (1995) para 2.

[280] SC Res 771 (1992) para 3.

[281] This can be seen in Bosnia and Herzegovina where the Security Council first declared certain areas as 'safe areas', and authorised UNPROFOR to protect such areas from attack, including using force in the self defence of these areas: SC Res 836 (1993) para 5, para 9.

[282] The most recent civil conflict in Rwanda between the Tutsi and Hutus began in 1990. In 1993 a power sharing agreement to end the civil war was signed and a UN mission was sent to monitor the peace agreement. In April 1994, however, the Presidents of Rwanda and Burundi were killed when their plane was shot down. The Rwandan Patriotic Front (RPF) launched a major offensive and extremist Hutu militia and parts of the army began a genocidal massacre of 800,000 Tutsis. When the massacre began, the Security Council was unable to contain the situation and largely withdrew its troops, although it did later re-intervene.

[283] SC Res 918 (1994).

[284] SC Res 1011 (1995).

[285] SC Res 1132 (1997).

[286] SC Res 1231 (1999) para 3, SC Res 1171 (1998).

law".[287] Conduct of ethnic cleansing has also been explicitly rejected.[288] In the former Yugoslavia, the Council held that "reports of mass killings" and continuance of the practice of "ethnic cleansing", amounted to a threat to international peace and security, justifying intervention under Chapter VII.

Enforcement measures have been imposed with the direct aim of halting the deaths of civilians. The sanctions in Rwanda are one such example, aiming to stop "the use of such arms and equipment in the massacres of innocent civilians".[289] Another is the peacekeeping force sent to contribute to the security and protection of displaced persons and civilians.[290] The practice in Somalia emphasised the "heavy loss of human life".[291] The Security Council specified that "the international community is involved in Somalia in order to help the people of Somalia who have suffered untold miseries due to years of civil strife in that country".[292] Moreover, in some instances interventions have been used to secure the delivery of humanitarian assistance.[293]

Overall this practice evidences a widespread, practically uniform, rejection of violence against civilians in civil conflicts. The interaction between such practice and the norms of *jus in bello* require further investigation, which is undertaken in chapter 4 below.

2.5 RELIANCE ON A BREACH OF A PEACE AGREEMENT

The Council has repeatedly rejected and condemned breaches of peace or cease-fire agreements,[294] and called on parties to abide by their commitments.[295] Can the practice rejecting force be explained primarily as a response to a return to force in breach of a peace agreement?

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[287] See Rwanda [SC Res 955 (1994)]. See also the former Yugoslavia [SC Res 808 (1993)].

[288] Croatia, alarm at reports of ethnic cleansing [SC Res 779 (1992) preamble], Bosnia and Herzegovina [SC Res 752 (1992) para 6, SC Res 787 (1993) para 2, SC Res 820 (1993) para 6], Georgia [SC Res 876 (1993), Armenia statement of the President S/PRST/1995/21], Lebanon [SC Res 436 (1978), see also SC Res 490 (1981), SC Res 512 (1982) SC Res 542 (1983)], Israel [SC Res 605 (1987)], Georgia, deep concern at the "human suffering caused by conflict in the region, and at reports of 'ethnic cleansing' and other serious violations of international humanitarian law" [SC Res 876 (1993), SC Res 1036 (1996)], former Yugoslavia [SC Res 771 (1992) preamble].

[289] SC Res 1011 (1995).

[290] SC Res 918 (1994).

[291] SC Res 733 (1992).

[292] SC Res 837 (1993).

[293] An additional aspect of the practice used to protect civilians has been the use of troops to secure the delivery of humanitarian assistance. In Albania, for instance, the protection force was specifically authorised to facilitate the safe and prompt delivery of humanitarian assistance and to help create a secure environment for the missions of international organisations [SC Res 1101 (1997) paras 2-5]. Similarly, in Somalia, one of the aims of UNOSOM was to protect the humanitarian relief workers [SC Res 897 (1994)]. The force was authorised under Chapter VII, and was empowered to use all necessary means to create a secure environment for humanitarian relief [SC Res 794 (1992)]. The Council justified the mission on the basis that the provision of humanitarian assistance was an important element of its effort to restore peace and security in the region [SC Res 751 (1992), SC Res 794 (1992)]. In Rwanda, as well, UNAMIR was to provide support for and protect the humanitarian operations, as well as UN personnel [SC Res 925 (1994), SC Res 897 (1994)].

[294] Former Yugoslavia [SC Res 713 (1991) preamble], Croatia [SC Res 819 (1993), SC Res 820 (1993)].

[295] Calls under peace agreements: In Georgia, the Security Council emphasised the "importance of implementation by the parties of the obligations to which they have committed themselves": SC Res 896 (1994). In Sierra Leone, it called on parties to abide by their agreements: SC Res 1260 (1998), SC Res 1270 (1999), SC Res 1289 (2000). In Liberia, it called on all parties "to respect and implement fully and expeditiously all the agreements and commitments they have entered into": SC Res 1020 (1995) para 5. See also Croatia, SC Res 762 (1993) preamble and para 2, Lebanon, SC Res 542 (1983) paras 3 and 4, Central African Republic, SC Res 1125 (1997), Mozambique, SC Res 782 (1992), Angola, SC Res 696 (1991) preamble, El Salvador, SC Res 729 (1992) para 5, SC Res 961 (1994) para 4, SC Res 961 (1994).

Calls under cease fire agreements: Georgia, SC Res 1225 (1999), Somalia, SC Res 746 (1992), see also SC Res 837 (1993) para 4 where the Security Council demands under Chapter VII that the parties comply with their commitments, also SC Res 886 (1993) para 6, SC Res 897 (1994) para 7, Congo (Brazzaville), Statement of the President S/PRST/1997/43, Former Yugoslavia, SC Res 713 (1991) para

Angola is an interesting example, since the Council appeared to act in excess of what had been agreed in the peace accords. While the Peace Accords did foresee United Nations monitoring of the cease-fire,[296] the Council went much further than anticipated by the Accords. It first reaffirmed that "it will hold responsible any party which refuses to take part in such a dialogue" and expressed its readiness to take all appropriate measures "to secure implementation of the 'Acordos de Paz'".[297] The Council went on to state that the breach of such accords was illegal and "any party which fails to abide by all the commitments entered into under the "Acordos de Paz para Angola" will be rejected by the international community".[298]

In the light of repeated breaches, the Council imposed an embargo on military and petrol sales to UNITA, and threatened further sanctions unless "the Secretary-General notifies the Council that an effective cease-fire has been established and that agreement has been reached on the implementation of the 'Acordos de Paz'".[299] Following the signing of the Lusaka Protocol in 1994,[300] the Council again emphasized the urgent need for the government and the rebels to both abide by their obligations under the peace agreement. The Council went on to impose travel sanctions on UNITA,[301] and freeze UNITA funds.[302]

The demands on the parties to implement the cease-fire and peace accords in Liberia[303] were also supported by a weapons embargo imposed under Chapter VII, aiming to achieve peace and stability.[304] Similarly in the FRY, the Council created a form of enforcement mechanism for the peace agreements, the sanctions were only to come into existence if the peace agreement was breached. The sanctions were to be imposed if the Council was informed, "that the Federal Republic of Yugoslavia or the Bosnian Serb authorities are failing significantly to meet their obligations under the Peace Agreement".[305] This practice did not rely on the consent of the parties to Council intervention as it

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4, Cambodia, SC Res 766 (1992) preamble, Georgia, SC Res 849 (1993). In Mozambique, it called on rebels to "respect scrupulously the cease-fire and the commitments entered into under the Agreement", SC Res 797 (1992) para 4.

[296] The Peace Accords of 1991 provided that "The United Nations will be invited to send monitors to support the Angolan parties, at the request of the Government of the People's Republic of Angola." Article 4, Cease-Fire.

[297] SC Res 785 (1992) para 9.

[298] SC Res 785 (1992) preamble.

[299] SC Res 864 (1993) paras 17.

[300] The Lusaka Protocol signed in 1994 provided much more clearly for UN intervention. It specifically affirmed the parties' commitment to respect the relevant resolutions of the Security Council. Lusaka Protocol (1994), Annex 8, A, I, 1 also see Annex I. Moreover, the overall supervision and control of the cease-fire was agreed to be the responsibility of the UN, Lusaka Protocol (1994) Annex 3 I(3). Thus, the agreed mandate of the UN was enlarged and it was accepted that it "should play an enlarged and reinforced role" in the implementation of the agreements. Lusaka Protocol (1994) Annex 8, A, 4. Nevertheless, the Security Council passed the resolution authorising the intervention under Chapter VII.

[301] SC Res 1127 (1997) para 4.

[302] SC Res 1173 (1998) para 11.

[303] SC Res 788 (1992).

[304] In Liberia, the weapons embargo under Chapter VII had the clear stated aim of achieving peace in the civil conflict, SC Res 788 (1992) para 8.

[305] SC Res 1022 (1995) para 3.

was in addition to, and prior to, authorisation in the Dayton Agreement for a UN implementation force to be set up via a Council resolution.[306]

The Council has also sought to deliberately "entrench" peace agreements by incorporating them into a resolution under Chapter VII, thus creating the option of enforcement through coercive means. In resolution 1244 (1999), for instance, the Council welcomed the agreement in Belgrade and decided under Chapter VII that "a political solution to the Kosovo crisis shall be based on the general principles in annex 1",[307] which included the end of violence and repression, withdrawal of military forces from Kosovo, and the deployment of a civil and security presence.

Other examples include the practice in Bosnia and Herzegovina, where the Council called on the parties under Chapter VII to "fulfil in good faith the commitments entered into",[308] and affirmed the need for the implementation of the Peace Agreements in their entirety.[309] In Croatia, it demanded under Chapter VII that "parties and others concerned comply fully with the United Nations peacekeeping plan in Croatia and with other commitments they have undertaken and in particular with their cease-fire obligations".[310] In Côte d'Ivoire the Council determined that the situation was a threat to international peace and security and then "endorsed" the agreement, and called on the parties to implement it.[311]

In addition, the Council has also declared that the international community will not condone the use of force in order to acquire territory during a civil conflict after a peace agreement. In the former Yugoslavia, it took note of the OSCE declaration of 3 September 1991 "that no territorial gains or changes within Yugoslavia brought about by violence are acceptable"[312] and demanded that the parties respect "the principle that any change of borders by force is not acceptable".[313] The Declaration on Yugoslavia[314] both called on parties "to observe their obligations under the cease-fire agreement and the Memorandum of Agreement" and went on to adopt the principle rejecting unilateral changes in frontiers through use of force as the basis of resolution of the dispute.[315]

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[306] The General Framework Agreement for Peace in Bosnia and Herzegovina (1995), "The Dayton Agreement", ANNEX 1A: Agreement on the Military Aspects of the Peace Settlement, Article 1 (1).
[307] SC Res 1244 (1999) para 1.
[308] Bosnia and Herzegovina SC Res 1031 (1995) para 1.
[309] Bosnia and Herzegovina SC Res 1031 (1995) para 30.
[310] SC Res 807 (1993) para 1.
[311] SC Res 1464 (2003).
[312] SC Res 713 (1991), preamble, SC Res 757 (1992).
[313] SC Res 752 (1992).
[314] Issued at an extraordinary meeting of the European Community on 3 September 1991 in The Hague.
[315] As discussed under the notion of secession in the Introduction, this reflected the European Guidelines on Recognition of New States in Eastern Europe and the Soviet Union, adopted by the European Community and its Member States on 16 December 1991, which required "respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement" European Guidelines on Recognition of New States in Eastern Europe and the Soviet Union, Adopted by the European Community and Its Member States (1991) 92 ILR 174.

Such statements are not limited to the break-up of the former Yugoslavia, however. Similar statements were made in Angola,[316] in the context of a resolution recognizing the government of Angola following the democratic elections and expressing concern that the peace talks "remain suspended and a cease-fire has not been established" The Council condemned UNITA for continuing military actions and also condemned "UNITA's repeated attempts to seize additional territory" contrary to the Acordos de Paz.[317]

One slightly different situation is that of Afghanistan where the Council rejected the use of force to gain territory without there first being an agreement. In 1998, it expressed concern at the Taliban offensive in the northern part of the country which caused a threat to international peace and security and human suffering. It went on to re-iterate

> that the Afghan crisis can be settled only by peaceful means, through direct negotiations between the Afghan factions under United Nations auspices, aimed at achieving a solution accommodating the rights and interests of all Afghans and stresses that territorial gains through military operations will neither lead to a durable peace in Afghanistan, nor contribute to a comprehensive settlement of the conflict in this multi-cultural and multi-ethnic country;[318]

These declarations can be read in a number of ways. They may reflect the notion of territorial integrity, or the notion of *uti possidetis* – including the extension of that principle that even a claim for self-determination cannot bring about a change in boundaries other than consensually. Alternatively, the provide support for the view that any breach of a peace agreement is prohibited.

In overview, while the Council has emphasised that parties are expected to abide by the peace agreements they enter into, the Council has not relied in a narrow sense on the terms of these agreements in seeking to enforce them, and has also acted before such agreements were signed or where there was no agreement. Its practice in response to civil conflict ought not to be considered to derive from the consent of parties derived from such agreements.

2.6 SUMMARY

Investigating the emergence of principles in Council practice is a difficult endeavour, as the Council practice seems to have developed without explicit recognition or discussion of its role in civil conflict or the implications such practice will have on international law. Moreover, the Council has typically

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[316] SC Res 864 (1993) para 8, see also for eg SC Res 1173 (1998). The conflict can be characterised as a war of self-determination that evolved into a civil war after independence in 1975. It presented as a complex conflict involving a number of different rebel groups with overt external support. The Security Council became involved in the civil aspect of the conflict in 1991, when most of the external intervention had subsided, and the government and the National Union for the Total Independence of Angola (UNITA) rebel forces had signed the Peace Accords for Angola.

[317] SC Res 864 (1993) para 8.

[318] SC Res 1193 (1998) para 2.

been considered a political rather than a legal body and its practice ranges across many resolutions in response to many conflicts.

What is surprising, however, is that the practice actually is not chaotic resolutions or without pattern, which would emphasise the discretionary nature of Council intervention and the exceptional nature of each civil conflict. Instead what emerges is that the Council has consistently supported and applied a set of recognisable principles when dealing with civil conflicts. These are in evolution, interact in different conflicts in different ways, and do at times seem to be subsumed into political considerations. However, they can be identified.

One indication that the Council must be relying on particular principles – although this does not resolve the question of the nature of these principles – can be seen in the transition from traditional peacekeeping operations to complex peace-building operations. Such operations required the peacekeeping forces to be able to enforce their Council mandate against parties that failed to abide by it. When the peacekeeping operations converted to peace-building operations particular normative values became incorporated into the operations. While Security Council neutrality was still usually maintained in the early stages of such conflicts, as these evolved and parties refused to abide by particular principles, the Council and the peacekeepers sought to enforce them.

Complex peacekeeping frequently required the choice of sides in a conflict, thus implicating a complex system of principles. In Angola, for instance, by 1993 Council sanctions were targeted at UNITA only, rather than both parties to the conflict, and in Sierra Leone by 1998 at the RUF only. When the Security Council begins acting to enforce particular decisions against individual belligerents, it is impossible to avoid the question of what principles are being enforced.

The focus of this chapter has been on sketching out the principles, and determining how they interact with each other, through a review of the practice. The review has identified support for a number of principles in practice. However, it is their legal impact that is of key importance. That debate cannot be undertaken until a more detailed discussion of theory underlying the role of the Council in international law is undertaken in chapter 3.

CHAPTER 2: THE RESPONSE OF STATES AND REGIONAL ORGANISATIONS

Thus far, the focus of the discussion has been on the practice of the Council, which has been treated separately in the light of its distinctive binding decision-making capacity. The thesis now turns to an investigation of the broader response of the international community. In particular it adds to the Council practice the response of individual states and regional bodies (the extent to which they support particular principles in their responses) and the support for particular principles incorporated in treaties governing regional organisations.

As was highlighted in chapter 1, the practice of the Council in response to civil conflicts has evolved over the last decade and a half, and a focus on the more recent conflicts provides the most useful perspective of what principles may be emerging. In chapter 1 the focus was on the evolution of practice in the Balkans. This chapter focuses on the evolution of practice in Western Africa. The Council and the international community have been heavily involved in the recent conflicts in Sierra Leone, Côte d'Ivoire and Liberia, and there have been interesting developments in the AU and ECOWAS security treaties.[319] This practice is used to illustrate the culmination of a trend that originated in the 1990s with the interventions in the former Yugoslavia, Iraq and Somalia.

1 CASE STUDIES

1.1 SIERRA LEONE

The civil conflict in Sierra Leone raged for over ten years, and was horrifying in its brutality against civilians. Although it began in 1991, the international community only began to pay proper attention in 1996.

1.1.1 The Conflict in Sierra Leone

Sierra Leone's devastating civil conflict has been characterised by vested economic interests[320] and involved extreme violence against the civilian population.[321] A brief description of the conflict provides a context for the discussion of the international community's practice.

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[319] Note that the purpose of the investigation of the response of the international community to the civil conflicts is not to determine *the legality of the interventions* or of the treaty provisions (as it was in *Nicaragua*). Instead, this practice is analysed to determine whether it supports the emergence of norms of *jus ad bellum internum* prohibiting certain civil conflicts.

[320] ICG, *Sierra Leone: Time for a New Military and Political Strategy* (2001) 2, Smillie, Gberie and Hazleton *The Heart Of The Matter, Sierra Leone, Diamonds and Human Security* (Partnership Africa Canada, Ontario, 2000), UN *Panel of Experts Report on Diamonds and Arms in Sierra Leone* (2000).

[321] "Getting Away with Murder, Mutilation and Rape: New Testimony from Sierra Leone", 11(3A) *Africa Rights Watch* (1999). See Pratt *Sierra Leone the Forgotten Crisis* (Special Envoy to Sierra Leone, 1999) for an insightful overview of the conflict.

From 1991 until 1996 Sierra Leone went through a period of great instability marked by a wide-ranging violent struggle between rebel forces and the military governments, which were also repeatedly overthrown in a series of coups.

The civil conflict is thought to have originated as a by-product of the conflict in adjoining Liberia where the warlord Charles Taylor was fighting to overthrow the Liberian government. Sierra Leone was part of the Economic Community of West African States Monitoring Group (ECOMOG) that intervened in the Liberian conflict. In 1991, apparently in retaliation, the National Patriotic Front of Liberia began making incursions into Sierra Leone and was joined in its attacks by the Revolutionary United Front (RUF), headed by Foday Sankoh, a former corporal of the Sierra Leone Army (SLA). The rebels engaged in a vicious conflict of intimidation from the first, attacking civilians in what became their hallmark fashion, crudely amputating limbs and ears of women, men, children and babies. They also kidnapped children as a way of recruiting soldiers.

In 1996, with the assistance of Executive Outcomes, a mercenary company, the government pushed back the rebels, and began the process of running multi-party democratic elections. The March 1996 elections were declared free and fair by international observers and Ahmad Kabbah was sworn in as president. On 30 November 1996, a first peace agreement, the Abidjan Peace Accord, was signed.[322] However, soon afterwards, the country was again shaken by a military coup. President Kabbah fled to a neighbouring country and Major Johnny Koroma, of the Armed Forces Ruling Council (AFRC), appointed himself Chairman and invited the RUF to join his new government. This can be considered a distinct second phase of the conflict, during which the AFRC/RUF military regime was in power in Sierra Leone.

The international community intervened intensely after this coup and the various aspects of these interventions by individual States, regional bodies and the Council are considered in more detail below. Ultimately, ECOWAS sought to reinstate the government by force. In October 1997, after five months of fighting against the armed supporters of the military coup, the Conakry peace plan was signed.[323] It envisaged the reinstatement of the deposed Government, the immediate cessation of hostilities, cooperation between the junta and ECOMOG in order to enforce sanctions peacefully, disarmament, demobilization and reintegration of combatants, and the provision of humanitarian assistance. It also provided immunities and guarantees to the leaders of the coup.

However, it was only in March 1998 that President Kabbah was returned to power, following a strong military offensive by ECOMOG on Freetown, driving out the AFRC/RUF, who had failed to abide by the Conakry Agreement and had continued fighting.[324] The civil conflict against the democratic

[322] 1996 Abidjan Agreement (Abidjan, 30 November 1996, Government of Sierra Leone and the RUF) S/1996/1034.
[323] ECOWAS Six Month Peace Plan for Sierra Leone S/1997/824 (1997).
[324] Security Council Press Release SC/6444 (14 November 1997).

government persisted however, despite repeated calls by the international community for rebel surrender. During this third period of the conflict the international community continued to support the reinstated government. In July 1998 a UN force (UNOMSIL) was sent to monitor the military and security situation, assist with disarmament, and monitor respect for international humanitarian law.[325]

A year later, however, resolution had still not been achieved, and a compromise agreement was signed with the rebel forces. The Lomé peace agreement signed on 7 July 1999 was markedly favourable to the rebels. It provided for power to be shared between parties and gave the rebels four key government posts, including the vice presidency, and effective control over the country's mineral wealth and tourism.[326] The rebels were also granted a total amnesty for their actions and the death sentence on Sankoh was lifted.[327] Nevertheless, the rebel forces did not abide by the agreement, attacking UNOMSIL forces, and taking some hostages.[328] UNOMSIL was thus replaced by UNAMSIL, a peacekeeping and demobilising force,[329] but the situation continued to deteriorate. In May 2000, faced with the ineffectiveness of the UN intervention and Sierra Leone's slide into general lawlessness, the UK intervened militarily.[330] UK forces, separate to the UN peacekeeping forces, secured the airport, trained the SLA, provided assistance to the government and the UN missions, and achieved the release of the forces held hostage.

Finally, by May 2001 the UK, UN and SLA forces had made sufficient progress to pressure the rebels into entering into a further peace agreement.[331] This time the agreement was largely implemented, and by January 2002, the demobilisation of rebel forces had progressed substantially. In May 2002 the first democratic elections since the coup in 1997 were held, returning Kabbah as president. At present the position in Sierra Leone appears to be one of relative peace and stability.

1.1.2 The Response of the international community

Turning to how the international community responded to the civil conflict, this section's purpose is to determine from the discourse and practice whether principles addressing recourse to force in civil conflicts are emerging. The practice of condemnation followed by action to prevent or stop the conduct is given particular attention, given that condemnation allows assessment of whether the international community is merely troubled and concerned, or whether it explicitly rejects the conduct, and enforcement establishes that the rejection is not merely rhetorical.

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[325] SC Res 1181 (13 July 1998).
[326] The rebels were offered the ministerial posts of Trade and Industry, Transportation, Housing and Energy and Tourism.
[327] *Keesing's Record of World Events* (Folio Views, Infobase) (1999) Vol 45(7).
[328] Article XV.
[329] SC Res 1270 (22 October 1999). In February the UNAMIL forces were doubled to fill the security vacuum left by the phasing out of the ECOWAS force SC Res 1289 (2000).
[330] *Keesing's Record of World Events* (Folio Views, Infobase) (2000) Vol 46(6).
[331] *Keesing's Record of World Events* (Folio Views, Infobase) Volume 47(5).

No response

There was little interest or intervention by the international community during the first phase of the conflict between 1991 and 1996, although ECOMOG did assist the SLA in attempting to push the rebels back towards Liberia, apparently on the understanding that the conflict was an extension of the Liberian conflict.[332]

Despite the serious violence against civilians over the next five years the conflict did not attract much international attention.[333] Neither did the repeated military coups cause protest. Nigeria for instance recognised and expressed its support for the Captain Strasser government within three weeks of the 1992 coup.[334] It was only in 1994, though, that the greater international community became involved in the conflict, and then only as an impartial negotiator, following a request to the Secretary-General to exercise his good offices in the conflict.[335]

Democratically Elected Governments

The overturn of the democratically elected government in the 1997 coup marks a dramatic change in the response of the international community. It elicited extensive and widespread condemnation of the coup and intervention against the rebels by the entire African continent, via the OAU (now the AU) and ECOWAS, by the United Nations, and by individual States.

Condemnation of the Coup and Calls for the Junta to Step Down

The condemnations of the rebel actions were framed in terms of the overthrow of a democratic government. Many States condemned the coup.[336] Nigeria was particularly vocal, calling for the restitution of the deposed government and intimating that it was prepared to use force to overturn the coup if necessary.[337] The OAU passed a resolution condemning the coup and endorsing military as well as diplomatic efforts to restore democracy.[338] Zimbabwe speaking to the Council on behalf of the OAU explained the decision on the basis that it had "to safeguard and defend and nurture democracy in Africa."[339] ECOWAS then issued a communiqué urging States not to recognise the regime installed following the coup and calling on them to make every effort to restore the lawful government.[340]

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[332] *Keesing's Record of World Events* (Folio Views, Infobase) (1993) Vol 39(12).
[333] Known as "sobels", soldiers by day, rebels by night, both forces perpetuated violence and looting. Pratt, *Sierra Leone the Forgotten Crisis* (1999) part 1, www.sierra-leone.org.
[334] Ibid (1992) Vol 38(5).
[335] S/1995/975 (1995).
[336] See for instance the comments by all members of the Security Council during the Security Council Meeting 3822 S/PV.3822 (1997).
[337] CNN "Peacekeepers Seek to End Violent Coup" (31 May 1997) www.cnn.com.
[338] OAU Summit, (Harare, 2-4 June 1997).
[339] Security Council Meeting 3797 S/PV.3797 (1997).
[340] ECOWAS Final Communique (Conakry, 26 June 1997).

Some commentators did criticise the hypocrisy of such justifications when arising from non-democratic governments. "The principle involved is not preventing military take-overs, but self-preservation,"[341] said The South African Weekly Mail and Guardian, pointing out that its proponents included Zimbabwe and Nigeria, neither of which was then democratic. In the main, however, the statements upheld the protection of democracy against forceful overthrow.

The Council reacted by repeatedly calling for the restoration of the government. It put out a presidential statement strongly deploring "this attempt to overthrow the democratically elected government" and calling "for an immediate restoration of constitutional order."[342] In the conflict that followed the coup, the Council repeatedly called "for the immediate and unconditional restoration of constitutional order in the country",[343] demanded "the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically-elected Government and a return to constitutional order",[344] calling upon the junta "to end all acts of violence and to cease all interference with the delivery of humanitarian assistance to the people of Sierra Leone",[345] and went on to repeatedly condemn the resistance of the junta to the authority of the government.[346]

From the preamble of resolution 1132 (1997), the finding of a threat to international peace and security can be seen to rely partly on the failure of the military junta to "allow the restoration of the democratically-elected Government", as well as grave concern at the "continued violence and loss of life in Sierra Leone" and at "the deteriorating humanitarian conditions in that country, and the consequences for neighbouring countries".[347] The Council did not intervene as a neutral party in Sierra Leone; it explicitly favoured the deposed government,[348] seemingly on the basis of its democratic nature.[349] It also condemned the actions of the rebels, initially in relation to the coup, and later in relation to breaking peace agreements and Council resolutions.[350]

The Secretary-General played an important role in shaping the debate. He repeatedly asserted that democratic governments must not be overthrown by force:[351]

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[341] South African Weekly Mail and Guardian "Africa: Littered With The Debris Of Democracy" (30 May 1997).
[342] Statement by the president of the Security Council S/PRST/1997/29 (1997) on the 27 May 1997. See also statements condemning the coup on 11 July 1997, S/PRST/1997/36 and 6 August 1997 S/PRST/1997/42.
[343] Statement by the president of the Security Council S/PRST/1997/29 (1997). In SC Res 1156 (1998) it welcomed the return of the democratic government.
[344] SC Res 1132 (1997) para 1, acting under Chapter VII.
[345] SC Res 1132 (1997) para 2, acting under Chapter VII.
[346] SC Res 1181 (1998) para 1.
[347] SC Res 1132 (1997) preamble.
[348] Statement by the president of the Security Council S/PRST/1997/29 (1997), statement by the president of the Security Council S/PRST/1997/36 (1997), statement by the president of the Security Council S/PRST/1997/42 (1997), SC Res 1132 (1997).
[349] Statement by the president of the Security Council S/PRST/1997/29 (1997), statement by the president of the Security Council S/PRST/1997/36 (1997), statement by the president of the Security Council S/PRST/1997/42 (1997), SC Res 1132 (1997), SC Res 1171 (1998).
[350] Eg. SC Res 1132 (1997), 1171 (1998), 1270 (1999)
[351] UN Press Release SG/SM/6241 (1997), Letter from the Secretary-General to the Security Council S/1997/776 (1997) 2.

> The United Nations and the international community firmly uphold the principle that the will of the people shall be the basis for the authority of government and that governments democratically elected shall not be overthrown by force.[352]

He wrote to the Council:

> At stake is a great issue of principle, namely, that the efforts of the international community for democratic governance, grounded in the rule of law and respect for human rights, shall not be thwarted through illegal coups.[353]

These statements were cited approvingly by many States on the Council,[354] suggesting widespread acceptance of a principle rejecting the legitimacy of recourse to force against a democratically elected government.

Sanctions against the Rebels

The imposition of sanctions against the rebels was clearly in response to their overthrow of the democratic government. ECOWAS imposed a total embargo on trade, petroleum products and arms and military equipment,[355] calling on States "to restore the lawful government" by dialogue, sanctions or force.[356]

The Council sanctions preventing travel of the junta members and imposing a petrol embargo were imposed a few months later under Chapter VII, and strongly rejected the violent overthrow of democratic governments.[357] The Council demanded, under Chapter VII, that "the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically elected Government".[358] The debate prior to voting on the resolution explicitly adopted such a principle.[359] Kenya, for instance explained, "Africa was saying, and the international community was supporting the clear statement, that military coups overthrowing democratically elected Governments were no longer going to be accepted". Similarly, the United Kingdom stated, "The international community cannot afford to acquiesce in the arbitrary and unconstitutional

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[352] UN Press Release SG/SM/6241 (1997).
[353] Letter from the Secretary-General to the Security Council S/1997/776 (1997) 2.
[354] See Kenya, France, Korea, Sweden, Guinea Bissau, Chile at the Security Council Meeting 3822 S/PV.3822 (1997).
[355] ECOWAS Meeting 20th Session (29 August 1997).
[356] ECOWAS Final Communique (Conakry, 26 June 1997).
[357] It imposed travel embargoes on the junta and prohibited the supply to Sierra Leone of petrol and arms [SC Res 1132 (1997)]. Later, the Security Council modified the embargo so that it only applied to the rebels and not to the Sierra Leone government or to ECOMOG [SC Res 1171 (1998)]. It also imposed a selective arms embargo preventing sale of arms to the rebels [SC Res 1171 (1998)].
[358] SC Res 1132 (1997). See also Statement by the president of the Security Council S/PRST/1997/42 (1997).
[359] Note that a number of countries emphasised that the role of the sanctions was not to punish the junta but to uphold the principles involved. See for instance the statement of Japan, Security Council Meeting 3822 S/PV.3822 (1997).

overthrow of a democratic Government." Egypt referred to a "new, unanimous African position regarding military coups in the countries of the continent".[360]

Forceful Intervention

The willingness of the international community to use military intervention to enforce the principles it had formulated raises questions regarding the legality of the interventions given the Charter restrictions on recourse to force. This issue is discussed in more depth in chapter 4, however, it does not prevent the recognition that a where States are prepared to have recourse to military enforcement measures they must have a strongly held position on the principle sought to be enforced.

Nigeria was particularly vocal, calling for the restitution of the deposed government and intimating that it was prepared to use force to overturn the coup if necessary.[361] Nigeria already had troops in Freetown, pursuant to a bilateral agreement with the civilian government to defend it from rebel forces,[362] and swiftly sent further troops.[363] It attempted to reinstate the president by force on 2 June 1997, but was unsuccessful.[364]

ECOWAS became involved after the coup at the invitation of the deposed president. Initially it attempted diplomatic negotiations, but it soon sent forces to join Nigeria on the ground.[365] This action was supported by the OAU which had resolved that a Nigerian led ECOWAS force should "take the most effective measures" to remove the military junta.[366] The ECOWAS actions included an explicit call on States to make every effort "to restore the lawful government by a combination of three measures, namely: the use of dialogue; the application of sanctions, including an embargo; and the use of force."[367] The decision to permit the use of force did raise some concern among members, but as Nigeria explained, it was agreed to because the other two options would be ineffective without it.[368]

ECOWAS then fought the supporters of the military coup for five months. Then there was an attempt at settling the conflict by agreement. However, the Conakry Agreement providing for the return of the president failed to be implemented by the rebels.[369] At that point ECOMOG reinstated the president by force, driving out the AFRC/RUF of Freetown. This is a clear indication of the aim of the military intervention. ECOWAS determinedly rejected the rebel take-over of the government and ultimately

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[360] Similar statements supporting the protection of democratic regimes were made by all members of the Security Council except China, which supported the resolution but limited its statement to a more ambiguous comment that "Like other Council members, the Chinese delegation is concerned at the changes in the situation in Sierra Leone and feels deep sympathy for the sufferings experienced by the people of that country." Security Council Meeting 3822 S/PV.3822 (1997).

[361] CNN "Peacekeepers Seek to End Violent Coup" (31 May 1997) www.cnn.com.

[362] CNN "Sierra Leone Rebel Declares Himself Head of State" (25 May 1997) www.cnn.com.

[363] CNN "Mutinous Soldiers Scrap Sierra Leone Constitution" (28 May 1997) www.cnn.com.

[364] CNN "Nigerians Launch Attack on Sierra Leone Mutineers" (2 June 1997) www.cnn.com.

[365] The force incorporating soldiers from Ghana, Guinea and Nigeria. CNN "More West African Soldiers Join Nigerians in Sierra Leone" (31 May 1997) www.cnn.com.

[366] CNN "Coups, Support Democracy" (4 June 1997) www.cnn.com.

[367] ECOWAS Final Communique (Conakry, 26 June 1997).

[368] Security Council Meeting 3797 S/PV.3797 (1997).

[369] ECOWAS Six Month Peace Plan for Sierra Leone S/1997/824 (23 October 1997).

overthrew it by force. It also remained in Sierra Leone during the third phase of the conflict, and supported the government while the rebels continued their struggle against it.

The UK also sent troops midway through the third phase of the conflict to assist the reinstated but beleaguered government and the ineffective UN forces.[370] It is thought that its intervention played a major role in bringing the conflict to a close.[371] The basis on which the intervention was justified varied over time. Initially, the UK maintained that it aimed merely to protect its nationals.[372] By October the intervention mandate included training the SLA to "build new, democratically accountable, and effective armed forces in Sierra Leone",[373] and by February 2001, the UK priorities were "to repel the rebels, restore the peace and rebuild the country".[374] From a legal perspective as well the justifications varied, from protecting nationals to consent by the Secretary-General and the president of Sierra Leone.[375]

The Council did not authorise the ECOWAS, OAU, or Nigerian actions.[376] It did not send troops until after the reinstatement of the president by ECOWAS' forceful action. When the Council did send peacekeepers, they aimed at ensuring an end to the conflict, and seeking to enforce the peace agreements and disarm the rebels. UNOMSIL was sent to monitor the military and security situation, assist with disarmament, and monitor respect for international humanitarian law.[377] It was replaced by UNAMSIL, a peacekeeping and demobilising force, after the rebels repeatedly breached the Lomé Peace Accord, and took UNOMSIL forces hostage.[378] UNAMSIL's mission was to disarm the rebel forces while still aiming to implement the Lomé Peace Accord.[379] It was to cooperate with the government, as well as the other parties to the accord, and assist the government in implementing the disarmament and demobilization plan.[380]

The Council had already condemned the coup and called on the junta to step down.[381] Moreover, as the situation continued to deteriorate, and faced with repeated breaches of the peace accord, the Council acted to strengthen the mandate of its peacekeeping force, and support the government.[382] In this way, the mandate of UN forces aligned more and more closely with the democratic government against the rebel forces, partly because of the rebel breaches of the peace accords and attacks against

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[370] *Keesing's Record of World Events* (Folio Views, Infobase) (2000) Vol 46(6).
[371] A UK forceful intervention received some explicit support, see ICG *Sierra Leone: Time for a New Military and Political Strategy* (International Crisis Group, 2001).
[372] Statement by Foreign Secretary, Robin Cook (House of Commons, 8 May 2000) www.fco.gov.uk.
[373] Speech by Foreign Secretary, Robin Cook (October 2000) www.fco.gov.uk.
[374] Speech by Foreign Commonwealth Office Minister of State, Brian Wilson (Westminster Hall, London, 28 Feb 2001) www.fco.gov.uk.
[375] Statement by Defence Secretary on Sierra Leone (15 May 2000) www.fco.gov.uk/news.
[376] Although the ECOWAS and the OAU actions were generally referred to positively in the Council. See for example the Statement by the president of the Security Council S/PRST/1997/36 (1997).
[377] SC Res 1181 (1998).
[378] SC Res 1270 (1999). In February the UNAMIL forces were doubled to fill the security vacuum left by the phasing out of the ECOWAS force SC Res 1289 (2000).
[379] SC Res 1270 (1999).
[380] SC Res 1270 (1999).
[381] See for instance S/PRST/1997/29, S/PRST/1997/36, S/PRST/1997/42, 1132 (1997), 1181 (1998).
[382] SC Res 1313 (2000).

UN forces. By the time it passed resolution 1313, the Council unanimously denounced the widespread and serious violation of the peace accord by the RUF and mandated UNAMSIL to deter and "decisively counter the threat of RUF attack".[383]

Recourse to Force in Breach of an Agreement

A second explanation for the practice – primarily the Council practice – is the rejection of recourse to force in breach of a peace or cease-fire agreement. The various peace agreements that were signed in Sierra Leone[384] were referred to in a number of ways. The determination that the situation amounted to a threat to international peace and security relied primarily on the overthrow of the democratic regime, but did nonetheless maintain, in the preamble, that the Abidjan Agreement continued "to serve as a viable framework for peace, stability and reconciliation".[385]

As the conflict dragged on, the Council increased its reliance on the breach of peace agreements and the need to abide by them as a basis for the condemnation of the RUF, the support for the government over the RUF, and rejection of the tactics of the RUF in attempting to gain control of Sierra Leone. The Council welcomed the signing of the Lomé accord,[386] and called on the RUF and other armed groups "to begin immediately to disband and give up their arms in accordance with the provisions of the Peace Agreement".[387] This was followed by it authorizing the deployment of the UN Mission in Sierra Leone, whose mandate was expressed as being to "cooperate with the Government of Sierra Leone and the other parties to the Peace Agreement in the implementation of the Agreement".[388]

The importance accorded by the Council to the parties abiding by the peace agreement is reinforced in later resolutions, where the Council expressly called on the parties "to fulfil all their commitments under the Peace Agreement to facilitate the restoration of peace, stability, national reconciliation and development in Sierra Leone",[389] and called on the RUF and AFRC to "begin immediately to disband and give up their arms" in accordance with the Peace Agreement.[390]

The central purpose of peace and cease-fire agreements is a promise to forego recourse to force and resolve the dispute in other ways. The repeated reference to such agreements by the Council – the explicit calls on the parties to abide by them and the decision to send troops to assist in the

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[383] SC Res 1313 (2000).

[384] On 30 November 1996, a first peace agreement, the Abidjan Peace Accord, was signed. In October 1997, after five months of fighting against the armed supporters of the military coup, the Conakry peace plan was signed. This was followed by the Lomé peace agreement signed on 7 July 1999, which was markedly favourable to the rebels, but was immediately breached. Finally, by May 2001 the UK, UN and SLA forces had made sufficient progress to pressure the rebels into entering into a further peace agreement, which has largely been implemented.

[385] SC Res 1132 (1997) Preamble.

[386] SC Res 1260 (1999) paras 1 & 2.

[387] SC Res 1260 (1999) para 8.

[388] SC Res 1270 (1999) para 8(a).

[389] SC Res 1270 (1999) para 2, SC Res 1289 (2000) para 3.

[390] SC Res 1270 (1999) para 4.

implementation of the peace agreement - supports the proposition that such agreements are binding. It also suggests widespread rejection of re-initiation of a conflict in breach of a peace agreement.

Violence against Civilians

Another major area of concern that emerges from the practice is the rejection of violence against civilians. The conflict in Sierra Leone was characterised by serious human rights abuses including torture, mutilation, rape and the amputation of limbs.[391] States repeatedly condemned the violence, loss of life, and human rights and humanitarian law breaches.[392]

The Council was particularly explicit; it repeatedly condemned the human rights abuses against the civilian population and demanded that the acts cease immediately.[393] It also emphasised that humanitarian law must be followed in civil conflicts.[394] The Council went further than condemning the violence against civilians: it acted to try and stop such conduct. When putting in place the sanctions regime, for instance, it emphasised the unacceptable violence and loss of life in Sierra Leone, and the deteriorating humanitarian conditions.[395] Moreover, it authorised UNAMSIL under Chapter VII to take all necessary action to "protect civilians under imminent threat of physical violence",[396] and set up a Conflict Crimes Court for Sierra Leone.[397]

Peaceful Resolution of Disputes

The international community in Sierra Leone also emphasised the need for peaceful resolution of the conflict in Sierra Leone, and supported peace agreements, negotiation, democratic elections, and reconciliation. The OAU intervention evidenced its will and determination "to resolve violent conflicts now plaguing the continent",[398] and the Council repeatedly emphasized its support for the regional organisations' attempts to work for a peaceful resolution of the conflict and for the restoration of peace.[399] The UK forceful intervention also emphasised that it aimed to restore peace to Sierra Leone.[400] As the Foreign and Commonwealth Minister of State explained, the UK purpose in

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[391] See for example, Tejan-Cole "Human Rights under the Armed Forces Revolutionary Council in Sierra Leone - a Catalogue of Abuse" (1998) 10(3) African Journal of International and Comparative Law 407, U.S. Department of State Sierra Leone Country Report on Human Rights Practices for 1997 (30 January 1998) www.sierra-leone.org.

[392] For example, the UK decision to intervene forcefully highlighted the brutality of the rebels, and the suffering of the people. Speech by Foreign Commonwealth Office Minister of State, Brian Wilson (Westminster Hall, London, 28 Feb 2001) www.fco.gov.uk.

[393] SC Res 1132 (1997) preamble, SC Res 1181 (1993) preamble, SC Res 1289 (2000); S/PRST/1997/36 (1997); S/PRST/1997/29 (1997), S/PRST/1997/42 (1997); and SC Res 1132 (1997), SC Res 1171 (1998), SC Res 1231 (1999) para 3, SC Res 1236 (2001) para 6, SC Res 1400 (2002), SC Res 1289 (2000).

[394] SC Res 1181 (1998), SC Res 1231 (1991) para 3. Also one of UNOMSIL's key responsibilities was to monitor respect for international humanitarian law. SC Res 1181 (1998).

[395] SC Res 1132 (1997).

[396] SC Res 1270 (1999) para 14, SC Res 1289 (2000) para 10.

[397] SC Res 1315 (2000).

[398] Security Council Meeting 3797 S/PV.3797 (1997).

[399] SC Res 1132 (1997) para 3, SC Res 1181 (1998) para 5, SC Res 1260 (1999).

[400] Speech by Foreign Commonwealth Office Minister of State, Brian Wilson (Westminster Hall, London, 28 Feb 2001) www.fco.gov.uk.

Sierra Leone was to help them "achieve the peace that they need, to develop their country's potential."[401]

The Council also emphasised that it was gravely concerned at conflict and violence in Sierra Leone,[402] and called, under Chapter VII, for parties to "end all acts of violence".[403] It repeatedly demanded that the junta give up their arms.[404] It affirmed the importance of non-violent methods of resolution of internal disputes, particularly free and transparent elections.[405] Moreover, it emphasised the urgent need to promote peace and national reconciliation[406] and encouraged all efforts aimed at "resolving the conflict and restoring lasting peace and stability".[407] It also commended the government for its "courageous efforts to achieve peace, including through legislative and other measures already taken towards implementation of the Peace Agreement".[408] The Council repeatedly expressed support for peace agreements,[409] and called on the parties to abide by them.[410] Finally, the peacekeeping missions were sent to ensure an end to the conflict, enforce the peace agreements and disarm the rebels.[411]

1.1.3 Conclusion

The dominant principle evident in the practice of the international community in response to this conflict is the rejection of recourse to force against a democratically elected government. Other principles also identified include the rejection of return to violence following the signing of a peace agreement, and rejection of violence against the civilian population. A corresponding obligation to resolve conflicts peacefully through negotiation, reconciliation, peace agreements and democratic elections is also evident.

1.2 CÔTE D'IVOIRE

The conflict in Côte d'Ivoire ignited in 2002 after an unsuccessful coup attempt in September. Soon after the country slipped into open civil conflict, with the rebels (a dissident division of the army) gaining control of half of the country. The response of the international community supports five distinct, and at times contradictory, principles, which echo and in some ways extend those supported in the practice in Sierra Leone.

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[401] Speech by Foreign Commonwealth Office Minister of State, Brian Wilson (Westminster Hall, London, 28 Feb 2001) www.fco.gov.uk.
[402] SC Res 1132 (1997).
[403] SC Res 1132 (1997) para 2.
[404] SC Res 1181 (1998) para 1, SC Res 1260 (1999) para 8, SC Res 1270 (1999) para 4.
[405] SC Res 1400 (2002).
[406] SC Res 1162 (1998) para 3, SC Res 1171 (1998), SC Res 1260 (1999) para 10, SC Res 1270 (1999).
[407] SC Res 1220 (1999).
[408] SC Res 1260 (1999).
[409] SC Res 1260 (1999) para 1.
[410] SC Res 1270 (1999) para 2, SC Res 1289 (2000) para 3.
[411] SC Res 1181 (1998), SC Res 1270 (1999). In February the UNAMIL forces were doubled to fill the security vacuum left by the phasing out of the ECOWAS force, SC Res 1289 (2000), SC Res 1270 (1999).

The international community rejected recourse to force to bring about an unconstitutional change of government, rejected attempts to settle the dispute through force, rejected violence in breach of a peace agreement, rejected recourse to force causing regional destabilization, rejected violence against civilians and upheld an obligation to resolve conflicts peacefully through negotiation, reconciliation and political processes.

Two aspects of the practice are particularly interesting. First, the principle rejecting recourse to force aiming to overthrow a democratic government, at the centre of the response of the international community in Sierra Leone, appears to be formulated in a broader fashion in this conflict: a rejection of recourse to force to unconstitutionally overthrow the government. In addition, the principle rejecting recourse to force in conflicts is here supported by key international actors. The Secretary-General explicitly disapproved of recourse force as a means of settling disputes. This would appear to represent a new development in this area, expanding the extent to which such recourse to force is rejected.

1.2.1 The Conflict in Côte d'Ivoire

In overview, the conflict in Côte d'Ivoire developed out of a failed violent coup on 17 September, 2002. Within a few weeks the rebel forces, who have since identified themselves as the Patriotic Movement of Côte d'Ivoire (MPCI), held half of the country and controlled two major cities, Bouake and Korhogo, although not the capital, Abidjan.[412]

President Laurent Gbagbo had come to power in October 2000 in elections marred by violence, when General Robert Guei, the winner of a successful military coup in 1999, refused to concede defeat and only left office following a violent popular uprising. Guei was found dead in the streets of Abidjan during the 2002 uprising.

The uprising in 2002 initiated a swift response by the international community. The French sent troops within 9 days of the attempted coup.[413] These forces were initially justified as necessary to protect the large French population in this former French colony. However, they soon took on a more complex role, separating the two armies and preventing the rebels from marching on the capital. Thus, when on 1 October 2002 the rebel forces gained ground and stated that they aimed to topple the government, the French troops warned them not to enter a broad zone that effectively cut off the route south to Abidjan, while nevertheless maintaining that their mission remained to protect their nationals.[414] The rebels responded by demanding the French maintain strict neutrality.[415]

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[412] Agence France-Presse "Senegalese mediator in bid to stave off Ivory Coast civil war" (11 Oct 2002) www.reliefweb.int/.
[413] These were deployed on the 26 September 2002.
[414] Agence France-Presse "Coast rebels gain ground, but French say 'no entry' to evacuation zone" (1 Oct 2002) www.reliefweb.int/.
[415] Agence France-Presse "Coast rebels gain ground, but French say 'no entry' to evacuation zone" (1 Oct 2002) www.reliefweb.int/.

Other international interventions by African nations clearly supported the government. Nigeria sent warplanes (and Ghana agreed to send an air squadron), to assist the government put down the rebellion.[416] ECOWAS also explicitly condemned the uprising and set up a six-member mediation group to try and bring peace and security to the country.[417]

On 17 October 2002, a ceasefire agreement was negotiated between the rebel forces and the government[418] that provided monitoring by the French forces until the arrival of a West African force.[419] On 31 October 2002, the government and rebels agreed to "refrain from any aggressive acts, such as exactions and extra-judicial executions, recruitment and use of mercenaries, enlisting child soldiers, and violating the ceasefire," and "to create a climate conducive to negotiations by proving our restraint through our words, actions and behavior."[420] No peace agreement was signed however, as the rebels called for President Gbagbo to step down. They maintained "that the administration of Mr Gbagbo is not a democratically elected power" The government insisted that the rebels disarm.[421]

On 17 November 2002, the first ECOWAS troops began to arrive to take over the monitoring of the ceasefire agreement from France.[422] However, the conflict intensified in late November when two new rebel groups emerged in the west.[423] In late January 2003, France hosted negotiations that led to the Linas-Marcoussis peace agreement, which provided for substantial compromises on the part of the government. It created a new National Reconciliation Government that was to bring about peace and stability through a series of reforms leading to a new set of credible elections,[424] and was to be supervised by France, ECOWAS and the United Nations.

The implementation of this agreement continues to face serious challenges. Nonetheless, in February 2003 the Council finally officially authorised the deployment of the ECOWAS forces, and the supporting French forces, under Chapter VII. They were authorised to use force to protect civilians threatened with physical violence.[425] Moreover, it authorised a United Nations Mission in Côte d'Ivoire (MINUCI), with a mandate to facilitate the implementation by the Ivorian parties of the

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[416] Reuters "Exodus from Ivory Coast city under French guard" (26 Sept 2002) www.reliefweb.int/.
[417] UN OCHA Integrated Regional Information Network "Côte d'Ivoire: ECOWAS sets up mediation group" (30 Sept 2002) www.reliefweb.int/.
[418] Reuters "Ivory Coast rebels sign ceasefire to end war" (17 Oct 2002) www.reliefweb.int/.
[419] UN OCHA Integrated Regional Information Network "Côte d'Ivoire: France to provide interim buffer force." (18 Oct 2002) www.reliefweb.int/.
[420] Agence France-Presse "Ivory Coast govt, rebels pledge to end 'aggressive acts'" (17 Nov 2002) www.reliefweb.int/.
[421] Reuters, (14 Nov 2002, Ivory Coast rebels reject draft peace plan" (31 Oct 2002) www.reliefweb.int/.
[422] Agence France-Presse "First west African peacekeeping troops arrive in Ivory Coast, *www.reliefweb.int/.* France, the United States, Britain, Canada, Germany, the Netherlands and Belgium had agreed to fund the ECOWAS operation.
[423] Agence France-Presse, (16 Dec 2002, Ivory Coast belligerents attend West African summit to defuse crisis. www.reliefweb.int/.
[424] Texte de l'Accord de Linas-Marcoussis, Dernière mise à jour: 24/01/03, Accord de Linas-Marcoussis. a- Un gouvernement de réconciliation nationale sera mis en place dès après la clôture de la Conférence de Paris pour assurer le retour à la paix et à la stabilité. b- Il préparera les échéances électorales aux fins d'avoir des élections crédibles et transparentes et en fixera les dates. c- Le gouvernement de réconciliation nationale sera dirigé par un Premier ministre de consensus qui restera en place jusqu'à la prochaine élection présidentielle à laquelle il ne pourra se présenter. f- Le gouvernement de réconciliation nationale s'attachera dès sa prise de fonctions à refonder une armée attachée aux valeurs d'intégrité et de moralité républicaine. Il procédera à la restructuration des forces de défense et de sécurité et pourra bénéficier, à cet effet, de l'avis de conseillers extérieurs et en particulier de l'assistance offerte par la France.
[425] SC Res 1464 (2003).

Linas-Marcoussis Agreement including a military component complementing the operations of the French and ECOWAS forces.[426] By mid 2003, the Government of National Reconciliation had taken power, and the parties had produced a joint statement declaring that the war was over.[427]

1.2.2 The Response of the international community

Recourse to Force to Overthrow a Legitimate Government

The first principle to have received explicit support as a practical response to the conflict was the rejection of the recourse to force to overthrow a legitimate government. This principle broadens the pattern observed in the Sierra Leone conflict. France sent forces to Côte d'Ivoire rapidly after the failed coup and start of the civil conflict, initially to evacuate its nationals. However, these troops remained in Côte d'Ivoire and by the end of October 2002, France emphasised that it sought to uphold a number of principles through its intervention. Dominique de Villepin, French Minister for Foreign Affairs, explained in a statement on 31 October 2002, that the first of these principles was its support for legitimate democratically elected governments.[428] From a classical legal perspective, the intervention was initially justified as a measure to protect nationals. It was also based on consent of Gbagbo, who was calling for international intervention, and later incorporated into the cease-fire. Nevertheless, the values and principles that France claimed to be supporting go well beyond these parameters:[429]

> Comme nous n'avons cessé de le rappeler, notre action en Côte d'Ivoire est dictée par les principes suivants:
>
> - respect et appui résolu aux autorités légitimes, démocratiquement élues;
>
> respect des frontières actuelles, de l'unité et de la souveraineté des Etats africains, de l'intégrité de leur territoire;
>
> appui aux efforts de médiation et de maintien de la paix conduits par les Africains eux-mêmes;
>
> - condamnation ferme de toute entreprise de déstabilisation menée par des rebelles;
>
> condamnation de tous les agissements susceptibles de porter atteinte à la paix civile et à la stabilité régionale.

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[426] SC Res 1479 (2003).
[427] Mr. Seydou Elimane Diarra, Prime Minister of the Government of National Reconciliation of Côte d'Ivoire, to whom I give the floor. S/PV.4793 (25 July 2003)
[428] Entretien du Ministre des Affaires Etrangeres, M. Dominique de Villepin, avec L'Agence Algérienne de Presse « Situation en Côte d'Ivoire: rôle de la France Dernière mise à jour » (Paris, le 31 octobre 2002).
[429] Entretien du Ministre des Affaires Etrangeres, M. Dominique de Villepin, avec L'Agence Algérienne de Presse « Situation en Côte d'Ivoire: rôle de la France Dernière mise à jour » (Paris, le 31 octobre 2002).

These principles were expanded upon in a later statement: [430]

> C'est une position de principe. Nous avons des principes, la France s'y tient concernant la Côte d'Ivoire. Nous ne soutenons pas un régime, nous ne soutenons pas un homme, mais nous dénonçons les atteintes à l'unité, à l'intégrité et à la souveraineté de la Côte d'ivoire. Nous dénonçons les violences, les exactions, les ingérences, les interférences extérieures, le recours à la force.
>
> Nous soutenons des principes qui nous paraissent particulièrement importants: le respect des élections démocratiques, le respect des droits de l'Homme, ou encore l'intégrité et la souveraineté de la Côte d'Ivoire et le soutien à tous les efforts de médiation régionale.

ECOWAS members similarly declared support for the democratically elected government. Nigeria and Ghana in particular immediately deployed military assistance to assist President Gbagbo after the failed coup.[431] Nigerian junior foreign minister Dubem Onyia, stated "The ECOWAS members think democracy is being threatened in Côte d'Ivoire,"[432] and that "ECOMOG is on alert and will be deployed when President Gbagbo decides."[433] He further emphasised that "ECOWAS has decided that any government that has to be changed must be changed through the ballot box," and that "We are acting to prop up the elected government in Ivory Coast".[434] Interestingly, however, the ECOWAS peacekeeping force which was ultimately agreed to, as a buffer force was not justified as seeking to support the government but rather to halt the fighting to allow negotiations to take place.[435]

The European Union resolved that the coup d'etat attempt was "seriously undermining the constitutional legality and unity of the country", and strongly condemned it, as well as the "persistence of fighting and the loss of human life in Côte d'Ivoire". It reiterated its "support for the democratically elected President, Mr Laurent Gbagbo, and the government of national unity of the Republic of Côte d'Ivoire as the guarantor of democratic legitimacy and the unity of the country".[436]

Violent Unconstitutional Changes of Government & Attempts to Take Power by Force

Despite the above statements, the principle most clearly supported by this practice is not so much the support for legitimate democratically elected governments, as the rejection of unconstitutional changes of government, particularly through attempts to take power by force.

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[430] Déclaration du porte-parole du Quai d'Orsay,(Paris, 13 décembre 2002).
[431] UN Office for the Coordination of Humanitarian Affairs (OCHA) (27 Sept 2002, Instability in Côte d'Ivoire Situation Report 27 Sep 2002, www.reliefweb.int/.
[432] (27 Sept 2002, Ivory Coast prepares to strike rebels as foreigners pull out, *by Hugh Nevill.* www.reliefweb.int/.
[433] (27 Sept 2002, Ivory Coast prepares to strike rebels as foreigners pull out, *by Hugh Nevill.* www.reliefweb.int/.
[434] Reuters, "Exodus from Ivory Coast city under French guard" (26 Sept 2002) www.reliefweb.int/.
[435] Agence France-Presse "West African leaders sending peacekeepers to I. Coast" (29 Sept 2002) www.reliefweb.int/.
[436] European Union, European Parliament resolution on the situation in Côte d'Ivoire, P5_TA-PROV(2002)0467 (10 Oct 2002) www.reliefweb.int/.

The Central organ of the Mechanism for Conflict Prevention, Management and Resolution of the AU, for instance, emphasised the unconstitutional nature of the attempted change of government. It explicitly condemned "the attempt to undermine constitutional legality in Côte d'Ivoire."[437] Moreover, it recalled the provisions of the AU and Declaration of Lomé 2000 on unconstitutional changes of government in Africa and "Urgently appealed to the parties concerned to seek, through dialogue, a lasting solution to the current problem, in strict conformity with constitutional legality, with a view to consolidating the process of reconciliation that was initiated at the Forum on National Reconciliation". In the AU, an unconstitutional change of government includes a military coup or mercenary intervention against a democratically elected government, or the replacement of a democratic government by an armed dissident group.

The ambiguity surrounding President Gbagbo's democratic legitimacy (given the violence surrounding the elections and the fact that a number of opposition members were banned from running) must nevertheless put into question at some level whether the protection of democratically elected governments can genuinely be relied upon here. Nonetheless, at least the early reactions emphasised this principle.

A slightly different formulation rejected attempts to take power by force, and may amount to an implicit broadening of the principle to focus on the means of attempting to take power rather than the truly democratic nature of the government. The AU stated that it: «Réitère également sa ferme condamnation de la tentative de prise du pouvoir par la force en Côte d'Ivoire».[438] The Council also formulated the key principle in these terms. It stated that it "firmly condemns attempts to use force to influence the political situation in Côte d'Ivoire and to overthrow the elected Government."[439] Finally, the European Union similarly condemned the violence perpetrated against a legitimate government and re-iterated its support for the principles of the African Union condemning any recourse to force to obtain political change.[440]

Attempt to Settle Disputes through Force?

A number of international actors disapproved of the recourse to force as a means of settling disputes. The Secretary-General in particular expressed a general principle unequivocally condemning "any attempt to settle disputes through violence". He went on to call "on all those involved in these attacks

[437] African Union "Côte d'Ivoire: Communiqué of the 84th Ordinary Session" (24 Sept 2002) www.reliefweb.int/.
[438] African Union « Communiqué de l'Union africaine: Erythrée, Soudan, Côte d'Ivoire. » (12 Oct 2002) www.reliefweb.int/.
[439] Statement of the President of the Security Council, S/PRST/2002/42. See also Press statement on Côte d'Ivoire by President of Security Council, AFR/506, SC/7558 (2002).
[440] European Union "Declaration by the EU Council on the situation in Côte d'Ivoire" (21 Oct 2002) www.reliefweb.int/.

to immediately and unconditionally cease their activities and submit to the constitutional order". He also called on all concerned parties to refrain from any action that could worsen the situation.[441]

In addition, France made a number of statements condemning recourse to force and violence and expressing its concern at the direction the conflict was taking.[442]

> La France dénonce le recours à la force, les violences et les exactions ainsi que toute ingérence ou interférence extérieure. En liaison avec ses partenaires, elle ne manquera pas d'en tirer toutes les conclusions.

These statements must be taken in the context of the situation in Côte d'Ivoire in general. For instance they must be considered within France's list of principles supporting legitimate democratic government and the territorial integrity and sovereignty of governments.[443] The violence, and its downward spiral, of itself caused serious concern – Mr Villepin explained that what France feared was "l'engrenage de la violence, la perte des repères", and thus that it was important to recreate the basis for political and social stability.[444] Nonetheless, the recourse to force rejected was still primarily the use of force against a constitutional government.

Recourse to Force in Breach of an Agreement

The international community rejected recourse to force in breach of a peace or cease-fire agreement, reinforcing the practice emerging from the conflict in Sierra Leone. A number of agreements were entered into by the rebels and government during the course of the conflict,[445] and the Lomé agreement in particular included an undertaking by both sides that they would refrain from "violations of the accord on cessation of hostilities" They pledged to urge "their authorities to refrain from any bellicose acts such as abuses and violence [and] extra-judicial killings".[446] The primary peace

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[441] UN Secretary-General "Secretary-General condemns armed attacks in Côte d'Ivoire" (20 Sept 2002) SG/SM/8395, AFR/485.

[442] "'Face à la détérioration de la situation en Côte d'Ivoire, la France tient à exprimer sa préoccupation et sa conviction qu'il n'est pas de solution durable à la crise en dehors d'un règlement politique général rassemblant l'ensemble des forces politiques ivoiriennes. Les atteintes à l'unité, à l'intégrité et à la souveraineté de la Côte d'Ivoire sont inacceptables. La France dénonce le recours à la force, les violences et les exactions ainsi que toute ingérence ou interférence extérieure. En liaison avec ses partenaires, elle ne manquera pas d'en tirer toutes les conclusions." Déclaration du porte-parole du Quai d'Orsay, (Paris, 13 décembre 2002).

[443] Déclaration du porte-parole du Quai d'Orsay (Paris, 13 décembre 2002). "C'est une position de principe. Nous avons des principes, la France s'y tient concernant la Côte d'Ivoire. Nous ne soutenons pas un régime, nous ne soutenons pas un homme, mais nous dénonçons les atteintes à l'unité, à l'intégrité et à la souveraineté de la Côte d'ivoire. Nous dénonçons les violences, les exactions, les ingérences, les interférences extérieures, le recours à la force. Nous soutenons des principes, nous soutenons des principes qui nous paraissent particulièrement importants: le respect des élections démocratiques, le respect des droits de l'Homme, ou encore l'intégrité et la souveraineté de la Côte d'Ivoire et le soutien à tous les efforts de médiation régionale."

[444] Le Quotidien «La Croix », « Entretien du ministre des affaires etrangeres, M Dominique de Villepin » (Paris, 16 décembre 2002) www.diplomatie.gouv.fr/actu/actu.asp.

[445] The initial cease-fire brokered by ECOWAS was entered into a month into the conflict and provided for France to monitor the agreement until ECOWAS troops could be deployed. On 31 October 2002, a further accord was entered into in Lome which agreed to respect the cease-fire.

[446] Agence France-Presse "Ivory Coast govt, rebels pledge to end 'aggressive acts'" (31 Oct 2002) www.reliefweb.int/.

agreement, the Linas-Marcoussis agreement,[447] explicitly provided for international supervision of the agreement,[448] "afin que les mesures de redressement appropriées soient prises."[449]

While there was extensive French and Nigerian intervention before any such agreements were signed, the formal intervention of the Council into the conflict only took place once the peace agreement was signed. The Council emphasised the binding nature of the agreement and that it expected that it would be implemented. It explicitly endorsed the accord, and entrenched the agreement by calling on the parties under Chapter VII to implement it fully and without delay.[450] Moreover, the ECOWAS troops were specifically agreed on to supervise the agreement.[451]

Regional Destabilization

The well established principle prohibiting recourse to force leading to regional destabilization was only mentioned in passing in this conflict. France did comment that it rejected any actions that were likely to affect the domestic peace and security and regional stability. «Comme nous n'avons cessé de le rappeler, notre action en Côte d'Ivoire est dictée par les principes suivants [...] – condamnation de tous les agissements susceptibles de porter atteinte à la paix civile et à la stabilité régionale.»[452] The AU also commented on its concern at the threat to peace and security of the Côte d'Ivoire as well as the region.[453]

Violence against Civilians by the Government

The rejection of violence against civilians received repeated support. The tactics of the government in particular attracted condemnation. President Gbagbo's security forces, for instance, burned down several districts, home to immigrant workers which they felt were associated with the uprising.[454] The

[447] 2003 Linas-Marcoussis Accord: a- Un gouvernement de réconciliation nationale sera mis en place dès après la clôture de la Conférence de Paris pour assurer le retour à la paix et à la stabilité. b- Il préparera les échéances électorales aux fins d'avoir des élections crédibles et transparentes et en fixera les dates. c- Le gouvernement de réconciliation nationale sera dirigé par un Premier ministre de consensus qui restera en place jusqu'à la prochaine élection présidentielle à laquelle il ne pourra se présenter. f- Le gouvernement de réconciliation nationale s'attachera dès sa prise de fonctions à refonder une armée attachée aux valeurs d'intégrité et de moralité républicaine. Il procédera à la restructuration des forces de défense et de sécurité et pourra bénéficier, à cet effet, de l'avis de conseillers extérieurs et en particulier de l'assistance offerte par la France.

[448] EU, AU, ECOWAS, SG, Francophonie Organisation, IMF and World Bank, G8, and France.

[449] Linas-Marcoussis Accord, Article 4.

[450] SC Res 1464 (2003).

[451] SC Res 1464 (2003) para 8, SC Res 1479 (2003), para 2.

[452] L'Agence Algérienne de Presse « Entretien du Ministre des Affaires Etrangeres, M Dominique de Villepin: Situation en Côte d'Ivoire: rôle de la France » (Paris, le 31 octobre 2002).

[453] African Union « Le Conseil Exécutif de l'Union africaine: Décision sur la situation en Côte d'Ivoire » 23 Dec 2002) www.reliefweb.int/. « 1. Exprime sa grave préoccupation face à la persistance de la crise, a ses graves conséquences humanitaires ainsi qu'au danger qu'elle fait peser sur la paix, la sécurité et la stabilité de la Côte d'Ivoire et de la région tout entière. 2. Souligne la nécessité de rechercher une solution négociée à la crise dans le respect de la légalité constitutionnelle et exhorte le Gouvernement de la République de Côte d'Ivoire et les Mouvements rebelles à coopérer pleinement avec la Médiation. 3. Encourage les dirigeants de la CEDEAO à poursuivre leurs efforts et à renforcer la cohésion de la région pour promouvoir une solution rapide et pacifique à la crise. »

[454] Agence France-Presse " Ivory Coast: a crisis of many dimensions", (27 Sept 2002) www.reliefweb.int/.

government also declared the rebel held areas to be a "war zone" and indicated that its attempts to retake that territory would use all-out force.[455]

The EU formulated the key principle in a clear and direct fashion. It "strongly condemns all acts of violence, from whatever source, against the population."[456] It also called on President Gbagbo "to urge his government and the Ivorian military to guarantee the protection of civilians, whatever their ethnic origin, and to step up their moves towards the integration and reconciliation of all the components of Ivorian society".[457] Other regional bodies, particularly the AU similarly condemned the violence, "the exactions against civilians", and urged the parties to observe human rights.[458]

The Council also called on "all parties to ensure full respect for human rights and international law, particularly with regard to the civilian population regardless of its origin, and to bring to justice all those responsible for any violation thereof." [459] The mandates of the French and ECOWAS troops incorporated the protection of civilians under the Council resolution. The Council authorized those troops "to ensure, without prejudice to the responsibilities of the Government of National Reconciliation, the protection of civilians immediately threatened with physical violence within their zones of operation".[460] It also demanded that "all Ivorian parties take all the necessary measures to prevent further violations of human rights and international humanitarian law, particularly against civilian populations whatever their origins".[461]

France had already indicated that while its prime mission did not include the protection of civilians, "nos soldats ne resteront évidemment pas les bras croisés s'ils étaient témoins d'exactions."[462] In response to the discovery of the mass graves, the French became resolute "Il y a aujourd'hui des actes inacceptables qui se passent en Côte d'Ivoire. C'est une question qui doit concerner et mobiliser la communauté internationale."[463]

Peaceful Settlement of Disputes

Finally, the international community explicitly and repeatedly maintained that only a peaceful resolution of the dispute was acceptable. France explained its conviction "qu'il n'est pas de solution durable à la crise en dehors d'un règlement politique général rassemblant l'ensemble des forces

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[455] Reuters "Exodus from Ivory Coast city under French guard" (26 Sept 2002) www.reliefweb.int/.
[456] European Union "Declaration by the EU Presidency concerning the situation in Côte d'Ivoire" (17 Dec 2002) europa.eu.int/.
[457] European Union "European Parliament resolution on the situation in Côte d'Ivoire" (10 Oct 2002) P5_TA-PROV(2002)0467 www.reliefweb.int/.
[458] African Union "First extraordinary session of the Executive Council: decision on the situation in Côte d'Ivoire" (16 Dec 2002) www.reliefweb.int/.
[459] Security Council condemns attempts at force to influence political situation, overthrow elected government in Côte d'Ivoire, S/PRST/2002/42.
[460] SC Res 1464 (2003) para 9.
[461] SC Res 1479 (2003) para 8.
[462] Déclaration du porte-parole du Quai d'Orsay (Paris, 13 décembre 2002).
[463] Le Quotidien «La Croix », « Entretien du ministre des affaires etrangeres, M Dominique de Villepin » (Paris, 16 décembre 2002) www.diplomatie.gouv.fr/actu/actu.asp.

politiques ivoiriennes.[464] It also stated:[465] "Notre seul objectif, c'est la recherche de la paix et de la réconciliation."

The European Union also reiterated its commitment to:

> a political solution to the crisis that encompasses all the opposing parties, pursues the course of national reconciliation embarked upon in October 2001 and respects democratic institutions and the unity of the national territory of the Republic of Côte d'Ivoire.[466]

Moreover, the Secretary-General explicitly supported "the Summit's call for the insurgents to cease hostilities and for all parties to work towards a negotiated settlement to avert further violence, whose humanitarian consequences could be disastrous for Côte d'Ivoire and the entire sub-region."[467]

Finally, as reviewed in chapter 1, the Council has repeatedly emphasised the importance of peaceful resolution of disputes. In this conflict, as well, it "called on all parties to resolve the current crisis peacefully and to abstain from any actions or statements or demonstration that might jeopardize or otherwise hamper the search for a negotiated solution."[468] It also called on the parties to recognize that the crisis could only be resolved through a political solution.[469]

Interaction of Principles

It may seem contradictory that the international community sought to uphold the principle of peaceful resolution, impartially demanding that both parties settle peacefully without specifying the required outcome, at the same time as strongly condemning the recourse to force against the legitimate government.[470] It could have been expected that the President would be re-installed, as had been the case in Haiti, and to some extent in Sierra Leone. In this case, however, it seems that the international community did not consider that outcome to be compulsory.

This may be due to the discomfort surrounding President Gbagbo's legitimacy. Côte d'Ivoire's Patriotic Movement (MPCI), the political wing of mutinous Ivorian soldiers called on France to remain neutral.[471] "The Great France, a country of human rights, freedom and democracy, is not expected to support an autocrat, a regime tarnished by political assassinations, mass graves under the

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[464] Déclaration d'une porte-parole du Quai d'Orsay, (Paris, 12 décembre 2002).
[465] Le Quotidien «La Croix », « Entretien du ministre des affaires etrangeres, M Dominique de Villepin » (Paris, 16 décembre 2002) www.diplomatie.gouv.fr/actu/actu.asp.
[466] European Union "European Parliament resolution on the situation in Côte d'Ivoire" (10 Oct 2002) P5_TA-PROV(2002)0467 www.reliefweb.int/.
[467] UN Secretary-General "Secretary-General affirms UN support for subregional efforts to resolve Côte d'Ivoire crisis" (30 Sept 200), Press Release SG/SM/8408 - AFR/489.
[468] UN Security Council "Press statement on Côte d'Ivoire by President of Security Council" (31 Oct 2002) AFR/506, SC/7558.
[469] UN Security Council "Press statement on Côte d'Ivoire by President of Security Council" (31 Oct 2002) AFR/506, SC/7558.
[470] European Union "European Parliament resolution on the situation in Côte d'Ivoire" (10 Oct 2002) P5_TA-PROV(2002)0467. www.reliefweb.int/.
[471] Pan African News Agence "Ivorian rebel movement urges France to be neutral" (12 Dec 2002," www.reliefweb.int/.

pretext of any constitutional legality. A leader who commits genocide deserves no support, he should appear before an International Criminal Tribunal," the release said. [472]

It may also provide an indication of the predominance of the principle of preventing conflict and violence over the principle rejecting recourse to force to bring about an unconstitutional change in government. The EU, for instance, did not consider that any particular outcome was obligatory, only that the method of reaching such an agreement must not involve recourse to force. The EU's emphasis on a peaceful solution and a cease-fire suggests that despite its disapproval of attacks against democratic governments, when a civil conflict ensues, the conflict must nonetheless be resolved peacefully.[473] Similarly, the ECOWAS peacekeeping force was also mandated to halt the fighting to allow negotiations to take place,[474] rather than to assist and reinforce the government. "Wade and host President John Kufuor of Ghana both made it clear the peacekeeping force would not support Ivorian government attacks on the rebels. The force's mandate, both said, is to halt the fighting to allow negotiations to take place, which would save face on both sides."[475]

Moreover, it is interesting to note that the resolution sought more than a return to the *status quo*. In contrast to the parallel principle involving intra-State conflicts,[476] where peace is preferred over justice, leading to the favouring of the *status quo*, here the resolution of the underlying sources of the conflict were to be addressed.[477] The Council called "upon the President of Côte d'Ivoire to involve fully all parties and to seek consensus among them."[478]

Consent

The final point that is worth considering is the extent to which consent of the State provided a legal justification for intervention.[479] President Gbagbo called for assistance to overthrow the rebels from the first, and then called for assistance to help resolve the conflict, by military intervention if necessary. President Gbagbo's advisor in Europe, Toussaint Alain, told Reuters "France, the United States and the European Union must get involved in the search for a peaceful solution and consider all options, even military intervention, to prevent the country and the whole region from exploding". [480]

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[472] Pan African News Agency "Ivorian rebel movement urges France to be neutral" (12 Dec 2002) www.reliefweb.int/.
[473] See also the EU comments reinforcing the need for all parties involved in the current crisis to participate in solving the conflict by political means, cease all hostilities and put a stop to any human rights violations European Union "Declaration by the EU Presidency concerning the situation in Côte d'Ivoire" (17 Dec 2002) europa.eu.int/.
[474] Agence France-Presse "West African leaders sending peacekeepers to I. Coast" (29 Sept 2002) www.reliefweb.int/.
[475] Agence France-Presse "West African leaders sending peacekeepers to I. Coast" (29 Sept 2002) www.reliefweb.int/.
[476] The prohibition on recourse to force in international relations.
[477] Presidential Statement "Security Council condemns attempts at force to influence political situation, overthrow elected government in Côte d'Ivoire" S/PRST/2002/42.
[478] Presidential Statement "Security Council condemns attempts at force to influence political situation, overthrow elected government in Côte d'Ivoire" S/PRST/2002/42.
[479] Note once again that the legal rationale for intervention is not the focus of this enquiry.
[480] Reuters "Ivory Coast urges West to help resolve conflict" (10 Dec 2002) www.reliefweb.int/.

Despite these clear requests, the legality of sending forces can be contested under traditional theory. The country was split, with rebels holding the north, and had the appearance of an insurgency or belligerency rather than a rebellion. Thus, the principle prohibiting assistance to a government, even at its request, in cases of insurgency or belligerency should have applied. The forces would, however, be justified as legitimate peace keepers once all parties agreed to their presence to monitor the cease-fire.

1.2.3 Conclusion

Empirically, the patterns of responses observable during both the Sierra Leone and Côte d'Ivoire civil wars reinforce the notion of certain emerging principles rejecting recourse to force. The principle rejecting recourse to force aiming to overthrow a democratic government (established in the discussion of the conflict in Sierra Leone) is adopted in a wider form here, with the international community rejecting recourse to force attempting to bring about an unconstitutional change of government. This represents a development from democratic principles to a more generic rejection of recourse to force against a constitutional government.

In addition, the review of this practice suggests that there is a complex network of principles advocated by the international community, which at times are in competition. For instance, despite condemnation of the initial attempts to overthrow the government, when the conflict became entrenched there appeared a general condemnation of recourse to force by either party. The international community also expressed determination that the conflict should be resolved by peaceful means and peace agreements providing for power sharing. Thus, despite disapproval of the recourse to force to bring about unconstitutional changes of government, the government was not entitled to act brutally in response. As Human Rights Watch explained in condemning the conduct of the government: "the response of the government to the military revolt has not been restricted to legitimate security measures, but has rather tended, at minimum, to exacerbate existing divisions in Ivorian society and, at worst, to promote or cause human rights abuses."[481]

1.3 LIBERIA

The most recent of the conflicts in Liberia began at a low level in 1999 and flared up dramatically in March 2003. The practice of the international community in response to this conflict complements that in Sierra Leone and Côte d'Ivoire and supports the principles extracted in that discussion. Nonetheless, this conflict is of additional interest because of its particular practice in response to force which causes humanitarian crises and civilian deaths.

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[481] Human Rights Watch "Côte d'Ivoire: Government abuses in response to army revolt" (28 Nov 2002) www.reliefweb.int/.

Two essential principles seem to underlie the reaction of the international community: the humanitarian catastrophe facing the population of Liberia, and the attempts to take power by force. This latter principle involves a variation on the rejection of recourse to force to take power unconstitutionally, or recourse to force in the resolution of political disputes. This principle reflects the prohibition on the overthrow of democratically elected governments, except that in this instance the democratic government of Charles Taylor was in question, and he was pressured by the international community to step down. This formulation may ultimately represent an incremental broadening of the principle to reject all attempts to take power by force, or as formulated by some states any attempt to take power through unconstitutional means.

1.3.1 The conflict in Liberia

The recent civil conflict in Liberia officially started in 1999 with clashes between Charles Taylor's then recently elected government, and rebels in the north. In March 2003, the fighting intensified dramatically and the rebel forces marched on Monrovia, escalating the unrest to the point where the conflict re-surfaced on the international community agenda.

Liberia has been in a state of unrest for the last 14 years. The 1989 civil conflict during which Taylor overthrew President Doe, who had himself come to power through a military coup, concluded in 1997 with Taylor winning the Presidential elections by a landslide. International observers declared the elections to be free and fair at the time. Since his election, however, Taylor has proven himself to be a destabilising influence on the region, supporting rebel wars in neighbouring states, particularly Sierra Leone. Liberia has been subject to arms and diamond embargos, while Taylor himself is subject to personal travel sanctions and has been branded an international pariah. Within his own region of West Africa, he became shunned as a troublemaker and accused of fermenting civil wars outside his borders.[482]

The recent conflict was initiated by a rebel group in the north, the Liberians United for Reconciliation and Democracy (LURD), which was joined by the new Movement for Democracy in Liberia (MODEL) in the west. During May and June 2003 these rebel groups gained control of the territory of Liberia and began an assault and siege of Monrovia[483] where tens of thousands of Liberian civilians had fled to escape their military campaign.

The key focus of the international community was on the fact that the fighting between the government and the rebels caused a major humanitarian disaster with large numbers of civilians being killed, major water and food shortages, and an outbreak of cholera. Clashes on the western outskirts of Monrovia caused close to 100,000 displaced people in camps to flee for their safety. Thousands had

[482] Institute for Security Studies "Liberating Liberia: Charles Taylor and the rebels who unseated him" (30 Nov 2003) ISS Paper 82.
[483] The LURD reached the outskirts of the capital on 5 June.

moved to the central and eastern parts of the capital. After the beginning of the attacks on Monrovia virtually none of Liberia's more than 3 million people, already traumatized by years of war and abject poverty, were able to receive emergency relief assistance.[484] Many agencies warned that "a dire humanitarian situation" was developing in the city, where thousands of civilians sought refuge in schools and the national sports stadium.[485]

The Liberian peace talks began on 4 June under the auspices of ECOWAS. They led to a ceasefire agreement on 17 June which stipulated that an interim government, from which Taylor would be excluded, would be agreed upon within 30 days.[486] However, this agreement was immediately repudiated. The LURD advance on Monrovia began on 5 June. The ceasefire was signed on 17 June, but held for less than a week before a second attack brought rebels into Monrovia's industrial area which included the port area. After ECOWAS agreed to send peacekeepers there was a brief period of calm before LURD again attacked and consolidated their hold on the port on 17 July.[487] Large numbers of casualties resulted from these attacks, especially during intense shelling of the city.[488] As the fighting continued to intensify, ECOWAS agreed to send peacekeepers, although a substantial delay was caused by the fact that ECOWAS requested that the funding for the mission be provided by other nations.

Charles Taylor himself stepped down on 11 August 2003 and went into exile in Nigeria in response to extensive international pressure, including being indicted on 4 June by the Special Court in Sierra Leone for war crimes.[489] He had agreed to a ceasefire which anticipated an interim government without him on 17 June but had later recanted. Nonetheless in late June 2003, US President George Bush called for him to step down and hinted that the US might send troops to help stabilise the situation.[490] Ultimately Taylor did resign without recourse to further violence and handed power to his deputy Moses Blah.

Since then, the peace process has progressed more rapidly. US troops arrived to assist the ECOWAS peacekeepers, and a peace agreement was signed on 18 August 2003. The US troops withdrew in September, and were replaced by a 15,000 strong UN peacekeeping mission, which was mandated to protect civilians, supervise elections in 2005, and assist in disarming and demobilising combatants.[491]

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[484] Secretary-General alarmed at impact of fighting in Liberia, SG/SM/8740.

[485] UN OCHA Integrated Regional Information Network "Liberia: Taylor calls for UN peace-keeping force" (11 Jun 2003) www.reliefweb.int/.

[486] UN OCHA Integrated Regional Information Network "Liberia: Mediator threatens to end peace talks, Bush tells Taylor to quit" (26 Jun 2003) www.reliefweb.int/.

[487] Institute for Security Studies "Liberating Liberia: Charles Taylor and the rebels who unseated him" (30 Nov 2003) ISS Paper 82.

[488] Institute for Security Studies "Liberating Liberia: Charles Taylor and the rebels who unseated him" (30 Nov 2003) ISS Paper 82. The Liberian health minister said at least 200 people had been killed and 350 injured in the latest battle for Monrovia. UN OCHA Integrated Regional Information Network "Liberia: Mediator threatens to end peace talks, Bush tells Taylor to quit" (26 Jun 2003) www.reliefweb.int/.

[489] UN News Service "UN-backed Sierra Leone court indicts Liberian President Charles Taylor" (4 Jun 2003). www.reliefweb.int/.

[490] Institute for Security Studies "Liberating Liberia: Charles Taylor and the rebels who unseated him" (30 Nov 2003) ISS Paper 82.

[491] UN OCHA Integrated Regional Information Network "Liberia: Disarmament of combatants to start in January" (29 Oct 2003) www.reliefweb.int/.

In October, as agreed, President Blah stepped down and a National Transitional Government was created with Gyude Bryant as Chairman. The transitional government was mandated to implement the Comprehensive Peace Agreement and to prepare for democratic elections in 2005.[492]

1.3.2 The response of the international community

Humanitarian Crisis and Civilian Deaths

The repeated and extensive condemnation of the impact of the conflict on civilians is a striking aspect of the response of the international community. This impact, both in terms of direct civilian deaths from the conflict and in the form of a developing humanitarian crisis, led to condemnation of the violence and calls on the parties to stop the fighting and negotiate a peaceful solution to the conflict. Both government and rebel forces were considered to have been responsible for widespread killing, torture, sexual slavery and conscripting child fighters.[493]

Humanitarian crisis

The timing of the international community' response to the conflict correlates to the sudden increase in the threat of a humanitarian crisis following the LURD march on Monrovia, and its waves of attacks on that city beginning on the 5th June. It also correlates with the signing of the ECOWAS negotiated ceasefire agreement on the 17th June, and the role of that repeatedly broken agreement is considered below. The existence of a number of principles operating in parallel seems to be consistent with what was observed in the conflict in Côte d'Ivoire.

The Secretary-General explicitly called on all the parties to cease hostilities in order to give the peace negotiations a chance and allow for the safe and unhindered delivery of humanitarian assistance to Liberia's traumatized population.[494] "The combination of cholera outbreaks and food shortages in an environment of ongoing violence, disruption of life-saving services, and cessation of humanitarian aid threatens to produce a major humanitarian catastrophe."[495] The Secretary-General urgently called on the Council to authorise a peacekeeping force to prevent a major humanitarian tragedy and to stabilize the situation in that country; "the consequences of allowing the situation to spiral out of control are too terrible to contemplate."[496]

The European Union also emphasised the "gravity of the humanitarian situation in Liberia and the urgent need to provide assistance" [497] ECOWAS Executive Secretary, Mohammed Chambas told the

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[492] UN Mission in Liberia (UNMIL), National Transitional Government inaugurated in Liberia (15 Oct 2003) UNMIL/PIO/PR/6.
[493] Agence France-Presse "Liberia's Taylor, rebels to meet in Ghana for landmark peace talks" (2 Jun 2003) www.reliefweb.int/.
[494] Secretary-General deeply concerned at renewed fighting in Liberia, calls for immediate cessation of hostilities, SG/SM/8761, AFR/650.
[495] Violations of ceasefire in Liberia: Letter from the Secretary-General to the Security Council (28 Jun 2003) S/2003/678.
[496] Violations of ceasefire in Liberia: Letter from the Secretary-General to the Security Council (28 Jun 2003) S/2003/678.
[497] European Union "Declaration by the EU Presidency on the peace process in Liberia" (21 Jul 2003) www.reliefweb.int/.

meeting of ECOWAS military chiefs: "The situation in Liberia is grave. We need to talk about sending an international intervention force. It needs to go in now and very quickly to keep the warring factions apart, secure Monrovia and pave the way for humanitarian agencies to move in."[498]

The Council responded to these pleas and determined that the situation in Liberia constituted a threat to international peace and security. It pointed to "its effects on the humanitarian situation, including the tragic loss of countless innocent lives, in that country, and its destabilizing effect on the region".[499] Thus, it authorized a multinational force to support the implementation of the 17 June 2003 ceasefire agreement under Chapter VII. The multinational force mandate relied both on the agreement and humanitarian aspects. It was to establish "conditions for initial stages of disarmament, demobilization and reintegration activities", "to help establish and maintain security in the period after the departure of the current President and the installation of a successor authority, taking into account the agreements to be reached by the Liberian parties", and "to secure the environment for the delivery of humanitarian assistance".[500]

Members of the Council emphasised these factors during the meeting prior to SC Res 1497 on 1 August 2003, authorising the multinational force.[501] The United States said that their sponsorship of the resolution "reflected the importance the United States placed on finding the right and effective means to bring peace to Liberia".[502] Germany maintained that "the constant death of civilians was to be deplored and the Council must react swiftly." Chile pointed out that it had supported the resolution "as its priority was to save lives and to give an appropriate response to a humanitarian crisis that brooked no further delay."[503] This focus by the international community also apparently was adopted by the local parties. At one point the main rebel group, the LURD, declared a truce on the basis that it would "provide needed relief to the civil populace and subsequently avoid a grotesque humanitarian catastrophe in Monrovia."[504] Later in the conflict, Liberia's caretaker president urged the ECOWAS peacekeepers to push into the lawless interior and stop carnage taking place.[505]

The Protection of Civilians

In the Liberian conflict the threat to the life of the civilian population was central to the decision to intervene. The Secretary-General called on parties to refrain from any action that might further

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[498] Letter from the Secretary-General to the President of the Security Council, (29 Jul 2003) S/2003/769. The deployment of ECOWAS troops was unfortunately repeatedly delayed for economic reasons as the members emphasised from the beginning that they needed financial assistance to undertake the operations. AllAfrica "International indecision as crisis deepens in Liberia" (21 Jul 2003) AllAfrica.com.

[499] SC Res 1497 (2003) preamble, (1 August 2003).

[500] SC Res 1497 (2003) para 1.

[501] SC Res 1497 (2003), Adopted by 12-0-3 (France, Germany, Mexico).

[502] SC Res 1497 (2003).

[503] SC Res 1497 (2003).

[504] Agence France-Presse "Liberian rebels declare truce to prevent humanitarian disaster in Monrovia" (27 June 2003) www.reliefweb.int/.

[505] Reuters "Liberia's Blah urges peacekeepers to halt killings" (25 Aug 2003) www.reliefweb.int/.

endanger the lives of the civilian population.[506] He called on the parties to the conflict "to take all necessary measures to ensure that civilians are not targeted and are spared the effects of war." He also reminded them that violators of international humanitarian (*jus in bello*) and human rights law would be held accountable for their acts.[507]

Before the ceasefire was first brokered, the Council already expressed its concern at the "rapidly deteriorating security situation" and urged "all combatants in the strongest terms to immediately cease hostilities and agree to a ceasefire". In so doing the Council emphasised "the urgent need for the combatants to spare the lives and property of innocent civilians, to maintain defensive positions well clear of Monrovia and Buchanan, and to refrain from committing further violations of human rights and international humanitarian law."[508] These concerns appear repeatedly in Council resolutions addressing the conflict.[509]

Taking Power by Force, and Use of Force to Resolve Political Differences

The trend already identified in the cases above rejecting recourse to force for political gain is expanded and consolidated through the consistent rejection and condemnation of attempts to take power by force and the use of force to resolve political differences in the Liberian case. The Secretary-General formulated these propositions explicitly, condemning any attempts to resolve political differences through armed violence,[510] and rejecting attempts to seize power by force.[511] He rejected military means, maintaining that "the Liberian crisis cannot be solved by military confrontation. Such confrontation can only lead to a further deterioration of an already dire humanitarian situation." In addition, he reiterated "that any attempt to seize power by force would be unacceptable to the international community."[512]

The Council also adopted similar principles, urging "the LURD and MODEL to refrain from any attempt to seize power by force, bearing in mind the position of the African Union on unconstitutional changes of government as stated in the 1999 Algiers Decision and the 2000 Lomé Declaration".[513] This was reinforced by statements of the AU and ECOWAS that taking power by unconstitutional means would not be recognised. They warned rebels that that they would not recognize any group that

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[506] SG "Secretary-General deeply concerned at renewed fighting in Liberia, calls for immediate cessation of hostilities" SG/SM/8761, AFR/650.
[507] SG "Secretary-General alarmed at impact of fighting in Liberia" SG/SM/8740, AFR/638.
[508] Press statement on Liberia by Security Council President, SC/7787, AFR/644.
[509] SC Res 1478 (2003) para 5, SC Res 1478 (2003) para 5, SC Res 1509 (2003) para 10.
[510] SG "Secretary-General deeply concerned at renewed fighting in Liberia, calls for immediate cessation of hostilities" SG/SM/8761, AFR/650.
[511] SG "Secretary-General condemns resumption of hostilities in Liberia; renews call for force deployment to restore calm" SG/SM/8787 AFR/670.
[512] SG "Secretary-General condemns resumption of hostilities in Liberia; renews call for force deployment to restore calm" SG/SM/8787 AFR/670.
[513] SC Res 1497 (2003) para 13.

takes power in Liberia through "unconstitutional means or by force of arms".[514] ECOWAS also emphasised that a negotiated settlement was the only way to end the conflict.

General Abdulsalami Abubabakar, leading ECOWAS efforts to end the conflict stated:

> ECOWAS and the International Community will not tolerate power obtained or maintained through unconstitutional means. I remind the belligerents that dialogue remains the only avenue for ensuring permanent peace in Liberia.[515]

Similarly, the EU condemned "the attempts by armed rebel groups to take power in Liberia by the use of force".[516] It called on all the warring parties "to put an immediate end to hostilities" and urged all the belligerents to search for a negotiated settlement of the crisis.[517]

The principle that achieving power by force is not acceptable became reflected in statements by the rebels themselves. At one time the MODEL rebel forces reminded the LURD forces that "we are appealing to them to recognise the sentiments of suffering Liberians and stop the fighting now." "The international community has already said it will not recognise any armed force that comes into power by the barrel of the gun. If LURD persists on their advance into Monrovia, then they will have to answer to the international community."[518]

The rejection of recourse to recourse to force to settle political disputes was explicitly adopted in the final peace agreement, which stated that it was: "Determined to establish sustainable peace and security, and pledging forthwith to settle all past, present and future differences by peaceful and legal means and to refrain from the threat of or use of force".[519]

In addition, it was agreed that neither of the warring factions could obtain the posts of Chairman and Vice-Chairman. These would be open only to political parties and civil groups, not to the rebels or Blah's government.[520] As ECOWAS emphasised "We are trying to strike a balance [...] the stakes are very high but at the same time we cannot put out a signal that one way to power is just to take up arms and cause all-round havoc."[521]

This reflects statements by the Secretary-General that the use of means that cause suffering to the civilian population disqualifies groups from leadership roles in the future of the country:

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[514] Deutsche Presse Agentur "African, ECOWAS, leaders warn Liberian rebels: no recognition" (27 Jul 2003) www.reliefweb.int/.
[515] Deutsche Presse Agentur "African, ECOWAS, leaders warn Liberian rebels: no recognition" (27 Jul 2003) www.reliefweb.int/.
[516] European Council "Bulletin EU 5-2002. Common Foreign and Security Policy (23/29). Liberia" (2002) europaeuint/abc/doc/off/bull/en/200205/p106023htm.
[517] Global News Wire, Asia Africa Intelligence Wire "European Union condemns violence in Liberia" (16 June 2003) web.lexis-nexis.com/executive/.
[518] UN OCHA Integrated Regional Information Network "Liberia: ECOWAS and MODEL call on LURD to stop fighting" (21 Jul 2003) www.reliefweb.int/.
[519] Peace Agreement between Government of Liberia, LURD, MODEL and Political Parties (18 Aug 2003).
[520] Agence France-Presse "EOWAS statement: Liberian peace deal to be signed after last-minute talks" (18 Aug 2003) www.reliefweb.int/.
[521] Agence France-Presse "EOWAS statement: Liberian peace deal to be signed after last-minute talks" (18 Aug 2003) www.reliefweb.int/.

> The Secretary-General reminds those who continue to wage war in Liberia and to use means that cause so much suffering to the civilian population that they will be held individually accountable for any war crimes they commit.[522]
>
> By their reckless and criminal behaviour, they are disqualifying themselves from any leadership role in the future of their country.[523]

Thus, the two principles rejecting recourse to force to take power, and rejecting recourse to recourse to force to settle political disputes are intrinsic to the practice of the international community in response to the conflict in Liberia. These two principles are particularly relevant to the search for the emergence of general principles in relation to such recourse to recourse to force. The rejection of recourse to force to resolve political differences and the rejection of attempts to seize power by force are both wider in content than the principle in Sierra Leone, which focused on rejection of force to overthrow a democratic government. They echo and reinforce, however, statements in Côte d'Ivoire rejecting recourse to force to overthrow legitimate governments, unconstitutional recourse to force, and recourse to recourse to force to settle disputes.

Overthrow of a democracy?

One of the difficulties in interpreting the response of the international community to the conflict in Liberia is that according to a simple analysis it could have been expected that the international community would have supported the government in place against the rebel advances as it had in Sierra Leone. Especially since President Taylor was elected following elections supervised and declared free and fair by the international community. However, it rapidly became clear that President Taylor was considered to be one of the causes for the ongoing violence in Liberia, and the region, and his departure from office was an essential element of the resolution of the conflict.

In fact the international community put pressure on the recognised president of Liberia to resign. President George Bush stated "President Taylor needs to step down so that his country can be spared further bloodshed".[524] The European Union similarly stressed that the early deployment of an interposition/international stabilisation force was essential and that this must be accompanied by Taylor immediately stepping down.[525] This does seem contrary to principles of non-intervention into the political process, and some suggested that Bush's statement had created something of a problem for the mediators at the peace talks since his demand for Taylor to resign contravened the African

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[522] UN News Service, (28 Jul 2003, Liberian rebel group 'disqualifying' itself from future leadership role – Annan" (28 Jul 2003) www.releifweb.int/.

[523] UN News Service, (28 Jul 2003, Liberian rebel group 'disqualifying' itself from future leadership role – Annan" (28 Jul 2003) www.releifweb.int/.

[524] UN OCHA Integrated Regional Information Network "Liberia: Mediator threatens to end peace talks, Bush tells Taylor to quit" (26 Jun 2003) www.reliefweb.int/.

[525] European Union "Declaration by the EU Presidency on the peace process in Liberia" (21 Jul 2003) www.reliefweb.int/.

Union declaration on the removal and appointment of elected African presidents.[526] When Taylor did resign on the 11 August 2003 he did so reluctantly, claiming that he was a "sacrificial lamb" stepping down to spare his people more bloodshed, and accusing the United States of backing his rebel foes. He said he was being "forced into exile".[527]

An additional rationale for seeking Charles Taylor's departure is the ceasefire of 17 June where he agreed to a transitional agreement that would exclude him. However on 20 June, he rejected the agreement and also emphasised that he reserved "the right, my constitutional right, following the transition, to run for general elections if I decide to do so".[528]

This practice could be interpreted in a number of ways. On the one hand it suggests that the support for democratically elected governments is one factor that must be considered. It must be weighed, however, against the importance of protecting civilians and preventing humanitarian crises. In this instance the only way to do the latter involved pressuring the President to leave. Another interpretation would be to recognise that the assessment of the democratic nature of a government involves more than simply the existence of a democratic election. In this instance, the fact that the international community had already condemned Taylor for his war mongering in the region, imposed sanctions on Liberia and a travel ban on him personally, as well as the fact that he had been indicted for war crimes in the Sierra Leone Special Court in June 2003, undermined his legitimacy as a democratically elected leader in the eyes of the international community.

Recourse to force in Breach of an Agreement

Another aspect of practice was the reaction of the international community to recourse to recourse to force in breach of an agreement. The first ceasefire agreement was signed on 17 June 2003, and was followed by a general peace agreement on 18 August 2003. The peace agreement was signed by Liberia's interim government and the two rebel groups. It declared the end to the war and put in place a procedure to resolve the conflict peacefully through a series of reforms, particularly of the army and policy, a transitional power-sharing government leading to elections in 2006.[529] The agreement in addition called on ECOWAS to deploy a multinational force to secure the ceasefire, create a buffer zone and ensure free humanitarian assistance and free movement of persons. It also provided for a United Nations stabilisation force under Chapter VII with the right to use force to back a proposed transitional government, a crucial principle.

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[526] UN OCHA Integrated Regional Information Network "Liberia: Ceasefire brokered, ECOWAS military chiefs to meet" (27 Jun 2003) www.reliefweb.int/.
[527] Reuters "Liberia's President Charles Taylor resigns" (11 Aug 2003) www.reliefweb.int/.
[528] UN OCHA Integrated Regional Information Network "Liberia: Taylor rejects transition government within 30 days." (20 Jun 2003) www.reliefweb.int/.
[529] Peace Agreement between Govt. of Liberia, LURD, MODEL and Political Parties (18 Aug 2003).

Violations of the ceasefire repeatedly attracted condemnation. The EU expressly condemned such breaches and called on the parties to sign a comprehensive peace agreement.[530] The Council emphasised that all parties to the conflict must honour the ceasefire,[531] as did the Secretary-General, who stated that he "He calls on the parties concerned and, in particular, the Liberians United for Democracy and Reconciliation, to fully observe the ceasefire."[532] He also expressed "deep concern of renewed and intensified fighting between government troops and rebel forces in Monrovia", pointing out that the development constituted a flagrant violation of the ceasefire agreement.[533]

The Council explicitly referred to the obligation of the parties to "cease hostilities throughout Liberia and fulfil their obligations under the Comprehensive Peace Agreement and the ceasefire agreement."[534] The mandate of the UN authorised force explicitly referred to the implementation of the ceasefire agreement. Nigeria spoke of enforcing the ceasefire, not merely monitoring it: "Nigeria is now ready to send troops into Liberia, not only to maintain peace but also to enforce peace."[535]

Regional Destabilization

Finally, the fact that the conflict in Liberia further destabilized an already fragile region must underlie much of the resolve to halt the conflict. The International Crisis Group highlighted this aspect when calling for intervention. "There is a universal cry from every voice that matters, within Liberia and internationally, for the United States to lead an effort, once and for all, to end the disastrous disintegration of Liberia and the destabilisation of the entire region to which Charles Taylor's destructive leadership has contributed so much."[536]

1.3.3 Conclusion

The practice of the international community in response to the conflict in Liberia reinforces many of the principles identified in the conflicts in Sierra Leone and Côte d'Ivoire. The most interesting aspect of the practice is the rejection of the recourse to force to gain power, and the exclusion of the rebels and government fighters from the interim government. This hints at the emergence of a new principle which may indicate the future direction of evolution of this field. It recognizes that attempts by rebel groups to gain power by force are no longer domestic matters, they ultimately involve the region and

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[530] European Union "Declaration by EU Presidency on the Peace Process in Liberia" (28 Jul 2003) 11832/1/03 REV 1(Presse 223), P 92/03 www.reliefweb.int/.

[531] Press statement by Security Council President on situation in Liberia, SC/7824 AFR/674.

[532] SG "Secretary-General condemns resumption of hostilities in Liberia; renews call for force deployment to restore calm" SG/SM/8787 AFR/670.

[533] SG "Secretary-General deeply concerned at renewed fighting in Liberia, calls for immediate cessation of hostilities" SG/SM/8761, AFR/650.

[534] SC Res 1509 (2003), para 4.

[535] Agence France-Presse "Statement of the Delta State Governor: Nigerian troops ready to "enforce" peace in Liberia" (30 Jul 2003) www.reliefweb.int/.

[536] International Crisis Group "Liberia: ICG urges U.S. to lead a robust multinational force" (16 Jul 2003) www.reliefweb.int/.

the international community, and result in substantial humanitarian devastation, and hence all such conduct may ultimately become prohibited.

The practice also highlights the international concern over conflict that causes humanitarian crisis and puts the lives of civilians at risk. The response seems to have been triggered by the high level of humanitarian crisis.

2 RELEVANT TREATY PROVISIONS

In addition to the case studies, the new Security Mechanisms in the African Union Treaty and the Economic Community of West African States treaty represent key developments in this field. The security mechanisms of regional organisations provide useful practice in establishing the emergence of customary law, particularly establishing a general practice accepted as law. The principles stated in such treaties are overtly adopted by the members of a regional organisation. The extent to which a treaty, of itself, creates custom is a somewhat controversial matter,[537] however, it is accepted that it can contribute to establishing that a rule has achieved sufficiently widespread support and acceptance to crystallise as custom.[538] Such conventions represent and codify the view of their members on such conflicts.

The purpose of reviewing this material is to assess the view of those States regarding the legitimacy of recourse to force in undertaking civil conflict, not to consider the legality of different forms of intervention. The key question is what these treaties imply or express about the legality of recourse to force causing civil conflict.[539]

This section first considers the legal framework within which the treaties operate, and their relevance to a search for emerging principles in the civil conflict context; it then considers the principles expressed in the AU and ECOWAS treaties.

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[537] See discussion in the *North Sea Continental Shelf Cases* 1969 ICJ Rep 3 of "a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. [...] [E]ven without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected". At paras 71 and 73.

[538] See for instance the discussion of this matter in the *Legality of the Threat or Use of Nuclear Weapons:* "The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a *corpus* of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles." Para 82. See also *Nicaragua v United States of America* at para 218.

[539] Note that this accords with the discussion in the *Nuclear Weapons case*, where the Court emphasised that those that argued that recourse to nuclear weapons was illegal stressed the conventions that included rules providing for the limitation or elimination of nuclear weapons. As the Court emphasised "In their view, these treaties bear witness, in their own way to the emergence of a rule of a complete legal prohibition of all uses of nuclear weapons." (para 60). However, the Court emphasized that those States who argued that these did not prohibit recourse to Nuclear weapons point to the fact that those very conventions include security assurances given by the nuclear-weapon States to the non-nuclear-weapon States, and "cannot be understood as prohibiting the use of nuclear weapons, and such a claim is contrary to the very text of those instruments. The very logic and construction of the Treaty on the Non-Proliferation of Nuclear weapons, they assert, confirm this." (para 61). *Legality of the Threat or Use of Nuclear Weapons.*

2.1 THE LEGAL FRAMEWORK

2.1.1 The UN Charter

It is useful to situate these regional mechanisms within their legal framework. The UN Charter provides for "Regional Arrangements" and authorises intervention into conflict through mediation and dispute resolution. Article 52 encourages such arrangements to "make every effort to achieve pacific settlement of *local disputes*"[540] provided that their activities are consistent with the Purposes and Principles of the United Nations.[541]

While there is no precise reference to civil conflicts within the Charter, regional organisations have frequently undertaken to resolve civil conflicts by peaceful means.[542] Recourse to forceful intervention, however, must be authorised by the Council.[543]

The Council has not condemned regional organisations undertaking forceful measures in such conflicts without its authorisation.[544] Some commentators have argued that despite a failure to seek official authorisation, the regional actions ought not to be considered illegal.[545] Borgen maintains, for instance, that rather than acting against the wishes of the Council these organisations have "provided much needed stop-gap measures until the Council was unified in an approach to the situation",[546] and, importantly, that the lack of outcry by the international community regarding such interventions implies a shift in what is considered appropriate regional intervention.[547] Similarly, Abass maintains that actions undertaken by a collectivity of States, even without Council authorisation, cannot be considered illegal unilateral action; given the lack of success of the collective security mechanism, a

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[540] Charter of the United Nations Article 52(2) and (3).

[541] Article 52(1).

[542] The Security Council has encouraged regional efforts. OAU in Angola: SC Res 864 (1993) preamble. OAU in Burundi: SC Res 1049 (1996) para 8,9, SC Res 1072 (1996) preamble. OAU in DRC: SC Res 1234 (1999) para 11, SC Res 1258 (1999) para 3. ECOWAS in Liberia: SC Res 788 (1992). OAU in Mozambique: SC Res 916 (1994). OAU in Rwanda: SC Res 812 (1993), SC Res 846 (1993). The League of Arab State in Somalia: SC Res 746 (1992), SC Res 751 (1992). OAS in Haiti: SC Res 954 (1994) para 10. OSCE and NATO in European conflicts: SC Res 841 (1993), SC Res 867 (1993) para 13.

[543] Article 53.

[544] See ECOMOG intervention in Liberia: The Security Council did not authorise this intervention although it commended ECOWAS for its "efforts to restore peace, security and stability" and condemned the attacks against ECOMOG forces (SC Res 788 (1992) paras 1 and 4). ECOMOG intervention in Sierra Leone was not authorised by the Security Council, although it repeatedly commended the ECOWAS actions (SC Res 1181 (1998) para 5, SC Res 1289 (2000) para 8). ECOMOG peacekeeping forces in Guinea Bissau were not authorised by the Security Council, they were endorsed in a later resolution (SC Res 1233 (1999)). In Chad, the OAU peacekeeping mission was noted by the Security Council, but not authorised (SC Res 504 (1982)). In Burundi economic sanctions were imposed by the OAU without Security Council authorisation. See Letter from the Secretary-General to the Security Council (29 December 1995) S/1995/1068 at 1. In the Central African Republic, an African peacekeeping force was not authorised by the Security Council which has nonetheless authorised logical support (SC Res 1125 (1997), SC Res 1159 (1998)). The case of NATO's bombing of Kosovo is also well known, and seemingly more controversial. Despite the Security Council neither authorising nor condemning the actions, due to a split between veto powers (see Draft resolution S/1999/328 (1999) and UN Press Release (26 March 1999) SC/6659), the Security Council did authorise a military presence to supervise the Serb withdrawal (SC Res 1244 (1999)) and welcomed the FRY's acceptance of a political solution to the conflict (SC Res 1244 (1999)). The OAS also imposed economic sanctions on Haiti without Security Council authorisation, OAS International Presence in Haiti, Resolution of the General Assembly (1996) AG/RES. 1373 (XXVI-O/96), OAS Support for Democracy in Haiti, Resolution of the General Assembly (2001) AG/RES. 1831 (XXXI-O/01).

[545] Morrison "The Role of Regional Organisations in the Enforcement of International Law" in Delbrück, Heinz, et al (eds.) *Allocation of Law Enforcement Authority in the International System: Proceedings of an International Symposium of the Kiel Institute of International Law, March 23 to 25, 1994* (Duncker & Humblot, Berlin, 1995) 39 at 39.

[546] Borgen "The Theory and Practice of Regional Organisation Intervention in Civil Wars" at 821.

[547] Ibid at 816 discussing the case of Liberia.

decentralised military option must be recognised.[548] Wippman warns of the "danger of discouraging regional interventions that genuinely merit, and eventually receive, Council approbation, but that would be rendered ineffective or unduly costly if forced to await prior authorisation".[549]

The regional organisations seem also to be adopting this view, declining to be restricted by the authorisation requirement. For instance, in response to the criticism that the new ECOWAS mechanism would be inconsistent with Article 53, the ECOWAS Director of Legal Affairs stated that the meeting of experts were of the view "that whilst the sub-region appreciates the importance of its obligations under the United Nations Charter, its recent experience has shown that the cost of waiting for the United Nations authorisation could be very high in terms of life and resources."[550]

This may suggest that even forceful intervention by regional organisations in civil conflict will be increasingly accepted as valid and highlights the importance that is placed on stopping such conflicts: Council political issues and veto restrictions cannot be allowed to impede addressing them .

2.2 THE PRINCIPLES ADOPTED BY THE AFRICAN UNION

The AU constitutive documents explicitly address civil conflict,[551] whereas the Organisation of Africa Unity, which it replaces, did not.[552] Two documents are relevant to this discussion, the Constitutive Act and the Protocol Relating to the Establishment of a Peace and Security Council.

2.2.1 The Constitutive Act

The AU Constitutive Act (2000) sets out in general terms the objectives of the AU and some guiding principles. Its objectives include to "Promote peace, security, and stability on the continent", to "Promote democratic principles and institutions, popular participation and good governance, and to "Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments".[553]

It also declares a number of principles that the Union must function "in accordance with". These include "Prohibition of the use of force or threat to use force among Member States of the Union", "Non-interference by any Member State in the internal affairs of another", yet "The right of the Union

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[548] Abass "The New Collective Security Mechanism of ECOWAS: Innovations and Problems" (2000) 5(2) Journal of Conflict and Security Law 211 at 223-224.

[549] Wippman "Enforcing the Peace: ECOWAS and the Liberian Civil War," in Damrosch (ed.) *Enforcing Restraint: Collective Intervention in Internal Conflicts* (Council on Foreign Relations Press, New York, 1993) 157 at 182. See also Wedgwood "Unilateral Action in the UN System"

[550] *Meeting of Experts on the Draft Protocol Relating to the Mechanism on Conflict Prevention, Management, Resolution, Peace-Keeping and Security* (17-19 November 1999, Lomé Togo) at 6, cited in Abass "The New Collective Security Mechanism of ECOWAS: Innovations and Problems" at 223-224.

[551] 2000 Constitutive Act of the African Union (Lomé, Togo). For a discussion of the evolution and drafting of the Constitutive Act see Packer and Rukare "The New African Union and Its Constitutive Act" (2002) 96 AJIL 365. See also Magliveras and Naldi "The African Union - a New Dawn for Africa?" (2002) 51(2) ICLQ 415.

[552] The 1993 OAU Mechanism for Conflict Prevention, Management and Resolution (Cairo, Egypt) did not refer to civil conflicts.

[553] Constitutive Act of the African Union, Article 3.

to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity", "Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities", "Condemnation and rejection of unconstitutional changes of governments" and "The right of Member States to request intervention from the Union in order to restore peace and security".[554]

2.2.2 The Protocol Relating to the Establishment of a Peace and Security Council

The Protocol on the other hand is primarily created to address conflicts. The preamble recognises that "the development of strong democratic institutions and culture, observance of human rights and the rule of law, as well as the implementation of post-conflict recovery programmes and sustainable development policies, are essential for the promotion of collective security, durable peace and stability, as well as for the prevention of conflicts" It states that the Members are "Determined to enhance our capacity to address the scourge of conflicts on the Continent" and that they are "Desirous of establishing an operational structure for the effective implementation of the decisions taken in the areas of conflict prevention, peace-making, peace support operations and intervention".

The Protocol establishes a Peace and Security Council "as a standing decision-making organ for the prevention, management and resolution of conflicts. The Peace and Security Council shall be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa."[555] Its objectives are to "promote peace, security and stability in Africa", "anticipate and prevent conflicts", where conflicts have occurred, it "shall have the responsibility to undertake peace-making and peace-building functions for the resolution of these conflicts", "promote and implement peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence", and "promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts."[556]

It is to be guided by a number of principles, particularly, the "peaceful settlement of disputes and conflicts", "early responses to contain crisis situations so as to prevent them from developing into full-blown conflicts", "non interference by any Member State in the internal affairs of another", "respect of borders inherited on achievement of independence", "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 4(h) of the Constitutive

[554] Constitutive Act of the African Union, Article 4.
[555] 2002 Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Article 2.
[556] 2002 Protocol, Article 3.

Act", "the right of Member States to request intervention from the Union in order to restore peace and security, in accordance with Article 4(j) of the Constitutive Act."[557]

The Peace and Security Council has a number of powers, which it performs in conjunction with the Chairperson of the Commission. It shall "anticipate and prevent disputes and conflicts, as well as policies that may lead to genocide and crimes against humanity", "undertake peace-making and peace-building functions to resolve conflicts where they have occurred", "recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity", "institute sanctions whenever an unconstitutional change of Government takes place in a Member State, as provided for in the Lomé Declaration".[558]

The Member states agree that in carrying out its duties under the Protocol, the Peace and Security Council acts on their behalf and they agree to "accept and implement" its decisions.[559] Moreover, its decisions are binding and States that fail to abide by them may face economic or political sanctions.[560]

The Protocol also creates an African Standby Force, which is to be directed by the Peace and Security Council and whose mandate includes "observation and monitoring missions", "intervention in a Member State in respect of grave circumstances or at the request of a Member State in order to restore peace and security"; "preventive deployment in order to prevent (i) a dispute or a conflict from escalating, (ii) an ongoing violent conflict from spreading to neighbouring areas or States, and (iii) the resurgence of violence after parties to a conflict have reached an agreement".[561]

2.2.3 The principles supported

These treaties provide useful insight into the underlying intentions of the Members and their view of civil conflicts. Conflicts in general are referred to as "the scourge of conflicts in Africa" and are recognised to constitute a major impediment to "the need to promote peace, security and stability as a prerequisite for the implementation of our development agenda".[562] The 2002 Protocol relating to the Establishment of the Peace and Security Council of the African Union is explicitly applicable to civil conflicts as it expresses concern about the continued prevalence of armed conflicts "within and between our States".

The entire purpose of the Peace and Security Council is to prevent and resolve conflicts, including civil conflicts, its primary power is to "anticipate and prevent disputes and conflicts, as well as

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[557] 2002 Protocol, Article 4.
[558] 2002 Protocol, Article 7.
[559] 2002 Protocol, Article 7.
[560] Ibid, Article 23(2).
[561] 2002 Protocol, Article 13.
[562] Ibid, Preamble.

policies that may lead to genocide and crimes against humanity".[563] Nevertheless, it does not explicitly condemn or prohibit recourse to force. The fact that genocide and crimes against humanity are prohibited and illegal actions, and that conflicts and "policies that lead to genocide and crimes against humanity" are listed together and are not distinguished could suggest that these are both considered prohibited conduct. However, civil conflicts *per se* are not explicitly prohibited, although the purpose of the Protocol is to prevent and resolve them.[564]

Since civil conflicts are not treated separately from international conflict, the principles and mandate could be read to apply to both. However, the restatement of the principle of non-intervention in domestic affairs, which is subject to explicit exceptions in the case of genocide, crimes against humanity and war crimes, suggest that only in those circumstances (or when a State requests assistance) are civil conflicts within the regional organisation's mandate.

The mandate of the Standby Force must be interpreted within this scope. Nonetheless, its explicit listing of differing instances where it may take *pre-emptive action* is interesting from the point of view of differentiating various aspects of recourse to force. The Force is mandated to take pre-emptive deployment to prevent escalation of a conflict, to stop violence spreading to neighbours, and to prevent the resurgence of violence after the parties to a conflict have reached an agreement. This also is indicative of different principles being applicable to different forms of violence.

Action to prevent violence spreading to neighbours implies regional destabilisation and thus a threat to regional peace and security. This principle is also widely supported in the practice and ties into the general notion of preventing conduct amounting to a threat to international peace and security. The pre-emptive action to prevent escalation of a conflict is the broadest category of provision and supports a general rejection of violent conflict. The explicit recognition of increasing violence, or a recurrence of violence after an agreement, as matters triggering preventative deployment are important indicators that such violence is not acceptable.

Permitting intervention into domestic affairs in relation to "war crimes, genocide and crimes against humanity" appears to regularize a form of humanitarian enforcement. Crimes against humanity, genocide and wars crimes are illegal under well established international law, but their prohibition is not generally enforceable or enforced.[565]

Finally, a clear principle within the AU is the rejection and condemnation of the overthrow of a democratically elected government, formulated as unconstitutional change of government. This

[563] Article 7, 2002 AU Protocol.
[564] Article 3 of the 2002 AU Protocol.
[565] See eg Rwanda, but subject to the creation of the new International Criminal Court.

principle was initially stated in the Lomé Declaration on Unconstitutional Changes of Government (2000), defined as:

> i) military coup d'etat against a democratically elected Government
>
> ii) intervention by mercenaries to replace a democratically elected Government
>
> iii) replacement of democratically elected Governments by armed dissident groups and rebel movements
>
> iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.

The Lomé Declaration provided that the OAU should "convey a clear and unequivocal warning to the perpetrators of the unconstitutional change that, under no circumstances, will their illegal action be tolerated or recognized by the OAU." In addition, after six months of suspension, "a range of limited and targeted sanctions against the regime that stubbornly refuses to restore constitutional order should be instituted, in addition to the suspension from participation in the OAU Policy Organs. This could include visa denials for the perpetrators of an unconstitutional change, restrictions of government-to government contacts, trade restrictions, etc".[566]

The Constitutive Act of the African Union (2000) also lists as a key value "Condemnation and rejection of unconstitutional changes of governments" and the Protocol lists as one of the Peace and Security Council powers to "institute sanctions whenever an unconstitutional change of Government takes place in a Member State".

A government refusing to relinquish power after free and fair elections falls into the same category. The formulations surrounding this principle are the closest to a declaration of illegality in the constitutive documents of the AU. It is particularly important that such actions are declared to be "illegal", and that these actions will not be "tolerated or recognised by the OAU".[567]

2.3 THE PRINCIPLES ADOPTED BY ECOWAS

ECOWAS' most recent Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security represents the most explicitly interventionist policy towards civil conflict of any regional organisation. The Mechanism may be applied "In cases of aggression or conflict in any Member State or threat thereof", "In case of internal conflict: that threatens to trigger a humanitarian disaster, or that poses a serious threat to peace and security in the sub-region", "In event of serious and massive

[566] (2000) Lome Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government. AHG/Decl.5 (XXXVI)
[567] (2000) Lome Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government.

violation of human rights and the rule of law" and "In the event of an overthrow or attempted overthrow of a democratically elected government".[568]

2.3.1 The Mechanism

The purpose of the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security is stated to be to "prevent, manage and resolve internal and inter-State conflicts", and "maintain and consolidate peace, security and stability within the Community". The responsibilities of ECOWAS include intervening "to alleviate the suffering of the population and restore life to normalcy in the event of crises, conflict and disaster".[569] It is empowered "to act on all matters concerning conflict prevention, management and resolution, peace-keeping, security, humanitarian support, peace-building, control of cross-border crime, proliferation of small arms, as well as all other matters covered by the provisions of this Mechanism".[570] The Council has the power to "decide and implement all policies for conflict prevention, management and resolution, peace-keeping and security", and "authorise all forms of intervention and decide particularly on the deployment of political and military missions".[571]

This Mechanism can be seen explicitly to target civil conflict.[572] The primary focus of its provisions appears to be the protection of the population within the region. Thus, conflict which "threatens to trigger a humanitarian disaster" is open to intervention, as are "serious and massive violations of human rights and the rule of law".[573] Its Protocol on Democracy[574] includes the ability to impose sanctions where there is a massive violation of human rights by a State.[575] An internal conflict that "poses a serious threat to peace and security of the sub-region" is also subject to intervention.

2.3.2 The principles supported

The recourse to civil conflict *per se* is again not explicitly condemned, but some aspects of recourse to force are condemned. The use of force to overthrow a democratic government is rejected. The Member States have agreed on a strong policy in relation to such conduct and describe their response as "imposing sanctions", implying that the conduct is prohibited and illegal. According to the 2001 Protocol on Democracy and Good Governance, all member States agree to the constitutional principles that "Every accession to power must be made through free, fair and transparent elections",

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[568] Article 25 of the 2001 ECOWAS Protocol.
[569] Article 40 of the 2001ECOWAS Protocol.
[570] Article 6, of the 2001 ECOWAS Protocol.
[571] Article 10 of the 2001 ECOWAS Protocol.
[572] This can be contrasted with the 1981 Protocol on Mutual Defence Assistance, which addressed civil conflict but restricted intervention to situations where the conflict was engineered and supported from outside and was likely to endanger the peace and security of other Member States. 1981 Protocol Relating to Mutual Assistance on Defence (Freetown, Sierra Leone), Article 4(b) See (2001) Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, Article 3.
[573] 1999 The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (Lomé, Togo).
[574] 2001 ECOWAS Protocol on Democracy and Good Governance (Dakar).
[575] Ibid, Article 45.

there is "Zero tolerance for power obtained or maintained by unconstitutional means".[576] Moreover, whenever democracy "is abruptly brought to an end by any means [...] ECOWAS may impose sanctions on the State concerned."[577] The sanctions are clearly envisaged as punitive measures, listed "in increasing order of severity" and ranging from refusal to support candidates to suspension from ECOWAS decision making bodies.[578] In addition, direct intervention is permitted in the event "of an overthrow or attempted overthrow of a democratically elected government".[579]

Sanctions can be applied when "there is massive violation of human rights in a member State".[580] This principle is closely linked to the doctrine of humanitarian intervention. The ECOWAS provisions have been seen by some to represent the first instance of *codification* of that controversial doctrine.[581]

The targeting of conflicts that threaten regional peace and security accords with the North Atlantic Treaty Organisation's approach to civil conflicts. NATO was at its core an alliance relying on the right to use collective self-defence in response to armed attack.[582] However, it has re-invented itself in response to the threat to regional stability arising from internal conflicts.[583] The strategic concept formulated in 1991 emphasised that the security of NATO members was "inseparably linked to that of the whole of Europe".[584] Thus, its role was expanded, under "non-Article 5 crisis response operations",[585] to take account of threats "likely to result from regional conflicts, ethnic strife or other crises beyond Alliance territory".[586] It is under this expanded role that NATO undertook its intervention into Kosovo. NATO itself highlighted the potential for wide instability and the importance of creating a region free from violence and instability.[587]

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[576] 2001 Protocol on Democracy and Good Governance, Section I, Article 1.
[577] Ibid, Section IV, Article 45.
[578] Ibid, Section IV, Article 45.
[579] Article 25, The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security. ECOWAS may also impose sanctions in such a situation. ECOWAS Protocol on Democracy and Good Governance, Article 45. See also Charter of the Organisation of American States, Article 10.
[580] 2001 Protocol on Democracy and Good Governance, Section IV, Article 45
[581] Consider for instance Abass's argument that as the provisions were adopted post Kosovo, they reflect the deliberate adoption of the principle of humanitarian intervention. Abass "The New Collective Security Mechanism of ECOWAS: Innovations and Problems" at 211-212.
[582] 1949 The North Atlantic Treaty (Washington DC) Article 5.
[583] The WEU has also expanded its focus by amending its founding treaty to incorporate a provision which states that consultations may take place "with regard to any situation which may constitute a threat to peace, in whatever area this threat should arise". (1984 Joint Meeting of the Foreign and Defence Ministers within the WEU Framework (Rome Declaration) (Rome), Article VIII (3), amending the 1948 WEU the Brussels Treaty (Brussels), as amended by 1954 WEU Paris Agreements (Paris). The Rome Declaration is the founding text of the WEU reactivation). The WEU in its Petersburg Declaration defined three types of missions for which military units could be employed. These covered humanitarian and rescue tasks, peacekeeping, and tasks of combat forces in crisis management, including peacemaking. (1992 WEU St Petersburg Declaration).
[584] NATO *The Alliance's Strategic Concept Agreed by the Heads of State and Government Participating in the Meeting of the North Atlantic Council* (Rome, 1991), para 4.
[585] NATO Declaration on Peace and Cooperation (1999) Press Release NAC-S(99)69. A non-Article 5 intervention involves Article 4 of The North Atlantic Treaty, which allows consultation whenever "the territorial integrity, political independence or security of any of the Parties is threatened"
[586] NATO Declaration on Peace and Cooperation. See operations in Bosnia and Kosovo for instance.
[587] Press release NAC - S(99)64.

2.4 IN SUMMARY

The provisions adopted in the constitutive documents of regional organisations provide useful insight into the principles governing the response of the international community to civil conflicts, and the future direction of evolution of this field, as they are explicitly accepted by the signatories to the treaty and published in easily accessible format.

The growing interventionist response of regional organisations to civil conflict emphasises the importance that regional organisations place on stopping such conflicts. In addition, the regional organisations are increasingly prepared to address civil conflicts through resolution and prevention, as well as sanctions and intervention. While the provisions reviewed do not determine whether the intervention will support the rebels or the government, they do provide that such conduct is no longer a matter only for the State in question, and that such conflicts must be brought to an end. The most recently adopted security mechanisms have taken a particularly interventionist and bold position with respect to civil conflicts. This can be seen in the ECOWAS and AU provisions, which explicitly reject the forceful overthrow of a democratic government. They also foresee intervention to stop conduct causing massive violations of human rights.

3 CONCLUSION

The review of the practice of the international community in three recent conflicts and the provisions of two recent treaties support a number of principles.

1. Principles rejecting the use of force against a democratically elected government, evidenced by:

   - Condemnation and action to prevent or reverse recourse to force to overthrow a democratic government.
   - Condemnation and action to prevent or reverse recourse to force to take power in an unconstitutional manner.

2. Principles rejecting violence against civilians evidenced by:

   - Condemnation and action to prevent or stop violence against civilians.

3. Principles rejecting recourse to force causing a threat to regional peace and security, evidenced by:

   - Condemnation and action to prevent or reverse civil conflicts that threaten regional peace and security.

4. Principles supporting the importance of peaceful resolution of such disputes, evidenced by:

- Support for negotiation, peace agreements and elections as a method of resolving civil conflicts.

- Statements declaring that only peaceful methods of resolution are acceptable.

- Pressure to negotiate peace and ceasefire agreements, and support for such agreements when signed, including "entrenchment" of such agreements by the Council under Chapter VII.

- Condemnation of breaches of such agreements, and action to prevent or reverse such breaches, including through sanctions or military intervention against the party breaching the agreement.

- A nascent policy denying positions in the post-conflict government to parties that persist in seeking to gain power by force.

PART II: CHARACTERIZING THE EMERGING PRINCIPLES

Thus far this thesis has reviewed a range of practice of States, regional bodies and of the Council in response to civil conflicts. The response of the international community to the conflicts seems to indicate growing rejection of certain types of civil conflicts. The way in which the practice consistently reverts to certain key ideas suggests that these represent essential underlying principles.

The very existence of this practice – which has largely been overlooked in the literature – is surprising given that such conflicts are supposedly domestic matters and outside of the jurisdiction of the international community. However, the key question is how to analyse the practice. Do the principles identified constitute no more than international policy, discretionary and flexible, or do they have some legal binding nature? And if the latter is the case, are these norms of customary law or must they be characterised in some other fashion?

CHAPTER 3: THE IMPACT OF SECURITY COUNCIL PRACTICE ON INTERNATIONAL LAW

The role of the Council in customary law formation, and more generally in international law formation, has been largely under-theorized in international law. This is in contrast to the role of General Assembly practice which has been widely debated. The nature and impact of Security Council practice has been addressed as an aside to the question of the International Court of Justice review of Security Council decisions.[588] Nonetheless, the Council provides an abundant source of accessible, published, and organised practice. Moreover, the Council's nature as a powerful and influential decision making body, that can pass binding resolutions and impose serious consequences and sanctions, suggests that any principles that are emerging within its practice will be of great importance.

This chapter reviews the ways in which the Council practice influences international law. It focuses on the impact of resolutions that condemn conduct (without declaring it to be illegal) and go on to impose sanctions. There are many such resolutions and hence their impact is of key importance to the discussion of norms in the civil conflict context. The chapter discusses the possible impact of such

[588] For an overview of that debate see *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (Libya v US), Provisional Measures* (1992) ICJ Rep 114. See Franck "The 'Powers of Appreciation': Who Is the Ultimate Guardian of UN Legality?" (1992) AJIL 519, Bowett "The Impact of Security Council Decisions on Dispute Settlement Procedures" (1994) EJIL 89, Bedjaoui and Noble *The New World Order and the Security Council: Testing the Legality of Its Acts* (Martinus Nijhoff, Dordrecht, 1994), Alvarez "Judging the Security Council". In other instances it has only been touched upon, for eg Higgins *The Development of International Law through the Political Organs of the United Nations* (Oxford, 1969). See Ratner in an upcoming chapter for a more focused investigation, although with little theoretical discussion. Ratner "The Security Council and International Law: Deciphering the Normative Messages of a Political Organ"

practice on the emergence of customary law, as well as whether it can create a quasi-legislative council prohibition on conduct.

1 THE COUNCIL AND CUSTOMARY LAW

Determining the extent to which customary law is modified and developed by the practice of the Council is of increasing importance given the range and volume of its practice. Although Council resolutions have been referred to both by courts and commentators, there has been little discussion of how best to characterise its impact.

This section undertakes a review of the way in which courts and commentators have dealt with the practice of the Council. It then considers whether such practice amounts to evidence of *opinio juris* and practice relevant to the formation of customary law.

1.1 THE APPROACH OF THE COURT AND COMMENTATORS

1.1.1 The International Court of Justice

A useful starting point ought to be the way in which the International Court of Justice has approached the question. However, in practice, the Court has not undertaken a systematic review of the role of the Council practice. It has in passing relied on Council resolutions in a rather ambiguous fashion, without clear justification as to their relevance to customary law.

For instance, in the *Hostages Case*, the Court maintained that a statement by the Secretary-General, and a Council resolution supporting particular principles, could be seen as "evidencing the importance attached by the international community as a whole to the observance of those principles".[589] In the *Threat or Use of Nuclear Weapons Case* the Court also relied upon a statement by the Secretary-General, approved by the Council, that the Geneva Conventions had become part of customary law.[590] However, it did not undertake a discussion of the relevance of the resolutions, or justify reliance on them, in contrast to its extensive discussion of the relevance of General Assembly resolutions.[591] Similarly, the International Tribunal for the former Yugoslavia relied on Council resolutions in support of the proposition that persons committing serious violations of international humanitarian law in the former Yugoslavia would be held individually responsible for such violations, again

[589] *Case Concerning the United States Diplomatic and Consular Staff in Teheran (Judgment)* (1980) ICJ Rep 3, at para 36 adopting the statement made in the Provisional Measures decision, *Case Concerning the United States Diplomatic and Consular Staff in Teheran (Provisional Measures)* (1979) ICJ Rep 7, *Case Concerning the United States Diplomatic and Consular Staff in Teheran (Judgment)*.
[590] *Legality of the Threat or Use of Nuclear Weapons* at 258.
[591] Ibid at 254-255.

without justifying the reliance.[592] Nevertheless, it seems implicit in these decisions that such resolutions are relevant evidence of customary law.

1.1.2 The View of Commentators

The approach by commentators to the practice of the Council also seems fairly cursory and provides little insight into how best to analyse its impact on customary law. Higgins' early influential treatise on the development of international law through the United Nations only briefly discusses the question of Council practice.[593] In later writings Higgins largely rejects the view that Council resolutions could be a source of international law other than as *ad hoc* binding obligations though she does admit that there is some indistinct way in which they may have an effect on customary law.[594]

Tunkin, the Russian socialist international law theorist, also suggests that Council resolutions have a norm-forming role, although it is also uncertain whether this arises from an amorphous impact on State practice or some more direct impact. He argues that:

> Resolutions of the Council adopted in conformity with the Charter may in a number of instances create a specific practice or contribute to the formation of an international practice that can crystallize into a rule of conduct and therefore be a definite stage in the process of forming a customary norm of international law.[595]

He also states that resolutions – and in this respect he did not differentiate between the General Assembly and Council – "may enter into the process of norm-formation and play a definite role in forming new principles and norms of international law and in affirming, strengthening, developing and interpreting existing principles and norms."[596]

Ratner also comments that the law making function of the Council is most significant in the formation of customary law.[597] However, he then considers the role of the Council in formulating legal principles and findings, interpreting the Charter, encouraging States to abide by international law and enforcing such laws. He does comment that the resolutions are "critical evidence" of "how expectations of states change over time",[598] but does not go on to consider in what ways these are evidence or how such resolutions affect customary law.

Other commentators have dealt with Council resolutions in a way that is reminiscent of the approach of the Courts, simply referring to them without explanation. Meron, for instance, states that in relation

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[592] *Tadic* at para 186.
[593] Higgins *The Development of International Law through the Political Organs of the United Nations* see 2-5.
[594] See passage quoted above at fn 661. Higgins *Problems and Process: International Law and How We Use It* at 28.
[595] Tunkin *Theory of International Law* (2nd ed, Wildy Simmons and Hill, London, 2003) at 187.
[596] Ibid at 187.
[597] Ratner "The Security Council and International Law: Deciphering the Normative Messages of a Political Organ" in Malone (ed) *The United Nations Security Council after the Cold War* (Lynne Rienner, Boulder, 2004) 591, see 593-595.
[598] Ibid at 602.

to the customary norm value of the Geneva Conventions, relevant practice includes "Council's appeals to parties to conflicts to apply the Geneva Conventions, and Council resolutions providing that Geneva Convention No IV applies to the territories occupied by Israel and requesting Israel to abide by its obligations under that Convention."[599] This approach seems unsatisfactory in that it does not attempt to analyse the relevance of the practice.

Similarly, the publication of the practice of the Council in the Repertoire of the Practice of the Council implies that it is widely accepted that such practice is relevant to international customary law. The practice is accompanied by a note explaining that it is published at the request of the General Assembly "Ways and means for making the evidence of customary international law readily available".[600] The Repertoire does not, however, elucidate in what way this practice is relevant.

Finally, a number of commentators consider Council resolutions to be analogous to General Assembly resolutions and relevant in similar ways. For instance Secretary-General Perez de Cuellar maintained that resolutions could represent *opinio juris*. He relied on Council resolutions and General Assembly resolutions in establishing the *opinio juris* of the international community regarding the Israeli deportation of civilians.[601] Kirgis similarly acknowledges this possibility but points out that in comparison to General Assembly resolutions, the Council suffers from being a "fifteen-member UN body dominated by one or a few states".[602] Gray, on the other hand, argues that at least in relation to the interpretation of the Charter and the development of the law on the use of force, Council and General Assembly resolutions are of equal importance: they are both "fora in which states can set out their legal justifications for the use of force and appeal to other states for support", and the fact that the General Assembly is more representative is balanced by the Council having primary responsibility for the maintenance of international peace and security.[603]

1.2 EVIDENCE OF PRACTICE AND *OPINION JURIS* OF STATES

Thus, commentators and Courts have tended to acknowledge the impact Council practice has on customary law in passing, but largely without explicit investigation of what form this influence takes. What then can be said about the role of this practice in the formation of customary law?

In undertaking such an analysis, the theoretical perspective adopted will affect the way in which the practice is analysed. A Positivist approach, for instance, tends to rely on a clear distinction between actions relevant to *opinio juris* and those forming customary law practice. It also emphasises the traditional view of customary law as defined in Article 38 of the Statute of the International Court of

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[599] Meron *Human Rights and Humanitarian Norms as Customary Law* at 55-56.
[600] General Assembly Resolution 686 (VII) (1952) www.un.org/Depts/dpa/repertoire/index.html, paragraph 1 (b).
[601] UN Doc S/19443 (1988) at 9.
[602] Kirgis "The United Nations at Fifty: The Security Council's First Fifty Years" at 529.
[603] Gray *International Law and the Use of Force* at 13.

Justice, particularly the importance of the actions of States over than other international bodies. The Law as Process school, on the other hand, tends to take a more flexible approach, looking for real impact rather than seeking to fit the practice into a particular category. Overall, however, the current trend in customary law norm analysis in all schools is to lean towards an inclusive approach to relevant practice, which is also the approach adopted in this thesis.[604]

1.2.1 The Practice of an International Organisation

How can the practice of the Council, as an international organisation, be relevant to customary law formation? The practice of international organisations can in theory be relevant in three ways. Traditionally, customary law has been formed from the practice of States rather than any other bodies or international organisations.[605] Thus, the majority of commentators have taken the view that the predominant relevance of international organisation practice is that it constitutes practice of individual State members. Higgins, for instance, argues that the United Nations is relevant to customary law because "international custom is to be deduced from the practice of States, which includes their international dealings as manifested by their diplomatic actions and public pronouncements."[606]

A more controversial prospect is that the actions of the organisation could amount to practice in their own right. Mendelson argues that[607]

> To a varying extent, intergovernmental organisations participate in international relations in their own name, and not that of the members who constitute them. As such, they are subjects of international law who play their own part in the law-making process.

Similarly, the International Law Association Committee on Customary Law Formation maintains that international organisations could be "international persons in their own right, and are capable of performing acts which contribute to the formation of international law."[608] However, it is not clear how such practice can be taken into account according to the general theory of customary law,[609] and it is still principally through the notion of resolutions as actions by the constituent States that its relevance is understood.[610]

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[604] Both the Positivist and Law as Process theoretical schools have tended to support an inclusive approach. As has the Natural Law school. See Higgins *Problems and Process: International Law and How We Use It* at 10. See also Meron *Human Rights and Humanitarian Norms as Customary Law*, Lillich "The Growing Importance of Customary International Human Rights Law", Schachter "International Law in Theory and Practice" at 333-338, and Brownlie *Principles of Public International Law* at 5.

[605] Mendelson "The Formation of Customary International Law" at 198.

[606] Higgins *The Development of International Law through the Political Organs of the United Nations* at 2.

[607] Mendelson "The Formation of Customary International Law" at 201.

[608] International Law Association *Final Report of the Committee on Formation of Customary General International Law* at 730.

[609] Van Hoof *Rethinking the Sources of International Law* at 63.

[610] Mendelson "The Formation of Customary International Law" at 201. See also International Law Association *Final Report of the Committee on Formation of Customary General International Law* at 730.

Finally, it is widely accepted that the practice of international organisations will also have an indirect influence on customary law, as a catalyst for the emergence of international customs[611] or by encouraging States to adopt certain behaviours.[612]

1.2.2 Analogy with the General Assembly?

To what extent can Council resolutions be treated analogously to General Assembly resolutions? While there are clear similarities, particularly the fact that both originate in international fora formed of individual State members, substantial differences exist. Some of these would undermine the Council's role in customary law formation, and others would strengthen it.

Before considering the impact of these differences, however, it is useful to briefly recapitulate the way in which United Nations General Assembly resolutions are considered relevant to customary international law. This has been a controversial matter.[613] Some have argued that General Assembly resolutions have little, if any, impact, as they are non-binding, formalistic, and often not intended to be followed by the States adopting them.[614] Nonetheless, it is generally accepted that General Assembly resolutions evidence *opinio juris* of the Member States involved, at least to the extent that the principles are of a normative character and are formulated as a matter of law.[615] Even Simma and Alston, who take a restrictive view, accept that General Assembly resolutions may be relevant "as starting points for the possible development of customary law in the event that State practice eventually happens to lock on to these proclamations".[616]

In the *Threat or Use of Nuclear Weapons Case,* the Court held that "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence of a rule or the emergence of an *opinio juris*".[617] In order to determine the impact of a particular resolution the Court held that it is "necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character."[618] In that particular instance, however, the Court held that the resolutions had

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[611] See Bowett, Sands, et al. *Bowett's Law of International Institutions* (5th ed, Sweet & Maxwell, London, 2001) at 290, also Chigara *Legitimacy Deficit in Custom: A Deconstructionist Critique* at 205.

[612] International Law Association *Final Report of the Committee on Formation of Customary General International Law* at 272.

[613] See Higgins *The Development of International Law through the Political Organs of the United Nations,* Schwebel "United Nations Resolutions, Recent Arbitral Awards and Customary International Law" in Riphagen, Bos, et al (eds.) *Realism in Law-Making* (Martinus Nijhoff, Dordrecht, 1986) 203, and Villiger *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (2nd ed, Kluwer Law International, The Hague, 1997).

[614] See for instance Arangio-Ruiz "The Normative Role of the General Assembly of the United Nations and the Development of Principles of Friendly Relations" (1972 III) Hague Academy of International Law, Recueil des Cours 431, Danilenko *Law-Making in the International Community* at 121. Schwebel "The Effect of Resolutions of the United Nations General Assembly on Customary International Law" (1979) 73 ASIL Proceedings 301. Taulbee "Governing the Use of Force: Does the UN Charter Matter Anymore?"

[615] See *Nicaragua v United States of America.* Danilenko *Law-Making in the International Community* at 12o-122, International Law Association *Final Report of the Committee on Formation of Customary General International Law* at 771, Article 31. For a review of the controversy surrounding the relationship between *usus* and *opinio juris* and what is required to establish customary law, see Van Hoof *Rethinking the Sources of International Law,* Chapter VI. This view seems consistent with the International Court of Justice position in *Nicaragua v United States of America* 99-100.

[616] Simma and Alston "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" at 89-90.

[617] *Legality of the Threat or Use of Nuclear Weapons* at 254.

[618] Ibid at 254.

been adopted with a substantial number of negative votes and abstentions and thus that "although these resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons."[619]

According to the Committee on the Formation of Customary Law, General Assembly resolutions may also constitute a form of State practice as verbal acts.[620] Certain General Assembly resolutions have also been viewed as providing more general evidence of the existence of a customary law rule.[621] In Schwebel's words, certain resolutions "viewed as expressions of the assembled States of the world community rather than as acts within the constitutional or acquired authority of a quasi-legislative body" may be declaratory, though not creative, of international law.[622]

1.2.3 Size of the Council

It could be thought that the impact of Council resolutions in comparison to the General Assembly would be more limited due to purely numeric weight. Bedjaoui, for instance, has argued "Nothing would in principle prevent States from [...] creating new custom within an international organisation in the framework of its activity, provided the organisation is genuinely universal and the custom is created by States within the most representative organ. The Council could scarcely be the organ for such a role, given its very narrow composition."[623]

However, the decisions of the Council can be seen to represent more than the view of the small number of Member States. Political reality dictates that the Council cannot make decisions which do not have the support of a vast majority of the membership, because as Fox points out, "members are acutely aware that undertaking large or risky operations without a broad base of support among the membership is simply pointless".[624]

Moreover, while only the Council members may formally vote, many more States attend and participate in Council debates.[625] This is provided for under Article 31 according to which any

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[619] Ibid at 254.
[620] International Law Association *Final Report of the Committee on Formation of Customary General International Law* at 772.
[621] See also Article 29, International Law Association *Final Report of the Committee on Formation of Customary General International Law,* Akehurst "Custom as a Source of International Law" at 6.
[622] Schwebel "United Nations Resolutions, Recent Arbitral Awards and Customary International Law" at 209.
[623] Bedjaoui and Noble *The New World Order and the Security Council: Testing the Legality of Its Acts* at 32.
[624] Fox "International Law and Civil Wars" (1994) 26 NYU J of Int Law and Pol 633 at 643, referring to and agreeing with Szasz "Centralized and Decentralized Law Enforcement: The Security Council and the General Assembly Acting under Chapters VII and VIII", Paper presented to the International Symposium on Allocation of Law Enforcement Authority (Kiel, Germany, 23-25 March 1994).
[625] States may participate in accordance with rule 37 of the Council's provisional rules of procedure. Numbers of participants vary. For example Norway and Nepal participated in meeting 4824, S/PV.4824 (2003), Albania, Italy, Serbia and Montenegro participated in meeting 4828, S/PV.4828 (2003), the DRC, Rwanda and Tanzania participated in meeting 4775, S/PV.4775 (2003), Greece (speaking on behalf of the EU, the acceding states of Cyprus, the Czech Republic, Eastonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Bulgaria, Romania and the European Free Trade Association of the Economic Area of Iceland), Bahrain, Switzerland, Canada, Philippines, Monaco, Rwanda, Ukraine, Egypt, Austria, Nepal, Israel, Ethiopia, Costa Rica, Indonesia, Sierra Leone, Slovenia, Myanmar, Colombia, Malawi, Liechtenstein, DRC, Burundi, Japan, Namibia, Ecuador, Palestine, Rwanda participated in meeting 4684, S/PV.4684 (2003).

Member of the United Nations may participate in the discussion of any question brought before the Council whenever its interests are especially affected. Also, the number of States involved in a particular ongoing issue will grow given that the non-permanent membership of the Council rotates every two years.[626]

It also appears that the Council is empowered to act on behalf of all the Member States when passing a resolution, suggesting that its practice must be taken to have a substantially greater weight than simply representing the view of its small membership. Article 24(1) specifies that the Council acts on the behalf of the Members when carrying out its duties related to the maintenance of peace and security. Although the meaning of this provision has been the subject of debate,[627] and there is little legislative history to shed light on it,[628] it must at least mean that actions of the Council are attributable to the "UN organisation as a whole and not to individual members, such as, for instance, the members of the SC".[629] Ecuador explained during the debates that this meant that the Council "must act in the name and on behalf of all members of the Organisation".[630] Moreover, under Article 25 of the Charter, Members agree to accept and carry out Council decisions, thus reinforcing the view that the numeric size of the Council is not representative of the weight that ought to be accorded to its resolutions.

1.2.4 Seriousness and Binding Nature of Resolutions

The principal argument against the customary law relevance of General Assembly resolutions is that these are non-binding resolutions, and the States do not mean them to be followed when they are passed.[631] The Council is also a political decision making body. Its function is a practical one: to address and resolve situations that are a threat to international peace and security. Hence, it could be argued that the States participating in the decisions have no intention of creating customary law through their actions.

However, Council resolutions are markedly different to General Assembly resolutions. The Council is the primary body responsible for the grave matters of international peace and security. It is empowered to make binding decisions and impose economic sanctions or military enforcement. As Simma and Mosler point out, the Council is "the politically more important organ which, according to the intentions of the authors of the Charter, is supposed to take the necessary prompt and effective

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[626] Article 23, Charter of the United Nations.
[627] See Simma and Mosler *The Charter of the United Nations: A Commentary* at 442, see also Kelsen *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* at 280.
[628] See the discussions regarding Article 24(1) at the Conference on International Organisation Founding of the United Nations, San Francisco 1945, UNCIO.
[629] Simma and Mosler *The Charter of the United Nations: A Commentary* at 449.
[630] Comments of Ecuador on the Dumbarton Oaks Proposals at 407. See also Bailey and Daws *The Procedure of the UN Security Council* at 22.
[631] See for instance Arangio-Ruiz "The Normative Role of the General Assembly of the United Nations and the Development of Principles of Friendly Relations" at 431, Danilenko *Law-Making in the International Community* at 121-122, Schwebel "The Effect of Resolutions of the United Nations General Assembly on Customary International Law".

measures for the maintenance of peace, and which possesses the corresponding powers to do so."[632] The power of the Council to pass binding resolutions is a further distinction. A binding resolution has particular force, it has an immediate quasi-judicial impact, and as the Court in *Namibia* pointed out, it means that all Members must comply with the decision, "including those members of the Council which voted against it and those Members of the United Nations who are not members of the Council."[633]

1.2.5 Decision Making Body

Another relevant distinction with the General Assembly is that the Council is a decision making body. The General Assembly is only empowered to "discuss" and "make recommendations", and in some circumstances "initiate studies".[634] It is a forum for debate and its actions are verbal. The Council, on the other hand, may establish subsidiary organs,[635] "call upon parties to settle their dispute",[636] "investigate"[637] and "recommend procedures".[638]

Importantly it can also "determine the existence of any threat to the peace" and "make recommendations" or "decide what measure shall be taken".[639] Its resolutions range from expressions of concern, to decisions to use force. These resolutions are verbal conduct in one sense, but lead to physical actions, which may have dramatic impacts. Thus, they can be considered to have a greater weight than General Assembly resolutions, and be relevant not only as *opinio juris* but also as a form of practice.

1.2.6 Consequential Practice of States under Resolutions

The fact of a pre-existing obligation complicates the question of whether the consequential practice of States (enforcing Council resolutions) is relevant to customary law. The situation in the case of practice undertaken pursuant to a treaty may provide a useful analogy. In that case the practice is usually considered not to contribute to customary norms, as it is not referable to a "general practice accepted as law"[640] but rather a treaty obligation. The Committee on the Formation of Customary Law maintains that "what states do in pursuance of their treaty obligations is *prima facie* referable only to the treaty, and therefore does not count towards the formation of a customary rule."[641] This is

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[632] Simma and Mosler *The Charter of the United Nations: A Commentary* at 447.
[633] *Advisory Opinion on Namibia* at 54.
[634] Article 10 and Article 13, Charter of the United Nations. Note that it has other powers under the Trusteeship arrangements.
[635] Article 29, Ibid.
[636] Article 33 (2), Ibid.
[637] Article 34, Ibid.
[638] Article 36, Ibid.
[639] Article 39, Ibid.
[640] Article 38(b) of the Statute of the International Court of Justice.
[641] International Law Association *Final Report of the Committee on Formation of Customary General International Law* Article 24 at 757. This is consistent with the position of the Court of Justice in *North Sea Continental Shelf Cases* at 43-44.

nonetheless a matter to be determined in each case, and some practice will be relevant to customary law formation.[642]

In the case of the Council the question is a little more complex. As mentioned above, the implication in much of the Council practice is that the legal rule underlying a binding obligation is not created in the resolution but rather is enforced through that resolution. If this were the correct analysis of such obligations then the actions undertaken in pursuance of the resolution would be relevant evidence of practice supporting the underlying obligation. In that case the practice upholds that norm despite being most proximately referable to the Council resolution.

In those instances where the resolution is neither restating or referring to an obligation already existing under international law, the conduct consequential to Council resolutions is likely to amount to relevant practice only where it is not only referable to a binding resolution, such as when it takes place according to a recommendatory resolution, or is undertaken independently from the obligation. Finally, the consequential practice under binding resolutions will play a part in shaping the opinion of the international community and act as a crystallising force in relation to the acceptance of a particular norm.

1.3 CONCLUSION

Council resolutions at the very least provide evidence of *opinio juris* and verbal acts of the States members of the Council, and arguably also reflect a broader consensus. Moreover, the Council's special status in the international community causes it to shape the views of the broader international community on matters on which it passes resolutions, thus creating consensus views aligned with its resolutions, and hence its practice can be considered to indicate the future direction of evolution of customary law on those matters.

By analogy with General Assembly resolutions, its resolutions may contribute to customary law as *opinio juris* of individual States, and as verbal practice. In addition, certain resolutions lead to physical actions, which may be a form of State practice so long as they are not merely the implementation of an obligation created by the resolution.

The weight of Council resolutions is greater than that of General Assembly resolutions. Despite the Council's more limited membership, these resolutions represent more than merely the view of the members of the Council and are serious and considered statements. Moreover, they are binding, and the Council can pass sanctions, and is a powerful and influential decision-making body in world affairs.

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[642] Meron *Human Rights and Humanitarian Norms as Customary Law* at 50.

The impact of the resolutions will still depend on their particular wording and the surrounding circumstances. They are most likely to be direct evidence of *opinio juris* when they formulate legal principles in a deliberate way, or specify that a particular action is contrary to international law. Nevertheless, it is difficult to see why repeated calls for States to abide by particular behaviour or principles, even when not formulated as illegal, will not, in time, serve as the foundation for new customary law norms.

This is particularly true where the Council imposes conduct or standards through sanctions or forceful intervention. A migration of the principles it seeks to impose as 'Council prohibited conduct' to customary law could be anticipated in such situations, given the authority of the Council, and the fact that it represents the most prominent members of the international community. Naturally, however, the emergence of a customary law norm would require reinforcing practice outside the Council.

2 QUASI-LEGISLATIVE IMPACT

The notion that the Council can have a quasi-judicial impact where it makes explicit findings of illegality or interprets provisions of the Charter or legal principles is broadly accepted.[643] However, the question of how the Council can have a quasi-legislative impact – defined as one involving the creation or modification of some element of a legal norm that is "directed to indeterminate addressees and capable of repeated application in time",[644] has received less attention, and has also been somewhat more contentious.

This section considers two forms of quasi-legislative impact, the first derived from resolutions explicitly maintaining that certain conduct is illegal, and the second considering whether, even when the Council does not explicitly make a finding of illegality, it can, through frequent repetition of prohibitions in different instances, and the adoption of enforcement measures under Chapter VII, create a quasi-legislative prohibition on certain conduct.

2.1 QUASI-JUDICIAL

The International Court of Justice in *The Advisory Opinion on Namibia*[645] implicitly accepted that the Council could make a quasi-judicial finding of illegality. It held that

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[643] Gowlland-Debbas "The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case", also Harper "Does the United Nations Security Council Have the Competence to Act as Court and Legislature?" (1994) 27 NYU J Int L & Pol 103, Kirgis "The United Nations at Fifty: The Security Council's First Fifty Years", Alvarez "Judging the Security Council" particularly the content of footnote 115 at 21 and, Jessup *Transnational Law* (Yale University Press, New Haven, 1956) at 103-104.

[644] Kirgis "The United Nations at Fifty. The Security Council's First Fifty Years" at 520 adopts Yemin *Legislative Powers in the United Nations and Specialized Agencies* (Sijthoff, Leyden, 1969) at 6.

[645] *Advisory Opinion on Namibia* (1971) ICJ Rep 16.

> A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end.[646]

It went on to find that, "The decisions are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out."[647] Thus, Members were prohibited from disregarding such illegality or recognising violations of law resulting from it. Judge Onyeama described the nature of the Council resolution as "in effect, a judicial determination."[648]

The reasoning of the Court in the *Lockerbie Case* also supports the view that the Council resolutions have a legal impact, and can even prevail over other legal obligations.[649] The Court held that the Council resolutions were binding under Article 25. It stated that "prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement".[650]

The resolutions that most clearly purport to have a quasi-judicial application are those where the Council finds that certain conduct by a State or non-State actor is illegal.[651] The impact of such resolutions is particularly clear when the Council then goes on to request actions or impose enforcement measures.[652] Illegality can also be implied. For instance, in the case of Libya, the Council stated that "every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State" and found that Libya's failure to demonstrate by concrete actions its renunciation of terrorism constituted a threat to international peace and security, it then requested that Libya discharge its responsibility by surrendering two of its nationals.[653]. Similarly, after the coup in



[646] *Advisory Opinion on Namibia* at 54.
[647] *Advisory Opinion on Namibia* at 53.
[648] Ibid at 147.
[649] See Bowett "The Impact of Security Council Decisions on Dispute Settlement Procedures" for criticism of this position.
[650] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (Libya v US), Provisional Measures* at para 42.
[651] Eg: the SC maintained that the secessionist activities by the province of Katanga during the war in the Republic of Congo were illegal, SC Res 169 (1961). It declared that the continued presence of South Africa in Namibia was illegal and that all acts by the South African Government concerning Namibia were invalid, SC Res 276 (1970). It declared that the capture and murder of diplomats by the Taliban were flagrant violations of international law, SC Res 1193 (1998) and SC Res 1267 (1999) as were acts of genocide in Rwanda, SC Res 925 (1994). and attacks against United Nations personnel, see for eg SC Res 912 (1994) also in the case of Rwanda.
[652] Examples include Southern Rhodesia, South Africa, Iraq, the former Yugoslavia, Libya and Somalia. See Alvarez "Judging the Security Council" at 20-21. For instance, it called on Israel "to rescind these illegal measures and to facilitate the immediate return of the expelled Palestinian leaders so that they can resume the functions for which they were elected and appointed", SC Res 468 (1980) para 1. In relation to Iraq's invasion of Kuwait, the Council called on the international community not to recognise the annexation, SC Res 662 (1990). imposed a binding settlement with regard to the boundary dispute, SC Res 687 (1991) and made findings with respect to responsibility for damages, SC Res 686 (1991), SC Res 687 (1991), SC Res 705 (1991).
[653] SC Res 748 (1992). See Gowlland-Debbas "The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" at 660.

Haiti, the Council referred to the new regime as the "illegal *de facto* regime" and authorised the use of force "to facilitate the departure from Haiti of the military leadership".[654]

Despite the fact that some commentators have expressed their concerns, particularly regarding the extent to which the Council may validly develop its influence and authority unchecked,[655] most scholars have acknowledged that these resolutions have important consequences, and have conceived of them as quasi-judicial.[656]

2.2 EXPLICIT QUASI-LEGISLATIVE DETERMINATIONS

The role of the Council in shaping general international law principles is less well recognized, although commentators acknowledge that the Council has in some instances affected the meaning of legal terms, or modified or created legal rules of general application. Szasz points out a particularly striking example of such conduct in the case of the recent resolution on terrorism, where the Council relied on Chapter VII to order States to take, and refrain from, certain actions in an outright legislative manner.[657] Kirgis recognises this form of "legislative authority" when there is a threat to, or breach of, the peace.[658] He points to the Council Chapter VII tax on Iraq's oil exports, and the subsequent transfer of frozen proceeds,[659] which gave the commission set up to administer the fund to pay compensation for damage to be paid by Iraq[660] a way to execute its decisions, both in that case and possibly in future cases.[661]

Alvarez points out that resolution 688, which deals with the entry of humanitarian organisations into Iraq to protect the Kurds, is a decision that "like many others the Council has recently made, bears on the meaning of Article 2(7) and the present status of human rights law."[662] Moreover, once the Council has found, for instance, that mass rapes constitute a breach of humanitarian law, this position

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[654] SC Res 940 (1994) para 3 & 4.

[655] For a discussion of these issues see Franck "The 'Powers of Appreciation': Who Is the Ultimate Guardian of UN Legality?", Bowett "The Impact of Security Council Decisions on Dispute Settlement Procedures", Bedjaoui and Noble *The New World Order and the Security Council: Testing the Legality of Its Acts,* Alvarez "Judging the Security Council". For instance, White questioned the authority of the Council to undertake the quasi-judicial determination of the Kuwait border and the punishment of Iraq. White Keeping the Peace: The United Nations and the Maintenance of International Peace and Security (2nd ed, Manchester University Press, Manchester, 1997) at 98.

[656] Gowlland-Debbas "The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case", also Harper "Does the United Nations Security Council Have the Competence to Act as Court and Legislature?" (1994) 27 NYU J Int L & Pol 103, Kirgis "The United Nations at Fifty: The Security Council's First Fifty Years", Alvarez "Judging the Security Council" particularly the content of footnote 115 at 21 and, Jessup *Transnational Law* (Yale University Press, New Haven, 1956) at 103-104.

[657] Szasz "The Security Council Starts Legislating" (2002) 96 AJIL 901 at 901, referring to SC Res 1373 (2001).

[658] Kirgis "The United Nations at Fifty: The Security Council's First Fifty Years" at 522. See also Harper "Does the United Nations Security Council Have the Competence to Act as Court and Legislature?", Gowlland-Debbas "Security Council Enforcement Action and Issues of State Responsibility". See also Dulles *War or Peace* (Macmillan, New York, 1950) 194, Kahng *Law, Politics, and the Security Council: An Inquiry into the Handling of Legal Questions Involved in International Disputes and Situations* (Nijhoff, The Hague, 1964) at 13.

[659] SC Res 705 and SC Res 706 (1991), SC Res 778 (1992), see Kirgis "The United Nations at Fifty: The Security Council's First Fifty Years" at 525-526.

[660] SC Res 687 (1991) paras 16- 19.

[661] Ibid at 525-526.

[662] Alvarez "Judging the Security Council" at 22. See also Gowlland-Debbas "Security Council Enforcement Action and Issues of State Responsibility" at 63-68.

is effectively crystallised in the law, even if the rule was originally of conventional or customary law origin.[663]

Teson has also argued that the Security Council has, through its practice, established its power to authorize the use of force to remedy serious human rights violations, thus developing the substantive law of the Charter.[664] Moreover, the accumulation of individual resolutions can cause a gradual evolution of meaning.[665]

Some commentators, however, have questioned whether the Council has the authority to make such legal determinations. Higgins, for one, argues that the Council is not authorised under the Charter to make legal findings, and hence questions the authoritativeness of such resolutions.[666] Nonetheless, until resolutions explicitly declaring illegality or defining legal meaning are de-legitimised, perhaps by an International Court of Justice ruling, they remain authoritative and binding.

2.3 IMPLICIT QUASI-LEGISLATIVE PROHIBITIONS?

One particularly interesting issue is whether, even when the Council does not explicitly make a finding of illegality, it can, through the formulation, seriousness, frequent repetition in different instances, and enforcement measures under Chapter VII, create a quasi-legislative prohibition on certain conduct. The great majority of the Council practice considered in this thesis does not specify that conduct is illegal, but consists of statements condemning particular conduct and calling on parties to cease the conduct.

This section argues that, indeed, although this effect has as yet been largely overlooked, in practical fact, the Council can create a quasi-legislative prohibition on certain conduct by force of repetition, accumulated condemnation, and enforcement, where the practice is shown to amount to more than *ad hoc* policy decisions. This derives from the Council's ability to enforce its decisions and an informal precedent system within the Council. While such prohibitions are difficult to characterize under international law, they have substantial *de facto* impact.

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[663] See Meron "War Crimes in Yugoslavia and the Development of International Law" (1994) 88 AJIL 78, Paust "Applicability of International Criminal Law to Events in the Former Yugoslavia, 9" (1994) Am U J Int L & Pol 499, Goldstein *Recognizing Forced Impregnation as a War Crime under International Law* (Center for Reproductive Law & Policy, 1993).

[664] Teson "A Symposium on Re-Envisioning the Security Council: Collective Humanitarian Intervention" (1996) 17 Mich J Int'l L 323 at 353-354.

[665] Kirgis "The United Nations at Fifty: The Security Council's First Fifty Years" at 526-527, and generally Ratner "The Security Council and International Law: Deciphering the Normative Messages of a Political Organ".

[666] Higgins "The Place of International Law in the Settlement of Disputes by the Security Council" (1970) 64 AJIL 1 at 5. See also Kirgis "The United Nations at Fifty: The Security Council's First Fifty Years" at 529. Bowett "The Impact of Security Council Decisions on Dispute Settlement Procedures"

2.3.1 *Ad Hoc* Policy or Binding Prohibitions?

The Council, like most decision making bodies of an executive nature, has a broad discretion in its practice. The extent of this discretion, and whether it must be guided by standards or law, remains somewhat uncertain.[667] However, the key question, for the purposes of this thesis, is whether the Council can voluntarily establish a general norm through its practice.

Starting from the proposition that the outcome of Council practice will depend on whether the Council intends to simply resolve a particular threat to international peace and security or intends to formulate a prohibition of more general application. This will turn on the formulation of the resolution and extent to which it is re-stated in other situations.

An important factor will be whether the Council formulates similar principles across a wide variety of analogous situations. Even if these principles are initially formulated as mere policy, over time, the repetition of these principles by States in Council debates (and outside of the Council), and in later resolutions may suggest that a consensus is forming around a particular proposition. A large volume of similar practice is difficult to account for unless the policy of the Council is informed by a common understanding of the way in which the parties should behave.

This is in accord with the view that political restrictions on the Council require it to act in a coherent and fair manner, in as much as this is possible, to maintain its legitimacy.[668] The Council, as a predominantly executive body with a broad discretion to enforce international peace and security is not bound by its prior decisions. However, the repeated condemnation of certain conduct, and maintenance of the importance of particular principles, must create within the body of the Council a set of principles that influence future Council practice, though they are not binding. Higgins acknowledged for instance that "sometimes the substance of the Council work, and the fact that it is legal work repeated year in and year out, makes it engage in the processes of customary development as well as the mere imposing of obligation."[669]

A resolution by the Council condemning conduct must be taken seriously. The Council is the primary decision making body responsible for international peace and security, and a failure to comply with its decisions may cause a State to become an international pariah and face sanctions or forceful

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[667] The Appeals Chamber decision in the *Tadic* case suggested that it would be subject to some restrictions, deciding that even though the determination of a threat to the peace "is more of a political concept [...] the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the Purposes and Principles of the Charter" *Tadic (Court of Appeal)* at para. 27. This is consistent with Teson's reasoning that, that notion of discretion which "conceives of the official as deciding the case anew, as creating fresh law" does not apply to the Council, which is subject to international law and standards, even if its decisions may not be subject to review by the ICJ. See Teson "A Symposium on Re-Envisioning the Security Council: Collective Humanitarian Intervention" (1996) 17 Mich J Int'l L 323 at 339.

[668] See Franck *Fairness in International Law and Institutions* (Clarendon Press, Oxford, 1995).

[669] Higgins *Problems and Process: International Law and How We Use It* at 28.

intervention.[670] Moreover, the Council power is reinforced by the fact that its permanent members are the most powerful economic and military States. Political reality dictates that decisions are usually only taken when the majority of States support them – despite the limited number that officially makes the decision – and thus they are actually representative of a widely accepted position.

Therefore, in the context of an international sphere where no other mechanism of regulation is associated with any enforcement power, the role of the Council in shaping the conduct of states through its power to reject certain conduct and effectively prohibit it, takes on particular prominence.

2.3.2 Council Sanctions and Illegality

The relationship between conduct that is *de facto* prohibited through force of repeated Council action condemning conduct and then imposing sanctions, and illegality under traditional international law is somewhat uncertain. The Council does not formally require a breach of international law or of the Charter before it can act.[671] In Kelsen's words "The purpose of the enforcement action under Article 39 is not to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law."[672] Therefore, the mere fact that the Council imposes sanctions does not render the conduct illegal.

Nonetheless, there is a complex if intuitive link between Council sanctions and illegality under international law. Many factors reinforce the perception that actions subject to Council censure are illegal, including the binding nature of resolutions, the gravitas of the Council, and the use of sanctions to enforce decisions. Despite being difficult to quantify, an assumption exists that where the Council imposes sanctions, the party being sanctioned was acting contrary to international law. The Council has sought to impose sanctions following a breach of international law by a State.[673] Moreover, States frequently assert non-compliance with the Charter or international law as a basis for Council intervention. This practice, which Higgins considers to arise from "the psychological need for legal justification",[674] is generally acknowledged.[675] In addition, it reinforces the perception that States look to the Council to enforce international law.[676]

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[670] See for instance Iraq, but consider the extent to which the same could be said of Israel, which has also failed to abide by Security Council resolutions.

[671] See Higgins "The Place of International Law in the Settlement of Disputes by the Security Council" at 16, Schachter "United Nations Law" (1994) 88 AJIL 1 at 12.

[672] Kelsen *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* at 294.

[673] See Alvarez "Judging the Security Council" at 21, Schachter "United Nations Law" at 12, Gowland-Debbas "The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" at 660.

[674] Higgins "The Place of International Law in the Settlement of Disputes by the Security Council" at 11.

[675] Ibid at 17. See also Schachter "The Quasi-Judicial Role of the Security Council and the General Assembly" at 960-961.

[676] See Ratner "The Security Council and International Law: Deciphering the Normative Messages of a Political Organ" at 601.

Moreover, a theoretical link between condemnation and sanctions and a violation of law is implicit in most legal theory. In Dicey's exposition of the rule of law, for instance he emphasised that "a man may with us be punished for a breach of law, but he can be punished for nothing else".[677]

Consider also for instance Kelsen's explanation that:

> sanctions are forcible interference in the sphere of interests normally protected by the law. They apply only on the condition that a delict has been committed or, what amounts to the same, that an obligation established by the law has been disregarded, and only against the delinquent [...][678]

Some commentators have acknowledged a more specific link between Council sanctions and perceived illegality. Alvarez, for instance, asked – without venturing to provide an answer –"whether the activities that prompted Council actions should generally be regarded as violations of international law".[679] Gowlland-Debbas took the matter further, pointing out that:

> we can no longer speak of two alternative methods of dispute settlement, the one political and the other legal, but of two alternative processes available to states within the legal framework of state responsibility: the distinction between the function of the Court and that of the Council becomes the distinction between judicial settlement procedures in disputes concerning responsibility and institutionalized countermeasures or sanctions.[680]

Gowlland Debbas seems to consider Council sanctions to be a form of enforcement of international law, while acknowledging that the condition for the application of the sanctions is strictly not an international wrongful act. This position is an extension of the reasoning of the International Law Commission, which defined sanctions, including Council sanctions as "reactive measures applied by virtue of a decision taken by an international organisation following a breach of an international obligation".[681]

Higgins also points out the implicit creation of legal norm through the mere fact of support of one side in a dispute. For instance, when after the 1967 Israel war, the Council and the General Assembly called on Israel not to alter the status of Jerusalem, an assumption grew out of that resolution that "Jordan has a legal title in Old Jerusalem which is preferable to that of Israel's."[682] The converse is

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[677] Dicey (Introduction by Wade) *Introduction to the Study of the Law of the Constitution* (10th, Macmillan, London, 1959) at 202-203.
[678] Kelsen *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* at 706.
[679] Alvarez "Judging the Security Council" at 21, see also Gowlland-Debbas "The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case".
[680] Gowlland-Debbas "The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" at 661.
[681] "International Law Commission Draft Articles on State Responsibility" (1980) II, Part 2, 30 Yearbook of the ILC.
[682] Higgins "The Place of International Law in the Settlement of Disputes by the Security Council" at 7.

also true, that "in practice an authorization by the Council has almost invariably been universally accepted as conferring international legality on an action".[683]

The link between sanctions and illegality is further reinforced by the fact that once a binding resolution has been passed, actions in breach of that resolution become illegal from that point on. A failure to abide by a binding Council resolution has been considered grounds for enforcement measures.[684] In Resolution 1193, for instance, the Council reminded "all parties of the obligation to abide strictly by the decisions of the Council and expresse[d] its firm intention, in accordance with its responsibility under the Charter, to consider such further steps as may be required for the implementation of this resolution".[685]

Moreover, the fact that under Article 1(1), the Council, as an organ of the United Nations, must act "in conformity with the principles of justice and international law" could be seen to reinforce the relationship between Council sanctions and the illegality of the underlying conduct. However, the interpretation of this article has been controversial. According to Kelsen, the restoration of peace is different to the restoration of law, allowing the Council "to enforce a decision which it considered to be just though not in conformity with existing law".[686] Other commentators, however, have taken the view that the Council is restricted by international law.[687]

2.4 CONCLUSION

Thus, the view is taken in this thesis that the Council can create a quasi-legislative prohibition on certain conduct by force of repetition, accumulated condemnation, and enforcement, where the practice is shown to amount to more than *ad hoc* policy decisions. This view is also supported by the basic notions underpinning the rule of law requiring that punishment and sanctions only be imposed in the case of a breach of law. While the conduct censured need not be illegal under international law, it does in practice become prohibited by the Council, which will in turn affect international opinion of the legality of the conduct.

3 SHAPING INTERNATIONAL OPINION AND PRACTICE

Finally, even if the view that Council practice impacts on the formation of customary law and can have a quasi-legislative impact, it is clear that the Council leads and shapes general international

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[683] International Commission on Intervention and State Sovereignty *Responsibility to Protect* (Ottawa, Canada, 2001), para 6.16.

[684] Cornell "A Decade of Failure: The Legality and Efficacy of United Nations Actions in the Elimination of Iraqi Weapons of Mass Destruction" (2001) 16 Conn J Int'l L 325 at 352, see Goodrich, Hambro, et al. *Charter of the United Nations: Commentary and Documents* at 276-81.

[685] SC Res 1193 (1998) para 16.

[686] Kelsen *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* at 295, 366.

[687] Bedjaoui and Noble *The New World Order and the Security Council: Testing the Legality of Its Acts* at 29-36. Note the 'justice', 'international law' distinction and the extent to which this implies that the Security Council need not act consistently with international law. Higgins "The Place of International Law in the Settlement of Disputes by the Security Council" at 8-9. See also for instance the Statement of the United States to Committee III/1 (S1945) 11 UNCIO 379 at 379.

opinion. The Council practice affects what is condemned, rejected and prohibited in the international community. The imposition of sanctions and binding resolutions forces individual States to change their behaviour, as well as changing long-term expectations.

3.1 CRYSTALLISING THE OPINION OF THE INTERNATIONAL COMMUNITY

Council resolutions drive and shape the opinion of the international community. This undeniable influence has been recognised since the Council's inception. As the representative for the Netherlands commented during the San Francisco debates, even a non-binding censure "would have a considerable moral effect on world opinion and might therefore be an effective deterrent to potential aggressors."[688]

Every day the Council assesses situations and applauds or condemns actions, it determines what conduct is acceptable, calls on parties to behave in certain ways, and ultimately can take steps to enforce its view through sanctions or enforcement action. In this fashion the Council plays a key role in crystallising the opinion of the international community. This is particularly true in relation to the perception of what is legal.

3.2 SHAPING THE PRACTICE OF STATES

The role of the Council in shaping and changing the practice of States is perhaps the most striking aspect of Council practice. The Council affects how States behave, not only through the implementation of a resolution, but also by modifying long term conduct and expectations. The Council can bind parties to a dispute in a quasi-judicial fashion as well as require that all Member States comply with a particular resolution. It has made explicit findings of illegality and insisted that the rest of the international community act as if those actions were illegal. It has also repeatedly and explicitly condemned certain conduct; demanded parties modify their behaviour; and backed up these demands with stated determination to enforce its resolutions.[689] Moreover, the precedent nature of the Council practice, which is reinforced by requirements of fairness and legitimacy,[690] has a norm forming impact, causing States to expect that certain conduct will be rejected.

The practice of the Council shapes the practice of States, but is also formed by such practice. A review of the practice in the Balkans and Western Africa suggests that at some points the opinion of States was leading the practice of the Council. This is most clear in the former Republic of Yugoslavia when the Council seemed to be adopting the decisions of the EU and Conference for the former Yugoslavia. However, as the practice evolved in the cases of Kosovo and the former Yugoslav Republic of Macedonia, it appears that the Council was no longer merely adopting principles agreed

[688] Statement of the Netherlands to Committee III/1 (1945) 11 UNCIO 329 at 329.
[689] See for example SC Res 1267 (1999), SC Res 771 (1992) para 7, see also SC Res 1267 (1999), SC Res 757 (1992).
[690] Franck *Fairness in International Law and Institutions* (Clarendon Press, Oxford, 1995), see also discussion above on precedents.

to in the region or by the parties (for instance in peace agreements), but was instead insisting on particular principles as intrinsic to the situation. Similarly, in the examples in Western Africa, in Sierra Leone, the Council adopted the principles already formulated by the regional organisation and individual States. However, the later decisions in Côte d'Ivoire and Liberia also seem to derive more from intrinsic Council authority.

The recent amendments to the ECOWAS and AU regional conventions to mirror the principles that have received extensive and consistent support in the Council are evidence that these principles are gaining widespread acceptance. Clearly, these treaties are not negotiated in a vacuum, without historical or chronological context. The practice of the Council and that of individual States, repeating the principles legitimised them for many years before the amendments to ECOWAS convention in 2001 and the creation of the African Union constitution in 2002. These conventions are a form of codification of the practice. Given that they reflect the same evolution on the nature of civil conflict as that of the Council, this must at least *prima facie* imply that the decisions taken by the Council has impacted on the practice of the region.

4 CONCLUSION

While it is difficult to characterise the impact of the practice of the Council within traditional legal theory, its practice is of key importance in shaping the practice of the international community and is highly relevant to the emergence of new customary law norms. The general practice of the Council, which includes the reasons it puts forward to justify its positions and the principles it cites and relies upon in the preambles to resolutions, provides a strong indication of the direction in which international law is evolving.

This is because the practice of the Council is both evidence of *opinio juris* and verbal action, and shapes what is considered prohibited and illegal in the international community. Many factors reinforce the perception that actions subject to Council censure are illegal, including the binding nature of resolutions, the gravitas of the Council, and the use of sanctions to enforce decisions. The imposition of sanctions and binding resolutions forces individual States to change their behaviour, as well as changing long-term expectations.

Even if the statements in the Council are initially policy decisions, if they are binding and repeated sufficiently, they can become a form of quasi-legislative Council prohibited conduct. This is not the same as saying that the practice renders the conduct illegal under international law; it does however, create a *de facto* prohibition on the conduct. Such practice may provide instigation for the emergence of customary international law. This will depend on the conduct of States separate to the Council and

the extent to which the principles formulated are incorporated in the practice of States and regional bodies, and into treaties.

CHAPTER 4: THE NATURE AND IMPACT OF EMERGING NORMS

The earlier chapters establish that there is a large and growing body of international practice that cannot be explained or justified according to a traditional international legal approach to civil conflict. This chapter seeks to analyse this practice and considers whether it is best characterised as evidence of new emerging legal obligations, or whether it reflects at present no more than policy responses of the international community to civil conflict.

It begins with an overview of methodological issues. The approach adopted emphasises descriptive accuracy – it takes the view it is vital that international law evolve to approximate better real-world practice and thereby reflect the changing perspective of the international community, providing it guidance in the new situations it faces.

The thesis identifies three possible norms within the practice: the rejection of civil conflict which aims to overthrow a democratically elected government; the rejection of civil conflict aiming to cause or involving massive violence against civilians; and more speculatively, that ultimately the rejection of civil conflict for political aims (other than in self-defence by a State against violent uprising or by a people in self-defence against violent oppression).

It finds that much of the practice is too recent and not established enough in the public discourse of States to evidence the emergence of traditional customary law rules at present. Nonetheless, there is strong evidence to support the emergence of a limited norm prohibiting the overthrow of a democratically elected government. In addition, the extent and scope of the international community condemnation and rejection of civil conflict can be taken to support the proposition that, in time, broader international prohibitions against civil conflict will crystallize in international law.

The thesis concludes that contrary to widespread assumptions, civil conflict is no longer considered a domestic matter, and is increasingly being recognised as having a severe impact on the peace and stability of the world. A major and continuing shift in practice supports predictions of fundamental change in the perception of the legality of recourse to force in civil conflict even where this takes place entirely within one sovereign State.

1 METHODOLOGICAL ISSUES

It is clear that difficult methodological issues arise in seeking to analyse the practice available. This seems to represent a common dilemma in emerging fields of international law. In the Human Rights field, for instance, Schachter rejected the "usual process of customary law formation" as being unsuited to the nature of human rights violations. He pointed out that States do not usually protest against violations that do not affect their own nations,[691] and argued that the focus should be instead on available practice, which he found to suggest that some, but not all, of the norms in the Universal Declaration had crystallised into custom.[692] In contrast, Simma and Alston argued that the formal criteria should not be bent to characterise the practice as customary law."[693] Instead they suggest that human rights norms should be acknowledged as legally binding as "general principles of law recognized by civilized nations" under Article 38 of the Court statute.[694] More generally, Sir Robert Jennings maintains that "most of what we perversely persist in calling customary international law is not only *not* customary law: it does not even faintly resemble a customary law."[695] Similarly, Charlesworth argues that modern custom does not accord with the traditional rhetoric of custom.[696]

This section, therefore, seeks to develop a methodology that is appropriate to the practice collated in Part I.

1.1 WHOSE PRACTICE IS RELEVANT?

Generally, new customary law norms are based on conduct of States acting consistently with that norm. In the case of permissive norms (or positive obligations) the focus is on practice consistent with the norm,

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[691] Schachter "International Law in Theory and Practice" (1982 V) 178 Hague Academy of International Law, Recueil des Cours 13. See also Gunning "Modernizing Customary International Law: The Challenge of Human Rights" (1991) 31 Virginia JIL 212 at 213.

[692] Schachter "International Law in Theory and Practice" at 336. Lillich adopts a similar approach. Lillich "The Growing Importance of Customary International Human Rights Law" (1996) 25 The Georgia Journal of International and Comparative Law I, at 9-10.

[693] Simma and Alston "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1992) 12 Australian Year Book of International Law 82-108 at 97.

[694] This would in their view accommodate a process of "express articulation of principles in the first instance, *ab initio* or progressively being 'accepted and recognised' as binding and peremptory by the 'international community of States as a whole'." Ibid at 104. This approach also requires bending of the formal requirements as the original debates surrounding 38(1)(c) favour the view that this source of law was intended to refer to general principles within the domestic sphere rather than the international sphere. See the record of the debates, for instance Lord Phillimore specified that what was intended was laws accepted by 'all civilized nations in foro domestico" Proces-Verbaux Du Comité Consultatif Des Juristes, 16 Juin/24 Juillet (1920), 306 at 335. See Lillich "The Growing Importance of Customary International Human Rights Law" (1996) 25 The Georgia Journal of International and Comparative Law I. For the alternative view see for instance Simma and Alston "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1992) 12 Australian Year Book of International Law 82-108 at 104. In the environmental rights context, Bodansky also seeks to justify customary law as new form of universal declaratory law. Bodansky "Customary (and Not So Customary) International Environmental Law" (1995) 3 Ind Journal Global Legal Stud 105 at 116–19.

[695] Jennings "The Identification of International Law" in Cheng (ed.) *International Law: Teaching and Practice* (1982) at 3, 5.

[696] Charlesworth "Customary International Law and the Nicaragua Case" (1984-87) Australian Year Book of International Law 1.

and statements upholding the positive obligation.[697] This is more difficult in the case of a norm of prohibition, as the primary practice will be non-practice (an absence of action).

As was seen in the *Nuclear Weapons Advisory Opinion*, an absence of action is difficult to interpret. In that case, certain States did argue that the consistent practice of non-utilization of nuclear weapons since 1945 supported the existence of a customary international law prohibiting their use.[698] However, other States argued that the non-use was referable not to emerging customary prohibition, but to the fact that circumstances that might justify their use had not arisen,[699] and ultimately this division of opinion led the Court to discount the importance of the practice.[700]

In the case of civil conflicts, disagreements that could have led to conflicts but were peacefully resolved are not easy to locate, and would in all likelihood not attract international community interest. However, what can be identified is the response of the international community to such recourse to force. The question that arises is whether the regular disapproval of certain types of conduct expressed through condemnation or intervention is a response to the breach of a legal rule. While this approach would not be strictly orthodox, it is consistent with an aspect of the opinion of the Court in *Nicaragua,* which emphasized that: [701]

> instances of State conduct inconsistent with a given rule *should generally have been treated as breaches of that rule*, not as indications of the recognition of a new rule.

Morgenthau points out that in essence "A rule, be it legal, moral, or conventional, is valid when its violation is likely to be followed by an unfavourable reaction, that is, a sanction against its violator."[702] Weisburd similarly emphasises "What is crucial, however, to permit the characterization of a norm as a rule of customary law, is that States refuse to acquiesce in a breach of the norm, but on the contrary actively seek to reverse the effects of the breach."[703] Schachter also highlights the importance of assessing

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[697] For instance, in the Anglo-Norwegian Fisheries Case (1951) ICJ Rep 116 the Court considered the practice of States that had asserted an extension of the fisheries limits, and preparatory documents to the third Conference on the Law of the Sea which included the principle of preferential rights for coastal states. (para 53). It also considered resolutions at conferences as showing "overwhelming support for the idea" (para 58), and noted that the practice of the North East Atlantic fisheries commissions (of which the parties were members) had adopted the principle in question.

[698] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep 226, paras 65-66.

[699] Ibid, paras 65-66.

[700] Ibid, para 67. It also considered the impact of General Assembly resolutions affirming the illegality of nuclear weapons, but held that as these were not binding, and were not supported by all nuclear states, these were insufficient to establish the requisite opinio juris. See para 68-69.

[701] *Nicaragua v United States of America,* para 186. (italics added).

[702] Morgenthau "Positivism, Functionalism, and International Law" in Simpson (ed.) *The Nature of International Law* (Ashgate, Aldershot, 2001) 159 at 175.

[703] Weisburd "The Significance and Determination of Customary International Human Rights Law" (1996) 25 Ga J Int'l & Comp L 99 at 103.

the intensity and depth of third-party condemnation of violation in determining the emergence of a norm.[704]

In practical terms, therefore, the customary law norm would be founded on the practice of the international community in response to the recourse to force in civil conflicts, rather than on an assessment of the extent to which States resolve their internal differences through political means as opposed to violence.

The question remains whether the disapproval is based on a policy decision or is hardening into a legal prohibition. This turns on the question of intention. Was the statement intended to protest against the violation of a legal obligation? This can be determined through consideration of how the statement is formulated: whether it implies a legal obligation and uses legal terminology, whether it is perceived as binding by different actors, and how the international community responds to its breach. A focus on intention is consistent with the emphasis on *opinio juris* in customary law, but also inherits similar difficulties, particularly, how to balance what States actually believe with what they claim.[705]

1.2 CONDEMNATION FOLLOWED BY SANCTIONS

The thesis argues that instances where non-injured parties respond to a situation by explicitly condemning the conduct and then seeking to impose sanctions are crucial practice. Such responses, which appear to represent attempts at enforcement of a prohibition by non-injured states, are unusual in the realm of international law.[706] In fact, according to orthodox international law they are of uncertain legality, at least when they involve the use of force. Nonetheless, they represent a particularly strong rejection of the conduct taking place by the international community.

Rejection and disapproval of conduct does not necessarily imply that such conduct is illegal. However, sanctions are the manifestation of the fact that the conduct is seriously in question. While the practice of

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[704] Schachter was discussing human rights norms. Schachter "International Law in Theory and Practice" (1982 V) 178 Hague Academy of International Law, Recueil des Cours 13 at 335-336.

[705] See helpful discussion of the problems raised by *opinio juris* in Byers *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, Cambridge, 1999) at 130-142. See also Akehurst "Custom as a Source of International Law" at 32. See Danilenko *Law-Making in the International Community* (Martinus Nijhoff, Dordrecht, 1993) at 98-129 for a further discussion of the traditional role of *opinio juris* and its current role. For a striking criticism of Danilenko's strongly Positivist approach, see Alvarez "Book Review: Positivism Regained, Nihilism Postponed. Danilenko, Law Making in the International Community." (1994) 15 Mich J Int'l L 747.

Note that in the case of *opinio juris*, Byers for instance, maintains that rather than searching for beliefs, the Court is essentially searching for "convergent expectations", and it is doing so by examining "what States have openly done or admitted to doing, what in some cases they have not done, what State representatives have or in some cases have not said, and the contexts in which these various kinds of State practice have taken place". Byers *Custom, Power and the Power of Rules: International Relations and Customary International Law* at 151.

[706] Few international law norms are consistently enforced, and the absence of enforcement is one of the structural weaknesses of international law. Thus, while attempts at enforcement are striking and suggest that the norm is considered of particular importance by the international community, the reverse is not necessarily true. A failure to act to enforce a particular rule does not strongly contradict the existence of that norm.

rejecting aspects of civil conflicts has generally been analysed from the perspective of whether these imply new norms permitting recourse to force (focussing on *legality of intervention*) such an approach obscures the question of whether the practice can impact on the legality of the conduct. A series of interventions by States condemning the overthrow of democratic governments by force, for instance, must be relevant to the question whether there is an emerging principle that prohibits the overthrow of democracies by force.

It is uncontroversial that States may take actions in support of the international legal order, especially by applying economic and political sanctions. As Kelsen maintains "there is nothing to prevent us from calling reprisals sanctions of international law. For reprisals are reactions against violations of international law".[707] Nonetheless countermeasures are typically only open to the State victim of the breach, although if such an obligation were owed *erga omnes,* it would in theory be open to enforcement by all States. In that limited fashion therefore non-forceful sanctions that aim at stopping or preventing conduct that has been condemned imply that the principles sought to be enforced are not merely guidelines or policies but are binding principles.

Forceful responses to civil conflicts raise more complex issues, however, as these forceful countermeasures are *prima facie* illegal under the Charter.[708] While the legality of the actions themselves are not the focus of this discussion, the question of how to interpret this practice, in the light of its *prima facie* inconsistency with the prohibition on recourse to force under the Charter and the rejection of the legality of forceful countermeasures, does arise.

According to Oppenheim, while States formerly had the right to intervene to secure "the observance by other states of universally accepted rules of international law, or of their treaty obligations", in the form of a quasi "police action" such intervention can no longer be justified since the responsibility for policing now rests with the United Nations.[709] As the Court stated in *Nicaragua,* even if Nicaragua had made, and then breached, a commitment to hold elections, the United States could not use force as a remedy.[710]

Nevertheless, in practice States have resorted to forceful reprisals on many occasions. Arend and Beck acknowledge that, despite the apparent prohibition, States have frequently maintained that force had been used for purposes of deterrence or punishment and claimed the right to resort to reprisals.[711] Bierzanek

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[707] Kelsen and Tucker *Principles of International Law* (2nd ed, Holt Rinehart and Winston, New York, 1966) at 21-22.
[708] Brownlie *International Law and the Use of Force by States Revisited* at 281, *Nicaragua v United States of America* at 110-111.
[709] Jennings, Watts, et al. *Oppenheim's International Law* (9th ed, Longman, Harlow, 1992) at 439-440, footnote 4. See also Brownlie *International Law and the Use of Force by States Revisited* at 281.
[710] *Nicaragua v United States of America* at 131-133.
[711] Arend and Beck *International Law and the Use of Force* at 42-43. See also O'Brien "Reprisals, Deterrence and Self-Defense in Counterterror Operations" (1990) 30 Virginia Journal of International Law 421. Moreover, McDougal and Feliciano point out that

considers that "as long as the traditional structure of international relations exists, such imperfect methods of maintaining the international legal order are justified and are hardly to be avoided."[712] Bowett stated that:

> As states have grown increasingly disillusioned about the capacity of the Council to afford them protection against what they would regard as illegal and highly injurious conduct directed against them, they have resorted to self-help in the form of reprisals and have acquired the confidence that, in so doing, they will not incur anything more than a formal censure from the Council. The law on reprisals is, because of its divorce from actual practice, rapidly degenerating to a stage where its normative character is in question.[713]

This controversy prevents a straightforward correlation between the use of force by States and regional bodies, and the legality of the principles they seek to enforce. Nevertheless, these enforcement actions should not be discounted. The decision to use force is not taken lightly by a State, and it must indicate that the principle it seeks to enforce is of considerable importance. This is reinforced by the fact such use of force remains illegal according to traditional theory – even though in this latest incarnation, it has generally not been condemned by the international community.[714] Therefore, irrespective of the formal legality of these actions, they support the emergence of a legal prohibition that they seek to enforce. Recourse to forceful measures indicates a high level of commitment by a State to the principle it is seeking to enforce. Moreover, while in the short term it is not unthinkable that a pattern of enforcement could emerge without the conduct becoming illegal; it would be contrary to logic and fairness for such a situation to persist in the longer term.

1.3 VERBAL ACTS AND PHYSICAL ACTIONS

Concurrent with the human rights debate and the debate surrounding the weight to be given to *opinio juris,* a question of the weight to be accorded to verbal acts of States, in contrast with physical actions, arises. At one level this involves the issue of the extent to which verbal acts can contribute to practice as well as *opinio juris*;[715] at another it raises the question of how much weight to accord to a range of different types of practice during the process of making an assessment of whether a customary rule has emerged.

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frequently reprisals are the only protection to ensure that another State will do their duty under International law. McDougal and Feliciano *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (Yale University Press, New Haven, 1961) at 682.

[712] Bierzanek "Reprisals as a Means of Enforcing the Laws of Warfare: The Old and the New Law" in Cassese (ed.) *The New Humanitarian Law of Armed Conflict* (Editoriale scientifica, Napoli, 1979) 232 at 233.

[713] Bowett "Reprisals Involving Recourse to Armed Force" (1972) 66 AJIL 1 at 2.

[714] Consider for instance the Nigerian and UK intervention in Sierra Leone and French interventions in Cote d'Ivoire.

[715] See Meron "Editorial Comment: The Continuing Role of Custom in the Formation of International Humanitarian Law" (1996) 90 AJIL 238 at 239.

Many commentators have maintained that physical acts are the most important aspect of practice. This view is supported by D'Amato, for instance, who argues that a statement by a State can only be considered as evidence of *opinio juris* but not as evidence of the material component of custom.[716] Simma and Alston, similarly emphasise that actions not words should have precedence, as deeds "are hard and solid; they have been carefully hammered out on the anvil of actual, tangible interaction among States; and they allow reasonably reliable predictions as to future State behavior."[717]

The Committee on Formation of Customary Law supports the view that the issue is not whether verbal acts can amount to practice, which in their view they do, but rather that in some instances more weight should be attributed to conduct than to verbal acts.[718] Moreover, as Mendelson points out, different verbal acts carry different weights as well, "a formal statement of position by a head of State or Government, or a formal diplomatic communication at the highest level, plainly must be taken seriously."[719]

It is clear that a process of weighing different types of practice, as well as of supporting and opposing behaviour, is essential to the search for a customary law rule. Commentators have adopted differing approaches to this process. O'Connell, for instance, favours taking into account "the number of protests, the vehemence of the protests, the subsequent actions of all parties, the importance of the interests affected and the effluxion of time" [720] Schachter focuses on the intensity and depth of condemnation of violations.[721]

These approaches have in common an assessment of practice that seeks to take into account and weigh up the vehemence, importance, and nature of actions. In applying a similar approach to the norms considered in this thesis, it is useful to undertake a rough categorisation of conduct. A common sense approach suggests that certain actions will carry greater weight than others because they indicate greater or clearer commitment to a particular position. The strongest reaction would be an insistence through military force that other States follow the rule and the weakest would be a verbal expression of concern.

Therefore, the following scale – ranging from weakest to most significant categories of practice – is adopted to assist in the balancing process: expressions of concern and condemnation of civil conflicts or particular actions in them; explicit calls for specific outcomes or actions; the imposition of sanctions

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[716] D'Amato *The Concept of Custom in International Law* (Cornell University Press, Ithaca, N.Y., 1971) at 88. See also Fitzmaurice "Law and Procedure of the International Court of Justice: General Principles and Sources of Law" (1953) 30 BYIL 1 at 68, Wolfke *Custom in Present International Law* (2nd ed, Martinus Nijhoff Publishers, Dordrecht; Boston, 1993).

[717] Simma and Alston "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" at 89.

[718] International Law Association *Final Report of the Committee on Formation of Customary General International Law* at 724-725.

[719] Mendelson "The Formation of Customary International Law" (1998) 272 Hague Academy of International Law, Recueil des Cours 155 at 205.

[720] O'Connell "Mid-Ocean Archipelagos in International Law" (1971) BYIL 1 at 63.

[721] Schachter "International Law in Theory and Practice" at 338. Meron also supports this approach Meron *Human Rights and Humanitarian Norms as Customary Law* at 92.

against, or the provision of non-military assistance to either side in a civil conflict; and finally indirect and direct forceful intervention. In addition, the reactions by other States either supporting or challenging the legality of the above actions are also considered practice of great import.

With respect to the moral aspect, or values, of the norm considered, given the ongoing controversy, ultimately it is the least contentious path, and the one adopted by Schachter and Meron, to acknowledge the role of values, and yet adopt a Positivist approach as the primary methodology, on the basis that where a norm is established by such reasoning it is largely unimpeachable by either school.[722]

1.4 A QUESTION OF CONSENT?

The impact of consent to an intervention on the nature of emerging principles can be perplexing, and it may seem counter-intuitive.[723] Consent by a State has in general been considered a dominant rationale for intervention, and therefore where consent can be identified no other justifications are given any weight. Nonetheless, consent can *support* the emergence of new legal norms prohibiting conduct.

Traditionally, the emergence of international law is based on the consent of States. An example would be the emergence of the norm favouring a right to send satellites into orbit without the agreement of the underlying territorial States based on the accumulation of examples of States willingly agreeing to it. Similarly, the consent by party States to the actions of the international community rejecting recourse to force in initiating civil conflict supports the emergence of a consensus prohibiting the recourse to force.

This is in accord with the *Nicaragua* decision where the Court highlighted (in the context of General Assembly resolutions) that

> The effect of *consent* to the text of such resolutions cannot be understood as merely that of 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an *acceptance of the validity of the rule* or set of rules declared by the resolution by themselves.[724]

Even if this position is not accepted, the existence of consent does not *prevent* the emergence of norms based on other principles, unless the practice suggests that condemnation may *only* take place where there is consent. In the practice reviewed, the condemnation and intervention seems not to have been

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[722] Although note Koskenniemi's criticisms of Meron's approach, which he contends is ineffective and unrealistic. Koskenniemi "Book Review: Human Rights and Humanitarian Norms as Customary Law by Meron".
[723] Further discussion of the issue of consent in the practice is undertaken in chapter 4.
[724] *Nicaragua v United States of America* para 188. Italics added.

formulated as predetermined by the consent (although consent was acknowledged), particularly where the international community's response was based on a Chapter VII resolution.[725]

1.4.1 Response to a Breach of a Peace Agreement

Can the practice be explained primarily as a response to a return to force in breach of a peace agreement? Technically the legal nature of a peace agreement between a government and a rebel group is uncertain under international law. It is not a treaty since it does not involve two sovereign States. Neither, however, is it a purely domestic matter, as a commercial contract would be.[726] The practice in response to the breach of such agreements could be justified deriving from explicit consent to international enforcement, or it could reflect an expectation that parties that have agreed to particular clauses, and signed a document so doing, abide by their undertakings.

As is clear from the case studies, parties are expected to abide by their peace agreements.[727] In Angola, for instance, the Council sought to enforce the agreements,[728] sending repeated UNAVEM missions to do so,[729] imposing punitive sanctions for breaches,[730] and declaring that the parties must abide by the agreements, stop military confrontation,[731] and engage in a meaningful dialogue aimed at reconciliation.[732] In Côte d'Ivoire the Lomé agreement included an undertaking by both sides that they would refrain from "violations of the accord on cessation of hostilities", and a pledge to urge "their authorities to refrain from any bellicose acts such as abuses and violence".[733] The primary peace

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[725] In East Timor, for instance, the Council only intervened once the consent of Indonesia was secured [SC Res 1236 (1999) paras 1-3]. However it authorised the force on the basis of a finding of a threat to international peace and security [SC Res 1264 (1999)]. Similarly, in Liberia the cease-fire agreement was mentioned but the intervention was in fact authorised on the basis of the deterioration of the situation, which constituted a threat to international peace and security [SC Res 866 (1993)]. In addition, a number of the peacekeeping forces have been authorised under Chapter VII without reference to the consent of the parties. UNPROFOR in Croatia was authorised to use force in self-defence under Chapter VII, [SC Res 871 (1993)] and in Bosnia the mandate was extended to the protection of the safe areas under Chapter VII [SC Res 836 (1993).

[726] The principle of sovereign immunity that exists in most legal systems derived from the Common Law jurisdictions provides that governments or agents of the government may enjoy immunity for various acts. These are usually limited to acts that emanate from the function of government, and do not include not those acts that would normally come within the ambit of the activities of private citizens such as commercial contractual relations or liability for negligence. A similar notion applies under the Conflict of Laws rules which preclude the enforcement of claims which constitute an extension of the sovereign power within the territory of another contrary to concepts of independent sovereignties. A foreign State has no international jurisdiction to enforce its law abroad. See Dicey, Morris, et al. *Dicey and Morris on the Conflict of Laws* (Sweet & Maxwell Ltd, London, 2002).

[727] In Sierra Leone, the Council expressly called on the parties "to fulfil all their commitments under the Peace Agreement" SC Res 1270 (1999) para 2, SC Res 1289 (2000) para 3. In Liberia, the timing of the international community's response to the conflict correlated with the signing of the ECOWAS negotiated ceasefire agreement on the 17th of June. Violations of the cease-fire repeatedly attracted condemnation. The EU expressly condemned such breaches and called on the parties to sign a comprehensive peace agreement. European Union "Declaration by EU Presidency on the Peace Process in Liberia" (28 Jul 2003) 11832/1/03 REV 1, P 92/03 www.reliefweb.int/. The Council explicitly referred to the positive obligation of the parties to "cease hostilities throughout Liberia and fulfil their obligations under the Comprehensive Peace Agreement and the ceasefire agreement." SC Res 1509 (2003), para 4.

[728] The Peace Accords were accepted as binding by both the Government and the rebels, and provided for United Nations monitoring. See preamble, www.incore.ulst.ac.uk/cds/agreements/pdf/angl.pd and point 4, Fundamental Principles for the Establishment of Peace in Angola.

[729] UNAVEM I, II and III.

[730] SC Res 864 (1993), SC Res 1127 (1997).

[731] SC Res 793 (1992) para 4.

[732] SC Res 793 (1992) para 5.

[733] Agence France-Presse "Ivory Coast govt, rebels pledge to end 'aggressive acts'" (31 Oct 2002) www.reliefweb.int/.

agreement, the Linas-Marcoussis agreement,[734] explicitly provided for international enforcement measures: "afin que les mesures de redressement appropriées soient prises."[735] The Council emphasised the binding nature of the agreement and its expectation that it would be implemented, explicitly endorsed the accord, and entrenched the agreement by calling on the parties under Chapter VII to implement it fully and without delay.[736]

Thus, the practice suggests that the international community may be prepared to intervene to enforce a peace agreement if there is a return to violence, especially if such an agreement provides for international oversight or enforcement. However, there is also striking practice which has not relied on a peace agreement, thus the consent of the parties to such agreements do not govern the practice in this field. For instance, in Kosovo without relying on a peace agreement or a regional agreement, the Council condemned violence by both sides and called on them both to cease using violence. Similarly, in the Former Yugoslav Republic of Macedonia in 2001, the Council intervened before any peace agreement was negotiated,[737] calling on all political leaders to isolate the forces behind the violence and shoulder their responsibility for peace and stability.[738] Even before the peace agreement, the Council condemned violence by armed ethnic extremists and the killing of soldiers.[739]

Overall, it appears that consent is not the criterion that determines the response of the international community to civil conflict. As highlighted in chapter 1, where there was no consent – or where a Chapter VII resolution was relied upon irrespective of consent – the Council has still condemned, and demanded an end to, the use of force.[740] This is reinforced by the fact that the consent that is provided is frequently

[734] Linas-Marcoussis Accord.
[735] Ibid, Article 4. Referring to enforcement by EU, AU, ECOWAS, Secretary-General, Francophonie Organisation, IMF and World Bank, G8, and France.
[736] SC Res 1464 (2003).
[737] 7 March 2001.
[738] S/PRST/2001/7.
[739] Statement of the President S/PRST/2001/7 (2001), also 1345 (2001) para 1.
[740] As discussed in Chapter 2, for instance in East Timor despite the formal reference to Indonesia's consent, forces were authorised under Chapter VII. Moreover, the intervention in Haiti, Sierra Leone and Liberia were clearly not authorised by the de facto government, and were authorised under Chapter VII.

not genuine and given freely (for instance given under pressure),[741] and that the Council has acted beyond the scope of peace agreements even when it ostensibly relied on them.[742]

1.4.2 Consent in Support of the Emergence of a New Norm

In addition, consent can also have a different impact. As emphasised in chapter 1, consent is fundamental to a new norm emerging. A State's vehement rejection of the rules formulated by the Council (and its attempts to enforce them) must count against the emergence of new norms. On the other hand, a State's consent to the rules – whether it does so willingly, feels bound to, or has no realistic alternative – supports the view that a new norm is crystallising.

In many cases considered, State governments and rebel groups appear to have felt compelled to consent to the rules formulated by the Council, regional organisations and States.[743] This factor is somewhat diluted, however, by the difficulty in determining the motivation behind the consent and whether it is genuine. Consent – even consent to peace agreements, which implies consent to non-violent means of resolution of the conflict – is often driven by political self-interest,[744] or turns out not to be genuine and is directly undermined by later conduct.[745] Moreover, the legitimacy of the government is put into question during such conflicts such that it may no longer represent a meaningful gauge of the will of the State.[746]

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[741] See Falk's criticism of consent pointing out that it can be coerced or manufactured, that public approval can be claimed, or highly contingent and unreliable. Falk "The Complexities of Humanitarian Intervention: A New World Order Challenge" at 502. Consider the coerced consent of the Indonesian government with respect to the intervention in East Timor, or that of Yugoslavia following the bombing campaign by NATO. Similarly, in the Liberian civil war, agreement allowing ECOWAS intervention was signed after heavy fighting between the peacekeeping forces and one of the factions. Charles Taylor condemned the agreement on the grounds of coercion. Similarly, the 1960 Cyprus Treaty of Guarantee was signed in London with limited input from the interested parties and guaranteed by the two most interested States, Turkey and Greece. In Georgia the government agreed to allow Russian bases on their territory in exchange for assistance to fight rebels and reluctantly agreed to Russian peacekeepers deployment in relation to Abkhazian separatists. In Sierra Leone, the rebels ended up rejecting the peacekeeping forces sent to "To cooperate with the Government of Sierra Leone and the other parties to the Peace Agreement in the implementation of the Agreement" and went so far as to attack them.

[742] For instance, reliance on the Peace Accords in Angola for intervention is unsatisfactory since although these were accepted as binding by both the Government and the rebels, and provided for United Nations monitoring, they did not provide for intervention.

[743] As discussed in chapters 2 and 3, consent, in some form, has been evident in many of the interventions, although obviously not in all. Indonesia did consent, reluctantly, as did Yugoslavia. Charles Taylor did resign from Liberia and leave, although he did not explicitly consent to the intervention, although the rebels in Liberia consented to the norms formulated and even called on each other to abide by them. In Sierra Leone, the democratic government did consent, as did the democratic president in Haiti, and the beleaguered government in Côte D'Ivoire.

[744] In the case of Sierra Leone and Cote d'Ivoire both governments called for assistance and sought to be reinstated. The rebel forces (unsurprisingly) rejected this. In Cote d'Ivoire for instance the rebels contested France's role. Agence France-Presse "I. Coast rebels gain ground, but French say 'no entry' to evacuation zone" (Oct 2002) www.reliefweb.int/.

[745] Eg Conakry Peace Agreement in Sierra Leone, the RUF later attacked the UN peacekeepers.

[746] For example in Sierra Leone the forceful interventions by Nigeria, ECOWAS, and the UK were at least partially justified on the basis of the consent of the overthrown government. However, the legitimacy of this request was contentious. It did not arise from the incumbent government, since the coup was already a fait accompli, although it could be argued that the democratic nature of the overthrown government gave it authority to properly consent to the intervention. Moreover, the issue of consent hardly featured in the discussions surrounding the interventions. On the other hand, in Liberia, the government did not consent to intervention, but there were vocal calls for intervention from the civilian population, which begged for international action, going so far as to pile up bodies outside the US Embassy in a plea for help. Institute for Security Studies "Liberating Liberia: Charles Taylor and the rebels who unseated him" (30 Nov 2003) ISS Paper 82. For a general discussion see Wippman "Treaty-Based Intervention: Who Can Say No?", White *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* at 232, also at 610. See also Jennings, Watts, et al. *Oppenheim's International Law* at 438.

Nonetheless, to the extent that it can be seen that States have felt compelled to consent to the rules formulated in the Council and the actions to enforce these rules, this consent supports the emergence of binding norms.

1.5 INCONSISTENT PRACTICE

The extent to which the emergence of a legal norm is contradicted by inconsistent practice depends on the reasons for such inconsistency. If it is caused by a belief that such conflicts are domestic matters, or acceptable conduct, then the lack of response undermines the emergence of a relevant consensus. Alternatively, inconsistency may indicate that the law and practice is still in flux and has not yet solidified. The case of inconsistent enforcement must also be considered separately, as enforcement in international law is an exception and can be highly influenced by geopolitical considerations.[747]

It is often difficult to determine the true rationale for the lack of response. A lack of response by the Council, for instance, could be an exception to a rule; a failure to intervene based on political grounds; could indicate the lack of rule; or it could reflect the belief that the Council is precluded from responding because of the domestic nature of the conflict.[748] Elements of all of these approaches are evident in practice – even sometimes within the same conflict. A proportion of the early practice relied on Article 2(7) and State sovereignty as the justification for non-action.[749] However, in many cases, either no explanation is given for the lack of response to the conflict, or strong geo-political factors seem to provide the basis for the lack of action. Moreover, a practice of condemnation without intervention must be taken to still uphold the principles formulated in the condemnation.[750]

1.6 THE IMPORTANCE OF INTERNATIONAL LAW MIRRORING REALITY

In international law, the issue of how to deal with a controversial field where practice no longer accords with traditional norms is not new. The conservative view has been to uphold the validity of the extant

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[747] For instance, the SG has highlighted that in the case of Rwanda the political will and the troops were lacking and hence no enforcement measures were taken, but this does not undermine the existence of the norm prohibiting genocide. SG statement at Memorial Ceremony in New York, Press Release SG/SM/9223 26/03/2004.

[748] See Teson "A Symposium on Re-Envisioning the Security Council: Collective Humanitarian Intervention" for a discussion of the interplay between Security Council intervention and Article 2(7). See also Higgins *The Development of International Law through the Political Organs of the United Nations* at 58-130.

[749] Czech coup of 1948, the Hungarian crisis of 1956, race relations in South Africa, also Northern Ireland and the Spanish Civil War.

[750] Consider for instance Chechnya. Despite a dramatic lack of sanctions, the international community has nonetheless condemned the conflict and the violence. The European Commission, the European Parliament, and NATO have condemned the violence and emphasised the need for a political solution. See *Project Ploughshares Armed Conflict Report, Russia* (2002) www.ploughshares.ca. The EU parliament called for an immediate ceasefire in Chechnya and asked Moscow to look into allegations of war crimes committed by both sides in the conflict. Agence France Presse "Europe Living In 'Virtual Reality' About Chechnya: Moscow" (20 February 2001) web.lexis-nexis.com/executive/. The EU parliament also condemned the conflict in 2002. Global News Wire, Asia Africa Intelligence Wire "Russia Dismisses European Parliament's resolution on Chechnya" (12 April 2002) web.lexis-nexis.com/executive/. In 1999 at their year-end meeting, the NATO foreign ministers condemned Russia for its bloody assault on Chechnya. The Associated Press "NATO Warily Watches Development Of EU Defense Arm" (15 December 1999) web.lexis-nexis.com/executive/. Agence France Presse "Main Points From Russia-EU Summit Statement" (31 May 2003) web.lexis-nexis.com/executive/.

norms and discount inconsistent practice.[751] However, such a formalistic approach undermines the respect due to international law by rendering it an academic and theoretical field irrelevant to the circumstances and events in the real-world. It hinders the development of principles that can guide the practice of the international community in relation to civil conflicts, as it masks the failure of the traditional rules.

It is thus vital that international law evolve better to approximate real-world practice and thereby reflect the changing perspective of the international community, providing guidance in the new situations that arise. Increasingly, commentators support an approach which emphasises the importance of descriptive accuracy, where laws are assumed to correspond to reality. As Roberts argues

> Descriptive accuracy (which focuses on what the practice *has been*) is valuable in justifying the content of international law because laws should correspond to reality. Laws must bear some relation to practice if they are to regulate conduct effectively, because laws that set unrealistic standards are likely to be disobeyed and ultimately forgotten. This consideration particularly applies to decentralized systems of law, such as international law, where traditional enforcement mechanisms are unavailable or underdeveloped. Descriptive accuracy is also essential to predictive power because a theory that accurately describes practice enables more reliable predictions of future state behavior.[752]

Similarly, Reisman rejects the approach of those international experts who "respond to the appearance of a discrepancy between existing and emerging legal arrangements by heatedly rejecting the new", without taking into account whether the traditional arrangements are appropriately attaining their goal, particularly in contexts different from those they were originally established to address.[753] Franck also supports attempts to reformulate the law (in that instance those norms governing intervention) better to reflect reality:[754]

> One advantage of legitimating what is in any event happening - the general intervention of third States in civil wars - is that it permits international law to regulate the nature and scope of these interventions on the basis of reciprocal principles. In this sense international law, like law dealing with drug addiction, cannot hope to influence the situation so long as the law itself induces everyone to pretend that the problem does not exist.

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[751] This approach is particularly prevalent with those commentators who reject the emergence of new norms permitting humanitarian and pro-democratic intervention, and any other exceptions to the prohibition on intervention, and the crystallisation of human rights customary law.
[752] Roberts "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95 AJIL 757 at 762
[753] Reisman "Editorial Comment - Assessing Claims to Revise the Laws of War" (2003) 97(1) AJIL 82 at 83.
[754] Franck and Rodley "Legitimacy and Legal Rights of Revolutionary Movements with Special Reference to the People's Revolutionary Government of South Viet Nam" at 732.

Rules that are un-enforced and do not represent the actual practice of States should not be maintained. Falk argues "A legal norm that operates in such a climate of contradiction is bound to function as mere rhetoric and to erode generally arguments urging for international law".[755] Such a formalistic approach masks the failure of the traditional rules and slows the evolution of rules that can appropriately guide the practice of the international community.

2 ANALYSIS OF THE PRACTICE

The debate surrounding civil conflict has tended to focus either on rules governing intervention or, more rarely, on *jus in bello*. However, as established in Part I of this thesis, there is a large and growing body of practice which cannot be explained or justified according to these norms. The aim of this chapter is to determine whether new norms are emerging that better explain and justify the practice, and which may better guide the international community in responding appropriately to such conflicts.

In relation to each norm the discussion refers back to the relevant practice of the Council, States and regional organisations, and any relevant treaty practice identified in Part I of the thesis. It then discusses the extent to which the practice has crystallized as a legal norm taking into account any contradictory factors or alternative ways of characterising the practice. The practice which takes the form of a condemnation followed by sanctions is of particular importance to the analysis undertaken.

2.1 THE DOMESTIC NATURE OF CIVIL CONFLICTS

The view that civil conflicts are domestic matters has been central to the position that these conflicts are not subject to international regulation or appropriate for Council intervention.[756] O'Connell for instance stated that civil war has always been viewed as an internal matter and thus the Council may not dictate its outcome.[757]

However, matters are not irrevocably fixed within the reserved domain.[758] According to the "legalist" perspective, at least, the question of domestic nature is a relative matter which depends on the

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[755] Falk "Introduction in the International Law of Civil War" at 7.

[756] See the discussion below of Northern Ireland and the Spanish Civil War. Also Goodrich and Hambro point out such arguments were raised "against the consideration of the Czech coup of 1948, the Hungarian crisis of 1956, race relations in South Africa in 1963, and various 'colonial' questions". Goodrich, Hambro, et al. Charter of the United Nations: Commentary and Documents at 273-274.

[757] O'Connell "Regulating the Use of Force in the 21st Century" at 450-451.

[758] Brownlie *Principles of Public International Law* at 293, Higgins *The Development of International Law through the Political Organs of the United Nations* at 58-130, particularly at 63, Shaw *International Law* (4th ed, Cambridge University Press, Cambridge, 1997) at 202. The notion that domestic jurisdiction is relative is also expounded in the *Nationality Decrees in Tunis and Morocco* (1923) PCIJ Ser B No 4 at 23.

development of international law.[759] Although most aspects of such a conflict will remain subject to national jurisdiction, this jurisdiction may be controlled and limited by international duties through treaty or custom, or according to Brownlie, whenever a matter requires enforcing in relation to another State.[760] This view of domestic jurisdiction finds support in the *Nationality Decrees Case,*[761] and is consistent with the exemption for Chapter VII enforcement measures. As Goodrich and Hambro points out, any situation that amounts to a threat to international peace and security is "patently a matter of international concern".[762] White agrees, "any finding under Article 39, whether or not combined with enforcement measures, is sufficient to internationalise the situation and to escape the grasp of Article 2(7)".[763]

The practice reviewed in Part I shows extensive involvement in civil conflicts by the international community, (practice which has not been rejected by the remainder of the international community) and an increasing assumption that civil conflicts can amount to a threat to international peace and security, and suggests that civil conflicts are no longer considered domestic matters.

This position must still be evaluated in light of the statements of the Council upholding state sovereignty. The Council has referred to State sovereignty in practically all conflicts reviewed in this thesis, sometimes repeatedly in successive resolutions. The formulation adopted varies very little and is generally of the form recognising or affirming "the sovereignty, independence, territorial integrity and national unity" of the State.[764]

This would seem to support the view that civil conflicts are matters for the State alone. However, these statements are frequently contradicted either by direct actions of the Council or by other statements within the resolution.[765] In Afghanistan, the Council made repeated statements "Stressing the importance of non-interference in the internal affairs of Afghanistan" and "Reaffirming its strong commitment to the

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[759] See the discussion in Higgins *The Development of International Law through the Political Organs of the United Nations* at 58-130, Teson also reviews these positions and assesses them in Teson "A Symposium on Re-Envisioning the Security Council: Collective Humanitarian Intervention" at 327-329.

[760] Brownlie *Principles of Public International Law* at 293, Juss "Nationality Law, Sovereignty, and the Doctrine of Exclusive Domestic Jurisdiction" at 228-229. White *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* at 56 quoting Report of the Conference held at San Francisco by the Rt Hon Frazer, Chairman of the New Zealand Delegation, NZ Dept of External Affairs Publication, No 11, 28 argued that Article 2(7) should be read to permit intervention where it is "proper in the interests of peace and justice, and in the preservation of human rights to interfere in the internal affairs of Member states". Cf Gilmour "The Meaning of Intervene within Article 2(7) of the United Nations Charter" at 349, who maintains that it excludes anything internal.

[761] *Nationality Decrees in Tunis and Morocco* at 24.

[762] Goodrich, Hambro, et al. *Charter of the United Nations: Commentary and Documents* at 292, see Fielding "Taking a Closer Look at Threats to Peace: The Power of the Security Council to Address Humanitarian Crises"

[763] White *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* at 56.

[764] Eg SC Res 696 (1991), SC Res 958 (1994), SC Res 1101 (1997), SC Res 1214 (1998), SC 1267 (1999).

[765] Resolutions of the Council that target the conduct of governments contradict repeated statements upholding State sovereignty. Consider for instance, the condemnation of the South African government over 'apartheid' killings, in the condemnation of the Serbian police for excessive use of force in Kosovo, and in the condemnation of the violence by both government and rebel forces in Rwanda and Burundi. In the case of the Kurds in Iraq, the Council made no show of deference to the Iraqi government, nor in the case of Somalia, even though these situations were classically internal matters. Even in instances where the Council has supported the government over the rebel forces, such as the wars in Angola and Sierra Leone, its intervention does not intimate that these matters are internal and entirely within the purview of the government. Rather, the implication seems to be that in the particular circumstances of those rebel wars the Council considered the government to be worthy of support.

sovereignty, independence, territorial integrity and national unity of Afghanistan".[766] Nonetheless, it also strongly condemned the use of force in those conflicts and repeatedly demanded that the parties stop fighting, cease armed hostilities and renounce the use of force.[767] It also imposed a non-Chapter VII arms embargo.[768]

In East Timor, the Council tone appears deferential to Indonesia. The Council began by stressing that it was Indonesia's responsibility to maintain peace and security in East Timor.[769] However, the Council went on to insist that the government "take immediate additional steps, in fulfilment of its responsibilities, to disarm and disband the militia".[770] While the Council only authorised intervening forces once the consent of Indonesia was secured,[771] the intervention was actually authorised under a finding of a threat to international peace and security under the Charter, and was thus not legally reliant on the consent of Indonesia.[772]

In Sierra Leone, despite the explicit Council resolution "Affirming the commitment of all States to respect the sovereignty, political independence and territorial integrity of Sierra Leone",[773] the extensive and varied intervention by States and the Council into that conflict did not cause international outcry. Notwithstanding some prevarication regarding Nigeria's use of force, and the UK's later use of force, no claims of illegality were made,[774] nor did ECOMOG's intervention cause outcry.[775] The International Court of Justice has emphasised that whether practice is rejected as illegal by the remainder of the international community is one important element in the determination if a norm remains valid despite

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[766] SC Res 1076 (1996) preamble, SC Res 1214 (1998), SC Res 1267 (1999).
[767] SC Res 1076 (1996), SC Res 1214 (1998), SC Res 1267 (1999).
[768] SC Res 1076 (1996).
[769] SC Res 1236 (1999) para 5, see also SC Res 1272 (1999) stressing the responsibility of Indonesia to ensure safe return of refugees.
[770] SC Res 1319 (2000) para 1.
[771] SC Res 1236 (1999) paras 1-3, SC Res 1264 (1999) para 3.
[772] SC Res 1264 (1999).
[773] SC Res 1231 (1999).
[774] Nigeria's intervention, despite being prima facie contrary to the principle of non-intervention and the prohibition on the use of force under Article 2(4), was not condemned by the remainder of the international community. It was initially greeted with uncertainty from some West African countries, CNN "Sierra Leone Fighting Eases, Allowing More Evacuations" (3 June 1997) www.cnn.com, and the US opined that it would prefer to see the situation resolved politically, CNN "More West African Soldiers Join Nigerians in Sierra Leone". However, the Secretary-General endorsed the view that, as a last resort, force might have to be used to dislodge the coup leaders, The Times "Annan Hints at Use of Force to Topple Sierra Leone Coup" (5 June 1997) www.thetimes.co.uk, and the UK indicated that it would prefer a negotiated solution but recognised that force might have to be used. Ibid.
[775] Similarly, there was express support for the ECOWAS and OAU interventions, which were also unauthorised by the Security Council. See for instance the Statement by the President of the Council S/PRST/1997/36 (1997), SC Res 1132 (1997). Only Russia, during the Council debates, criticised the intervention on the basis that regional organisations' enforcement actions ought to be authorised by the Council, Council Meeting 3822 S/PV.3822 (1997). The UK government's intervention did not encounter very much condemnation either. The Secretary-General supported the presence of the UK troops as a stabilizing factor. Secretary-General Statement to Council SG/SM/7390 (2000). As did many States, Council Meeting 4139 S/PV.4139 (2000). See Canada, Malaysia, Argentina, and Russia who made similar comments, as did Portugal on behalf of itself and of the European Union. Bangladesh and India dissented, on the basis that the forces should be under UN command. Council Meeting 4139 S/PV.4139 (2000).

inconsistent practice.[776] The lack of reaction to the interventions is indicative of an acceptance in the greater international community that such actions are not illegal.

In the light of this practice, and given that the notion of sovereignty has already evolved to accommodate human rights developments,[777] State sovereignty, of itself, does not stand in the way of the emergence of new international norms addressing the violence of civil conflicts. Rather a shift and change in the traditional view of civil conflict as domestic matters is taking place. The extent of this transformation and its future direction of evolution are investigated further below.

2.2 RECOURSE TO FORCE AIMING TO OVERTHROW A DEMOCRATIC GOVERNMENT

Traditionally, the question of regime change has been considered a matter for the State in question and not a matter for the international community. While democratic States have expressed a policy preference for democratically elected States, there was nothing in international law to suggest that democracies could not be overthrown by civil conflict. International law had nothing to say about the internal governance of a State.

However, the rejection of the coups in Haiti and Sierra Leone by the international community was explicit, widespread, and uncontroversial. This section, therefore, considers the emergence of a norm prohibiting recourse to force to overthrow a democratically elected government. Such a norm would also imply a corollary right of a democratic government to defend itself against force seeking to overthrow it. The key question remains whether the practice reviewed evidences the emergence of a legal prohibition or merely a policy position of the international community.

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[776] The Court emphasised that inconsistent practice did not of itself prevent the emergence of a norm, so long as any departure was recognised as illegal, *Nicaragua v United States of America* at para 186.

[777] A number of Secretary-Generals have emphasised that sovereignty cannot be ascribed a meaning which shields States when serious human rights abuses are taking place. Most recently, Kofi Annan asserted, "State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa." Annan "Two Concepts of Sovereignty" This takes up and expands on a statement of Javier Perez de Cuellar that "It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity." Javier Perez de Cuellar, Annual Report of the Secretary-General on the Work of the Organisation (1991) at 10-11. In the Secretary-General's words, "The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality." Report of the Secretary-General: An Agenda for Peace (1992) at para 17. See also for instance the recent Commission on Sovereignty reinterpretation of the notion of sovereignty to include a responsibility to protect. International Commission on Intervention and State Sovereignty Responsibility to Protect at 2.24. See also American Society of International Law "The End of Sovereignty?" Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in Their Electoral Processes (1996) A/RES/50/172, Annan "Two Concepts of Sovereignty", Schrijver "The Changing Nature of State Sovereignty" (1999) The British Yearbook of International Law 65. Although debate remains: see for instance Teson Humanitarian Intervention: An Inquiry into Law and Morality, Bowett "The Interrelation of Theories of Intervention and Self-Defense", Bull *Intervention in World Politics*, Reisman "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 AJIL 866, Henkin "The Mythology of Sovereignty" (1992) 21 Canadian Council on International Law: Proceedings of the annual conference 5, American Society of International Law "The End of Sovereignty?" (1994) Proceedings of the 88th Annual Meeting, Washington, Franck "Multiple Tiers of Sovereignty: The Future of International Governance" (1994) 88 ASIL: Proceedings 51, Sellers *The New World Order: Sovereignty, Human Rights, and the Self-Determination of Peoples* (Berg, Oxford, 1996), MacCormick *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press, Oxford, 1999).

Before turning to the practice, however, it is useful briefly to situate the discussion within the broader debate on democracy in international law. The focus of the debate that has developed over the last decade and a half has been the emergence of a norm of democratic governance, or in other words the emergence of a "democratic entitlement" in international law. Much of the controversy has revolved around whether, if this norm exists, it justifies implementation by outside actors. Unsurprisingly, the logical corollary of such a right, namely the right to use "intrusive political, economic, and military measures [...] to implement democratization in a recalcitrant State" has encountered strong opposition.[778] While there is widespread support for a right to non-forceful intervention in support of democracy,[779] forceful implementation of such a norm has generally been rejected.[780]

The norm investigated in this section, prohibiting the recourse to force against a democratically elected government, is similar to but distinct from the notion of a right to democratic governance.[781] It could stand independent of the emergence of any norm of democratic entitlement, or it could be considered a sub-category of such a norm. It is substantially more modest than an entitlement to democracy. A prohibition against the forceful overthrow of a democracy need not presuppose a right to democracy. There is a large step between protecting a democracy from forceful overthrow once the people have legitimately chosen to be governed by democratic mandate, and intervening to democratize a State. Another perspective is that discussed in the Introduction, that while international law does not recognise the right to recourse to force to obtain self-determination, it does prohibit the denial of such a right. The overthrow of a democracy is a denial of this right to self-determination, and thus is prohibited.

2.2.1 Security Council Practice

As reviewed earlier, the Council has responded vehemently to the overthrow of democratic governments by force. Its practice in Haiti and Sierra Leone is particularly relevant. After the coup in Haiti, which overturned newly elected President Aristide, the Council intervened in 1993 reaffirming that the international community was committed to resolving the crisis in Haiti and to restoring democracy.[782] It underlined the importance of democratic issues[783] and deplored that the legitimate government had not

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[778] Fox and Roth *Democratic Governance and International Law* (Cambridge University Press, Cambridge, 2000) at 12.

[779] See Schachter "The Legality of Pro-Democratic Invasion" (1984) 78 AJIL 645, Franck "Intervention against Illegitimate Regimes" in Damrosch and Scheffer (eds.) Law and Force in the New International Order (Westview, 1991) 159.

[780] Unilateral forceful intervention has been rejected in particular. Reisman "Coercion and Self-Determination Construing Charter Article 2(4)", D'Amato "The Invasion of Panama Was a Lawful Response to Tyranny" (1990) 84 AJIL 516, Gray points out the inconsistency of Burma (1990), Algeria (1991), Nigeria (1993), Niger (1996), and Pakistan (1999). Gray *International Law and the Use of Force* at 43.

[781] For a general discussion of that debate see Franck "The Emerging Right to Democratic Governance", Fox "The Right to Political Participation in International Law" (1992) 17 Yale Journal of International Law 359, Fox and Roth *Democratic Governance and International Law* (Cambridge University Press, Cambridge, 2000). Note *Nicaragua v United States of America* where the reasoning seems to reject such a right, also note Carothers "Empirical Perspectives on the Emerging Norm of Democracy in International Law" (1992) 86 Am Society Intl L Proc 261 at 264, Roth *Governmental Illegitimacy in International Law* (Clarendon, Oxford, 1999) at 321.

[782] SC Res 862 (1993).

[783] SC Res 1048 (1996).

been reinstated.[784] It imposed an embargo aimed at resolving the crisis via a "comprehensive and peaceful settlement" and bringing about the reinstatement of the legitimate government.[785] When the Governors Island Agreement, which provided for Aristide's return to power, was breached, the US led a UN sanctioned "Operation Uphold Democracy" to overturn the military coup. The Chapter VII operation aimed to bring to an end the "illegal de facto regime" in Haiti, and assure the return of its "legitimately elected President". Its explicit aim was to "facilitate the departure from Haiti of the military leadership".[786]

Even more strikingly, in Sierra Leone the Council condemned the military coup outright,[787] and condemned the junta preventing the restoration of the democratically elected government.[788] It repeatedly demanded, under Chapter VII, that "the military junta take immediate steps to relinquish power and make way for the restoration of the democratically-elected Government and a return to constitutional order",[789] and went on to condemn repeatedly the resistance of the junta to the authority of the government.[790] These statements were followed by measures seeking to enforce them.[791]

The use of sanctions was aimed at forcing the junta to relinquish power and make way for democratic government.[792] During the Council debate, Kenya asserted: "Africa was saying, and the international community was supporting the clear statement, that military coups overthrowing democratically elected Governments were no longer going to be accepted".[793] The United Kingdom concurred, claiming that "The international community cannot afford to acquiesce in the arbitrary and unconstitutional overthrow of a democratic Government."[794] Egypt referred to a "new, unanimous African position regarding military coups in the countries of the continent".[795] Ultimately, the Council authorised a peacekeeping force under

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[784] SC Res 841 (1993).
[785] SC Res 841 (1993).
[786] SC Res 940 (1994). Para 3 "Determines that the illegal de facto regime in Haiti has failed to comply with the Governors Island Agreement and is in breach of its obligations under the relevant resolutions of the Security Council;", para 4 "Acting under Chapter VII of the Charter of the United Nations, authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement."
[787] SC Res 1132 (1997).
[788] SC Res 1132 (1997).
[789] SC Res 1132 (1997) para 1, acting under Chapter VII.
[790] SC Res 1181 (1998) para 1.
[791] The Council imposed travel embargoes on the junta and prohibited the supply to Sierra Leone of petrol and arms. SC Res 1132 (1997). Later, it modified the embargo so that it only applied to the rebels and not to the Sierra Leone Government or to ECOMOG. SC Res 1171 (1998).
[792] SC Res 1132 (1997). See also Statement by the President of the Security Council S/PRST/1997/42 (1997).
[793] Security Council Meeting 3822 S/PV.3822 (1997).
[794] Security Council Meeting 3822 S/PV.3822 (1997).
[795] Similar statements supporting the protection of democratic regimes were made by all members of the Security Council except China, which supported the resolution but limited its statement to a more ambiguous comment that "Like other Council members, the Chinese delegation is concerned at the changes in the situation in Sierra Leone and feels deep sympathy for the sufferings experienced by the people of that country." Security Council Meeting 3822 S/PV.3822 (1997).

Chapter VII, which can be considered to have intended to assist the democratic government maintain control and prevent a new uprising of the rebel forces.[796]

Other less clear-cut examples also support a trend rejecting the forceful overthrow of democracy. In Burundi, the Council strongly condemned the "overthrow of the legitimate government and constitutional order in Burundi",[797] but did not take enforcement action. In Guinea Bissau, it expressed its grave concern when an army uprising and failed coup triggered a civil conflict,[798] and welcomed the sending of ECOWAS's troops in response to the coup in 1999.[799] In Congo (Brazzaville) in 1997, the Council did not explicitly condemn the coup but rather expressed concern at the fighting and called on the parties to halt the violence.[800] In the Central African Republic, the Council was explicit in its condemnation when rebel forces within the military again attempted an unsuccessful coup in 2001, although it practically did not respond to the 1996 coup.[801] Similarly in Côte d'Ivoire, the first coup in 1999 elicited little response, but the attempt in 2002 was condemned in clear terms.[802]

The Council practice does not point entirely in one direction. It is of course true that the Council has failed to intervene in a number of instances where military forces have overthrown democratic regimes. In Fiji, the Security Council did not intervene following the military coup in May 2000 which overthrew the democratic government elected in 1999. Nor did it intervene in The Gambia, despite a coup in 1981 following weeks of violence, and another coup in 1994. In Chad, the Council has barely responded to the conflict, even after the start of the rebellion against the democratic government in 1998, other than a statement in 1982 "taking note" of the decision of the OAU to establish a peacekeeping force to maintain peace and security in Chad.[803]

The most recent practice in Haiti is also worth noting as it could be interpreted as undermining the earlier supporting practice. When in March 2004 a new uprising jeopardized Haiti's stability, the international community did not support President Aristide. However, it should be acknowledged that President Aristide's government was by then mired in controversy after tainted 2002 parliamentary elections, and had been facing increasingly vocal opposition to the extent that no parliamentary elections had been held and parliament's mandate had expired.

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[796] Particularly in light of the Council's repeated calls on the rebels to step down, disarm and demobilise. SC Res 1270 (1999) para 8, and further authorised the use force to protect civilians under SC Res 1270 (1999) para 14, SC Res 1289 (2000) para 10.
[797] SC Res 1072 (1996) para 1.
[798] SC Res 1216 (1998).
[799] SC Res 1233 (1999).
[800] Statement of the President S/PRST/1997/43 (1997).
[801] Statement of the President S/PRST/2001/18 (2001).
[802] The Council condemned the "attempt to seize power by force of arms or to overthrow the democratically elected Government", Press Release AFR/506 SC/7558. Statement of the President 31 October 2002.
[803] SC Res 504 (1982).

Accordingly, it may be argued that the President no longer represented a legitimately elected government. Nonetheless, many States in the region criticised the international pressure on Aristide, and upheld the general principle that, as CARICOM[804] President, Jamaican Prime Minister Patterson, maintained, "The unconstitutional removal of any leader cannot be condoned".[805]

Burma is another case that is often cited as contradicting the emergence of a principle rejecting recourse to force against democratically elected governments as the Council did not intervene to protect the fledging democracy from military suppression following the elections in 1990. Nonetheless, even in that case there has been vocal denunciation and condemnation of the coup. In particular, the recent re-imprisonment of the pro-democracy leader, Aung San Suu Kyi, in May 2003, attracted widespread international condemnation. Both the US and the EU imposed sanctions,[806] and the Secretary-General expressed his grave concern and called for her release.[807] Even the Association of Southeast Asian Nations (ASEAN), which has a strong tradition of non-intervention, called for her release.[808] Some of its members argued that ASEAN should threaten Burma with expulsion if it did not release the pro-democracy leader.[809]

However, the interaction of law and politics in the international context affects the assessment of this practice. Few international law norms are consistently enforced, and the absence of enforcement is one of the structural weaknesses of international law. Thus, while attempts at enforcement are striking and suggest that the norm is considered of particular importance by the international community, the reverse is not necessarily true. A failure to act to enforce a particular rule does not strongly contradict the existence of that norm.

An Emerging Norm

Strong and repeated condemnation by the Council of attempts by rebels to overthrow by force a democratically elected government is evidence of an emerging consensus among the international community rejecting such use of force. In this case the analysis relies on the explicit and universal formulation of a principle in two prominent cases, but also supported by more general practice. In both

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[804] The Caribbean Community and Common Market.

[805] CARICOM President statement "Aristide departure is a 'dangerous precedent'" (March 4, 2004) www.caribbeannetnews.com/2004/03/04/aristide.htm

[806] BBC "US Approves Burma Sanctions" (24 July 2003) www.bbc.co.uk.

[807] BBC "Burma Under Further Pressure" (12 July 2003) www.bbc.co.uk.

[808] BBC "Burma Told To Release Suu Kyi" (24 July 2003) www.bbc.co.uk.

[809] BBC "Burma Told To Release Suu Kyi" (24 July 2003) www.bbc.co.uk. See comments by Malaysian Prime Minister Mahathir Mohamad, and Thai Foreign Minister Surakiart Sathirathai stating his country had drawn up a "roadmap" for establishing a democracy in Burma.

Haiti and Sierra Leone, the Council rejected the coup in a robust and clear fashion. It formulated its rationale for doing so explicitly, it demanded in a binding resolution that the Junta step down and reinstate the democratic government, and it sought to enforce its demands through sanctions.

Whether the Council intends to *prohibit* conduct must depend on whether the Council intends simply to resolve a particular threat to international peace and security or intends to formulate a prohibition of more general application. The initial formulation of the rule in Haiti suggested a response to an exceptional situation, rather than a general rule. The Council initially emphasised that these were "unique and exceptional circumstances" when authorising the use of force to reinstate the democratic government.[810] However in Sierra Leone, the same rule was relied upon to justify that intervention, and there was no reference to exceptional situations.[811] This suggests that the Council now considers the prohibition to apply in a generic fashion, rather than only in one particular factual situation. The Council has also repeatedly condemned coups in Burundi, Guinea Bissau, Congo (Brazzaville), Central African Republic and Côte d'Ivoire. This repeated condemnation of conduct, and repeated demands that the parties behave in a certain way, must create an expectation that such conduct will continue to be condemned in the future.

This accords with the explicit formulation by the Secretary-General in 1997 that it is "an established norm" that "military coups against the democratically elected Governments by self-appointed juntas are not acceptable".[812] This statement was uncontroversial at the time it was formulated. Tying this practice back to the general debate surrounding a notion of democratic entitlement, some commentators have commented in passing, that "while it might not yet be possible to identify a general obligation on States to introduce democratic government",[813] a "forcible repudiation of the democratically expressed will of the people, the clearest manifestation of the exercise of the right to internal self-determination, will not be

[810] SC Res 841 (1993).
[811] SC Res 1132 (1997), SC Res 1171 (1998), SC Res 1181 (1998).
[812] Annual Report of the Secretary General on the Work of the Organisation, UN Doc A/52/1 para 37 (1997).
[813] Wheatley "Democracy in International Law: A European Perspective" (2002) 51 (2) ICLQ 225 at 234. See also the International Conferences on New or Restored Democracies in 1988, 1994 and 1997. The Secretary-General report, An Agenda for Democratization (1996) SG A/51/761, Secretary-General Stresses Need for Niger's Return to Democracy and Rule of Law (1996) Press Release SG/SM/5889, Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections (1994) A/RES/48/131, Electoral Assistance Division of the Department of Peace-Keeping Operations of the Secretariat and Department for Development Support and Management Services and Non-Governmental Organisations Colloquium on African Election Administration (Zimbabwe, 1994), Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization (1995) A/RES/49/190, Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization (1996) A/RES/50/185, Report of the Secretary-General on Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies (1996) A/51/512, Report of the Secretary-General on Support by the UN System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies (1997) A/52/513, Report of the Secretary-General on Human Rights Questions. Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections (1994) A/49/675, Report of the Secretary-General on Human Rights Questions. Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections (1995) A/50/736, Report of the Secretary-General on Human Rights Questions. Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections (1997) A/52/474.

accepted".[814] This would support, nonetheless, the distinction drawn in this chapter between a right to democratic governance and a prohibition against the forceful overthrow of a democratic government.

In addition, the Council resolutions were formulated as binding, and were followed by sanctions or military intervention aimed at enforcing them. These resolutions were not merely policy recommendations. Moreover, as discussed in chapter 3, a complex if intuitive link is asserted in this thesis between conduct that is in prohibited through Council action, and illegality under traditional international law. Despite the fact that such a link is not yet established in orthodox international law theory, it is argued that when the Council repeatedly imposes sanctions on certain conduct, the international community comes to view the party being sanctioned as acting contrary to international law.

The Council practice both seems to reflect the practice of States and to guide it. Nonetheless, two alternative positions must also be considered: namely whether the practice could be accounted for as *ad hoc* policy decisions in response to threat to international peace and security, or whether it can be explained as being based primarily on consent? If this were the case, the practice would be substantially less important to the emergence of new norms, although it would still evidence a change in attitude of the international community towards civil conflict.

A Policy Response to a Threat to International Peace and Security?

Can the Council practice be characterised as merely an *ad hoc* response to a threat to international peace and security, or does it evidence the emergence of new norms in this field? This issue is relevant to all of the norms investigated in this section and is considered here in detail. Much of the practice of the Council – especially that practice which consists of enforcement style actions such as sanctions or military intervention – can, at least at some level, be explained as resting solely on its Chapter VII responsibility. The enforcement practice in the Council is necessarily reliant on a formal finding of a threat to international peace and security. Some might say, therefore, that this practice merely reflects the discretionary response of the Council to a threat to international peace and security.

However, the consistent rejection by the Council of particular conduct across many conflicts cannot satisfactorily be explained as resulting from *ad hoc* discretionary decisions. Similar principles have been formulated across a wide variety of different conflicts. Even if these principles are initially formulated as mere policy, over time, their repetition by States in Council debates (and outside of the Council), and in later resolutions suggest that agreement is forming around a particular proposition. The volume of similar

[814] Wheatley "Democracy in International Law: A European Perspective" at 233.

practice cannot be accounted for unless the policy of the Council is informed by a common understanding of the way in which the parties should behave.

The mere fact that the Council justifies its intervention as based on a threat to international peace and security, does not prevent it from also developing a rule prohibiting certain conduct in all such conflicts. While one view may be that the description of the practice as a response to a threat against international peace and security under Chapter VII is sufficient, this thesis adopts a different view. Characterising this practice as a policy response to a threat to international peace and security may be correct on a formal level. It does not, however, properly explain the dramatic and surprising evolution taking place in this field, and unduly discounts the principles expressed and supported in the practice. It disregards what the Council and States actually say and do. In the main, the Council and States have not relied on broad statements of threat to international peace and security – although a focus on peace and security is evident in the constitutional documents of a number of regional organisations[815] – rather, they have formulated general rules condemning certain recourse to force in civil conflict.

In fact, as discussed in chapter 3, in this thesis the position is taken that the Council may formulate general binding rules prohibiting certain forms of conflict within the broad category of response to a threat to international peace and security. Over time, with repetition, these rules no longer constitute unrestricted discretionary responses to a threat, but are better characterised as quasi legislative Council prohibition on certain conduct, which can also crystallize as customary law.

2.2.2 The Practice of States and Regional Organisations

Chapter 2 reviews in detail a range of practice by States and regional organisations that reject the forceful overthrow of democratic governments. Again, as discussed in the context of the Council, practice that takes the form of condemnation followed by sanctions is relevant evidence of the existence and breach of a legal prohibition. Forceful intervention by States and regional organisations also plays a special role in this analysis. As discussed in the Introduction, not only does a State not usually intervene in affairs that fall within other States' exclusive domestic jurisdiction, but to do so forcefully means that it is acting against the formal prohibition on the use of force. Such practice must evidence a strongly held belief by the intervener that it is legally entitled to do so.

In overview, relevant practice includes the response of States to the coup in Haiti in 1991, where a meeting of Foreign Ministers of OAS member States formally condemned the coup and called on

[815] For instance, the AU treaty in that the Standby Force may take pre-emptive action "to prevent violence spreading to neighbours" It represents one justification for expanded NATO action, and in addition, the ECOWAS treaty permits intervention in the face of "a serious threat to peace and security of the sub-region".

members to impose an economic embargo[816] and to "bring about the diplomatic isolation of those who hold power illegally."[817] US Secretary of State Baker had demanded that delegates "make clear that the assault on Haiti's constitutional government has *no* legitimacy and *will not* succeed."[818] In Sierra Leone, similarly, ECOWAS urged States not to recognise the regime installed following the coup and called on them to make every effort to restore the lawful government.[819] The OAU endorsed military as well as diplomatic efforts to restore democracy,[820] and ECOWAS imposed sanctions.[821] The forceful interventions authorised by ECOWAS and the OAU explicitly aimed to remove the military junta,[822] and both Nigeria and the United Kingdom sent troops to this end at different times.

The Côte d'Ivoire practice is relevant both here and also to a broader discussion of the use of force for political purposes undertaken in the next section. As described in chapter 2, the situation in Côte d'Ivoire was not as clear cut as that in Sierra Leone because the legitimacy of that government was contested. This seems to have had an impact on the response of the international community, which did not maintain that Gbagbo should be re-instated, but rather sought to achieve a mediated solution to the conflict. For instance, although directly after the failed coup, the international community had vigorously protested against the attempt to overthrow the democratically elected government,[823] the aim of the ECOWAS peacekeeping force was to act as a buffer and halt the fighting and allow negotiations to take place, not reinstate the government.[824] Forceful intervention was initially justified on a range of rationales – from having been requested by Gbagbo, to having been incorporated into the cease-fire, to a measure to protect nationals – but it was ultimately justified in support of democratic elections[825] condemning "the attempt to undermine constitutional legality in Côte d'Ivoire".[826]

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[816] Organisation of American States "Support for Democracy in Haiti: MRE/RES.2/91" (October 8, 1991).
[817] Organisation of American States, "Support to the Democratic Government of Haiti: MRE/RES. 1/91," (October 3, 1991).
[818] U.S. Department of State "Statement by the Honorable James A. Baker III to the OAS Meeting of Foreign Ministers on the Situation in Haiti" (October 2, 1991). Emphasis in the original text.
[819] ECOWAS Final Communique (Conakry, 26 June 1997).
[820] OAU Summit, (Harare, 2-4 June 1997).
[821] ECOWAS Meeting 20th Session (29 August 1997).
[822] CNN "Coups, Support Democracy" (4 June 1997) www.cnn.com.
[823] ECOWAS members declared support for the democratically elected government. Nigeria and Ghana in particular immediately deployed military assistance to assist President Gbagbo after the failed coup. Nigerian junior foreign minister Dubem Onyia, stated "The ECOWAS members think democracy is being threatened in Cote d'Ivoire," and that "We are acting to prop up the elected government in Ivory Coast". Ivory Coast prepares to strike rebels as foreigners pull out, *by Hugh Nevill* (27 Sept 2002). www.reliefweb.int/, Reuters, "Exodus from Ivory Coast city under French guard" (26 Sept 2002) www.reliefweb.int/. The European Union resolved that the coup d'etat attempt was "seriously undermining the constitutional legality and unity of the country", and strongly condemned it, as well as the "persistence of fighting and the loss of human life in Côte d'Ivoire". It reiterated its "support for the democratically elected President, Mr Laurent Gbagbo, and the government of national unity of the Republic of Côte d'Ivoire as the guarantor of democratic legitimacy and the unity of the country". European Union, European Parliament resolution on the situation in Côte d'Ivoire, P5_TA-PROV(2002)0467 (10 Oct 2002) www.reliefweb.int/.
[824] Agence France-Presse "West African leaders sending peacekeepers to I. Coast" (29 Sept 2002) www.reliefweb.int/.
[825] Agence Algérienne de Presse « Entretien du Ministre des Affaires Etrangeres, M Dominique de Villepin: Situation en Côte d'Ivoire: rôle de la France » (Paris, le 31 octobre 2002) www.reliefweb.int/.
[826] African Union "Côte d'Ivoire: Communiqué of the 84th Ordinary Session" (24 Sept 2002) www.reliefweb.int/.

The range of conduct identified does not fall within the realm of the expression of a mere policy preference. To a large extent, the principles were formulated in a binding universal fashion, and were sought to be enforced, which suggests that the practice evidences the emergence of a legal prohibition. For instance, the principle that "The United Nations and the international community firmly uphold the principle [...] that governments democratically elected shall not be overthrown by force",[827] formulated by the Secretary-General in Sierra Leone, was cited approvingly by many States on the Council,[828] and is consistent with condemnation of the coup by Nigeria,[829] the OAU,[830] and ECOWAS.[831]

In contrast with the muted responses to the breach of human rights conventions – criticism and condemnation of such breaches of human rights are often subdued and never followed up with forceful action – the conduct of States and regional organisations in response to civil conflict is dramatic. The States which have intervened in civil conflicts have emphasised the importance of the principles relied upon, they have also tended to highlight that these accord with the view of the Council.[832] It would be difficult to explain this practice as deriving from a mere policy choice.

Ultimately, the practice supports the view that there exists a process of progressive and mutual reinforcement between the Council and States. The imposition of binding resolutions and sanctions by the Council forces individual States to change their behaviour, as well as changing long-term expectations. However, it is the views of the States that allows the Council to pass the resolutions in question.

The practice reviewed also weighs against the proposition considered earlier that the Council practice is *ad hoc* policy. The adoption, acceptance, and repetition over time by States of Council principles, and the incorporation of such principles into treaty regimes, confirms the view that the practice of the Council reflects a broad consensus, and strengthens the argument that it evidences the emergences of legal norms.

2.2.3 Treaty Support

The incorporation of rules into treaties contributes to the support and acceptance of the rule, rendering it more likely to crystallise as custom.[833] In addition, treaties can evidence increasing concern over an issue

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[827] UN Press Release SG/SM/6241 (1997).
[828] See Kenya, France, Korea, Sweden, Guinea Bissau, Chile at the Security Council Meeting 3822 S/PV.3822 (1997).
[829] CNN "Peacekeepers Seek to End Violent Coup" (31 May 1997) www.cnn.com.
[830] OAU Summit, (Harare, 2-4 June 1997).
[831] ECOWAS Final Communique (Conakry, 26 June 1997).
[832] Consider the many examples in Chapter 2 of the rationales of the AU, ECOWAS, Nigeria, the UK, France and the US in intervening into various conflicts, which accorded with the explicit condemnation by the Council of the situation and the demands it made on the parties.
[833] See for instance the discussion of this matter in the Legality of the Threat or Use of Nuclear Weapons Case: "The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles." Para 82. See also *Nicaragua v United States of America* at para 218.

and thus foreshadow that the conduct may be prohibited in the future. As the Court held in the *Nuclear Weapons Case*,[834] the treaties in that case did not constitute a prohibition but certainly pointed "to an increasing concern in the international community with these weapons" and could foreshadow "a future general prohibition of the use of such weapons".[835]

As discussed in chapter 2, the AU and ECOWAS treaties have adopted very strong positions rejecting unconstitutional change of government which are relevant both to the prohibition against the use of force to overthrow a democratic regime and also, more broadly, to a nascent principle rejecting recourse to force to gain power.[836] The Lomé Declaration, adopted by Member States of the AU, declares that unconstitutional change of government is prohibited, and even illegal. The Declaration "convey[s] a clear and unequivocal warning to the perpetrators of the unconstitutional change that, under no circumstances, will their *illegal* action be tolerated or recognized by the OAU".[837]

The Member States of ECOWAS have also formally adopted a principle of "zero tolerance" for power *obtained* or *maintained* by unconstitutional means.[838] The ECOWAS Protocol on Democracy provides for the imposition of sanctions as a punitive measure. In addition, direct intervention is permitted in the event "of an overthrow or attempted overthrow of a democratically elected government".[839]

These principles are also supported by the treaty regime of the Organisation of American States, which specifically supports the use of collective measures to restore democracy where it has been overthrown unconstitutionally.[840] This is an exception to the general policy prohibiting intervention into the internal matters of States in the OAS.[841] The 2001 Inter-American Democratic Charter provides that such a State

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[834] *Legality of the Threat or Use of Nuclear Weapons.*

[835] Ibid at para 62.

[836] The Lome declaration defines unconstitutional change of government as including military coups against a democratically elected government, intervention by mercenaries to replace a democratically elected government, attempt by rebels and armed dissident groups to replace democratically elected governments, as well as the refusal by incumbent governments to relinquish power after free and fair regular elections.

[837] Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (2000) AHG/Decl.5 (XXXVI). Italics added.

[838] 2001 Protocol on Democracy and Good Governance, Section I, Article 1.

[839] Article 25, The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security. ECOWAS may also impose sanctions in such a situation. ECOWAS Protocol on Democracy and Good Governance, Article 45. See also Charter of the Organisation of American States, Article 10.

[840] 2001 Inter-American Democratic Charter (Lima), Organisation of American States General Assembly "The Santiago Commitment to Democracy and the Renewal of the Inter-American System" (1991) OEA/SerP/XXIO2, Organisation of American States General Assembly "Resolution 1080" (1991) OAS Doc AG/RES1080 (XXI-O/91), OEA/SerP/XXIO2. OAS Inter-American Democratic Charter, Resolution of San Jose Costa Rica (2001) G/RES. 1838 (XXXI-O/01). See for example the condemnation of the attempted coup in Venezuela in April 2003. OAS Permanent Council Emergency Meeting 13 April 2003.

[841] Charter of the Organisation of American States, Article 1, Article 2(b), and (c). OAS Declaration Affirming the Respect for the Personality Sovereignty and Independence of States, Resolution of the General Assembly (1997) AG/DEC. 14 (XXVII-O/97).

may not participate in the OAS,[842] and it authorises the OAS general assembly to adopt "decisions it deems appropriate" in response.[843]

In Africa and Latin America, at the very least, therefore, a consensus rejecting the forceful overthrow of democratically elected governments is forming. Moreover, these treaties do not occur without historical or chronological context. Given their recent adoption they would seem to represent the culmination of the practice seen in the Council and the general practice of States in respect of civil conflict.

2.2.4 Conclusion

As evidenced in Part I of this thesis, and recapitulated in this section, recourse to force against a democratic government has been vehemently condemned by the international community which has taken enforcement action in response in a number of cases. The explicit condemnation of the use of force to overthrow a democratic government supports the emergence of a prohibition. Its legal nature is emphasised by the attempts to enforce it by States, regional organisations and the Council through sanctions and forceful measures, as well as its adoption in a number of regional conventions across Africa and Latin America, and repeatedly by the Council.

One further difficulty that must be addressed before determining that a new norm of *jus ad bellum internum* is emerging is the question of what it would mean in practice. While the emergence of new customary law norm would create a binding obligation on parties, it would not, according to traditional theory, ensure their enforcement. This is one of the inherent weaknesses of international law. A State injured by the breach of a norm of international law could seek to take the matter to the International Court of Justice, or *in extremis* take retaliatory non-forceful measures. However, other than in the case of the breach of Article 2(4) of the UN Charter, which can be enforced through Chapter VII measures, a breach of international law generally leads to international opprobrium rather than enforcement.

The fact that the norm under consideration would apply to a non-State party raises additional complexities. The enforcement of international law against non-State actors remains an uncertain question. However, it would not be the first such norm to exist. Additional Protocol II of the Geneva Conventions, for instance, applies to non-State entities and renders certain conduct illegal. It clearly binds "dissident armed forces or other organized armed groups which, under responsible command, exercise

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[842] 2001 Inter-American Democratic Charter (Lima) Article19.

[843] Ibid, Article 20. This accords with the OAS General Assembly Resolution 1080 on Representative Democracy in 1991 which had determined that " the principle, enshrined in the Charter, that the solidarity of the American states and the high aims which it pursues require the political organisation of those states to be based on effective exercise of representative democracy must be made operative" [AG/RES1080 (XXI-O/91), preamble] and thus that in the event of any sudden or irregular interruption of the democratic political institutional process in any of the member states, the Secretary-General must call relevant meetings to "to look into the events collectively and adopt any decisions deemed appropriate, in accordance with the Charter and international law" [Ibid, Article 1 and 2].

such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol",[844] and breaches of that Protocol by a non-State actor would be considered a breach of international law.

Overall, the emergence of such a norm would provide a normative justification for much of the practice. The response of the international community condemning such uses of force and calling for their remedy can be explained as a result not of *ad hoc* discretion but of a rule prohibiting such use of force. It would explain and legitimize demands by the international community for both parties to abide by the rules. Finally, it would provide an additional justification for the enforcement practice of the Council, which has an intuitive although complex relationship with the enforcement of international law.[845]

In conclusion then, the practice reviewed can be considered to evidence the emergence of a norm prohibiting recourse to force to overthrow a democratic government. The practice also supports the implied corollary right of a democratic government to defend itself against a use of force seeking to overthrow it. Such rules would fall within a sub-category of *jus ad bellum internum*, they would prohibit civil conflict seeking to overthrow a democratic government and justify and explain a large proportion of the practice in response to such conflicts.

2.3 RECOURSE TO FORCE AIMING TO CAUSE OR INVOLVING MASSIVE VIOLENCE AGAINST CIVILIANS

The question of protection of civilians has typically been dominated by moral and ethical arguments. It is useful, however, to consider whether the rejection of massive violence against civilians is emerging as a rule of *jus ad bellum internum* in addition to it constituting a rule of *jus in bello*. The rule considered in this section is whether recourse to force in civil conflict which aims to cause or involves massive violence against civilians is prohibited.

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[844] Article 1, Additional Protocol II to the 1949 Geneva Conventions.

[845] As discussed in chapter 3, States frequently assert non-compliance with the Charter or international law as a basis for Council intervention. Gowland Debbas in particular seems to consider Council sanctions to be a form of enforcement of international law, while acknowledging that the condition for the application of the sanctions is strictly not an international wrongful act. Gowland-Debbas "The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" at 661. Kirgis also points out that in many instances the rules are self-enforcing, and that when they are not, in addition to self-help, the pressure against those that breach these rules brought by of international agencies could be considered a form of enforcement. See Kirgis "Enforcing International law" in ASIL Insights January 1996.

2.3.1 The Impact of *Jus in Bello*

The question of the impact of *Jus in Bello* can be approached by analogy with the reasoning of the International Court of Justice in the *Nuclear Weapons Case,* where the Court discussed whether the humanitarian laws of war implied a complete prohibition on recourse to nuclear weapons.

The protection of civilians from violence is a cardinal aspect of humanitarian law, and despite the minimal proportion of *jus in bello* treaty law applicable to civil conflicts, the prohibition on violence to life and person, murder, mutilation and cruel treatment applies to all civil conflicts that are "armed conflicts not of an international character".[846] The applicability of the prohibition on violence against civilians in non-international conflicts has been reinforced by the Tribunal decision in *Tadic,* where it was concluded that the protection of civilians from hostilities has emerged as a rule of customary law applicable in internal conflict.[847]

In the *Nuclear Weapons Case*, the Court emphasised how difficult it would be to establish that recourse to nuclear weapons would be prohibited by *jus in bello* rules. It did, however, conclude that "the use of such weapons in fact seems scarcely reconcilable with respect for such requirements"[848] and would generally be contrary to international law, with the possible exception of "an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[849]

In theory, it is possible to imagine forms of civil conflict where violence is targeted at non-civilians which would satisfy the humanitarian *jus in bello* requirements, such as conflicts involving only the army and the rebel forces. However, to use the Court's terminology, recourse to civil conflicts "seems scarcely reconcilable" with respect of *jus in bello* principles since in many instances the killing of civilians through displacement, ethnic cleansing, direct targeting to undermine morale, and forced recruitment is an inherent and integral aspect of the civil conflict.

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[846] Common Article 3 of the Geneva Conventions, which applies to "armed conflict not of an international character", prohibits: "Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; Taking of hostages; Outrages upon personal dignity, in particular humiliating and degrading treatment". Additional Protocol II, which applies to all non-international conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." According to this Protocol "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." APII Article 13.

[847] *Tadic (Jurisdiction)* at 67-68, para 127. See the discussion in Meron "Editorial Comment: The Continuing Role of Custom in the Formation of International Humanitarian Law" (1996) 90 AJIL 238

[848] Legality of the Threat or Use of Nuclear Weapons para 95.

[849] Ibid para 95.

Before turning to the practice, the explicit restriction in Article 3 of Additional Protocol II to the Geneva Conventions must be addressed. Could this neutralize the impact of *jus in bello* on *jus ad bellum internum*? The provision states that:

> Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
>
> Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

However, this provision only supports the right to re-establish law and order by "by all legitimate" means. If particular means are determined to be illegitimate, this provision would not apply.

2.3.2 More than Principles of *Jus in Bello?*

It is axiomatic that massive violence against civilians is prohibited. The intertwined nature of the principles addressing civilians, humanitarian crises, and massive breaches of human rights renders this area somewhat difficult to analyze, and the international community often does not differentiate between different principles when condemning actions, or intervening into civil conflict and imposing sanctions. Nonetheless, in addition to practice upholding the rules of *jus in bello* – calling on parties to abide by rules of humanitarian law and maintaining individual responsibility for breaches of such rules[850] – some of the practice could imply that the conflict itself becomes rejected when it causes massive violence against civilians.

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[850] These have been expressed as binding, legal principles, for which perpetrators will be held accountable. See for instance the Secretary-General comments in Liberia, Secretary-General was alarmed at the impact of fighting in Liberia, SG/SM/8740, AFR/638; The Council condemned violations of human rights and demanded under Chapter VII that parties cease all human rights violations against the Liberia population and stressed the need to bring those responsible to justice. SC Res 1509 (2003); The Council in Sierra Leone condemned the human rights abuses against the civilian population and demanded that the acts cease immediately. SC Res 1132 (1997) preamble, SC Res 1181 (1993) preamble, SC Res 1289 (2000); S/PRST/1997/36 (1997); S/PRST/1997/29 (1997), S/PRST/1997/42 (1997); and SC Res 1132 (1997), SC Res 1171 (1998), SC Res 1231 (1999) para 3, SC Res 1236 (2001) para 6, SC Res 1400 (2002), SC Res 1289 (2000). The Council also emphasised that humanitarian law must be followed in civil conflicts, SC Res 1181 (1998), SC Res 1231 (1991) para 3; and authorised UNAMSIL under Chapter VII to take all necessary action to "protect civilians under imminent threat of physical violence", SC Res 1270 (1999) para 14, SC Res 1289 (2000) para 10; and set up a Conflict Crimes Court for Sierra Leone to try individuals for war crimes, SC Res 1315 (2000). In the former Yugoslavia, as a further example, the Council condemned "in the strongest possible terms" the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces, SC Res 1034 (1995) para 2. It held that "mass killings" and continuance of the practice of "ethnic cleansing" amounted to a threat to international peace and security, SC Res 808 (1993) and it sought "to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them", SC Res 808 (1993).

For instance, in the case of Liberia, when the impact of the conflict on civilians became extreme – both in terms of direct civilian deaths from the conflict and in the form of a developing humanitarian crisis – the international community became involved and called on the parties to stop the fighting and negotiate a peaceful solution to the conflict. The Secretary-General called on the Council "to urgently authorise a peacekeeping force to prevent a major humanitarian tragedy and to stabilize the situation in that country."[851] Even before the ceasefire was first brokered, the Council already expressed its concern at the "rapidly deteriorating security situation" and urged "all combatants in the strongest terms to immediately cease hostilities and agree to a ceasefire."[852]

Nonetheless, most of the rationales have been formulated in moral, not legal, terms – "Our collective interest and our common humanity demand urgent and decisive action from the Council. We cannot be oblivious to the warning signs of an imminent possible catastrophe"[853] – even though they ultimately led to a finding that the conflict in Liberia constituted a threat to international peace and security.

The Council decided to intervene in Liberia in the light of the conflict's "effects on the humanitarian situation, including the tragic loss of countless innocent lives, in that country, and its destabilizing effect on the region".[854] It stressed "its utmost concern at the dire consequences of the prolonged conflict for the civilian population".[855] Germany maintained specifically that "the constant deaths of civilians were to be deplored and the Council must react swiftly," and Chile also emphasised that "its priority was to save lives and to give an appropriate response to a humanitarian crisis that brooked no further delay."[856] This reinforces the perception that such violence has a practical impact. Massive violence against civilians is not merely a breach of *jus in bello* but can render the conflict a threat to international peace and security and justifies action to stop it.

In Sierra Leone, as well, the Council relied on widespread violence as one basis for its intervention aiming to end the conflict. When putting in place the sanctions regime it emphasised the unacceptable violence and loss of life, and the deteriorating humanitarian conditions.[857] Moreover, it authorised UNAMSIL under Chapter VII to take all necessary action to "protect civilians under imminent threat of physical violence".[858] The case of Somalia also supports such a principle. In that case the "heavy loss of

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[851] UN Security Council, (28 Jun 2003, Violations of ceasefire in Liberia: Letter from the Secretary-General to the Security Council, S/2003/678, Letter dated 28 June 2003 from the Secretary-General addressed to the President of the Security Council.
[852] Press statement on Liberia by Security Council President, SC/7787, AFR/644.
[853] UN Security Council, (28 Jun 2003, Violations of ceasefire in Liberia: Letter from the Secretary-General to the Security Council, S/2003/678, Letter dated 28 June 2003 from the Secretary-General addressed to the President of the Security Council.
[854] SC Res 1497 (2003) preamble, (1 August 2003).
[855] SC Res 1509 (2003), (19 September 2003).
[856] SC Res 1497 (2003).
[857] SC Res 1132 (1997).
[858] SC Res 1270 (1999) para 14, SC Res 1289 (2000) para 10.

human life"[859] was the key rationale leading to the intervention. The Council specified: "the international community is involved in Somalia in order to help the people of Somalia who have suffered untold miseries due to years of civil strife".[860] Resolution 794 (1992) referred to "the magnitude of the human tragedy caused by the conflict," and "the deterioration of the humanitarian situation."[861]

In the discussion above, recourse to force by a democratic government in response to an attempt to overthrow it was considered to constitute valid self-defence. However, even in that instance, if the conflict were to target civilians or cause massive violence against civilians, its validity would be seriously put into question. In Macedonia the Council explicitly recognized that the Government of Macedonia was entitled to address the violence it was facing, but that it should do so with "an appropriate level of restraint and to preserve the political stability of the country".[862] In resolution 1345 (2001), of 21 March 2001, it again emphasized that the government should "end the violence in a manner consistent with the rule of law".

The lack of international intervention into Rwanda could be considered a counter-example. Even in that case, however, the devastating inaction is widely viewed as the greatest failure of the international community since the creation of the Council,[863] and the Council did still strongly condemn the "large-scale violence",[864] and imposed sanctions seeking to stop "the use of such arms and equipment in the massacres of innocent civilians".[865]

Moreover, a norm prohibiting civil conflict involving massive violence against civilians would be consistent with the general development of this area of the law. Massive violence against civilians has long been prohibited as a crime against humanity. This was established as early as 1915 in the declarations by the governments of France, UK and Russia denouncing the massacre of Armenians taking place in Turkey in which they maintained that these were "crimes against humanity and civilisation" [866] It is also reflected in the AU constitutive document, which allows the Union to intervene in a Member State "in respect of grave circumstances, namely war crimes, genocide and crimes against humanity".[867]

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[859] SC Res 733 (1992).
[860] SC Res 837 (1993).
[861] SC Res 794 (1992).
[862] S/PRST/2001/7.
[863] Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (1999) S/1999/1257.
[864] SC Res 918 (1994), SC Res 925 (1994).
[865] SC Res 1011 (1995).
[866] Schwelb "Crimes against Humanity" (1949) 23(8) British Yearbook of International Law 181. Interestingly, according to the trial chamber of the ICTY in *Tadic*, the "civilian population" in such crimes might include resistance movements. *Tadic (Jurisdiction)* at para 638-642. This view was also adopted in *Prosecutor v Kupreskic*, where the tribunal stated that "the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity." *Prosecutor v. Kupreskic* (2000) No IT-95-16-T Available at www.un.org/icty/kupreskic/trialc2/judgement/index.htm at para 549.
[867] Constitutive Act of the African Union, Article 4.

2.3.3 Conclusion

The practice evidences a generalized rejection of conflicts that cause massive violence against civilians. It is precisely the gross violence against civilians that gives rise to the international response. States and the Council have responded to civil conflicts involving massive violence against civilians by both condemning the actions and calling on the parties to stop hostilities. They have also taken action to attempt to stop such conflicts. Nonetheless, much of the practice in this case seems to be formulated in moral, not legal terms, and in contrast to the norm discussed above, the condemnation seems to lack a systematic, or conscious, element.

Once massive violence against civilians takes place in a conflict, the conflict is then subject to international intervention and condemnation. Nonetheless, this practice remains somewhat diffuse in comparison with the practice reviewed in relation to the norm rejecting force against a democratic government, lacking in explicit declaratory statements by the Council, individual States and the Secretary-General on the policy that is being adopted, and its general and binding nature. Ultimately, the practice could develop in a more conscious manner and ultimately lead to the emergence of a norm of *jus ad bellum internum,* currently, the practice remains somewhat undeveloped and uncertain.

2.4 A PROHIBITION AGAINST FORCE TO GAIN POLITICAL POWER?

So far this thesis has focused on the extent to which the practice reviewed supports the emergence of a number of discrete norms prohibiting certain forms of civil conflicts. However, the scope and nature of the practice, especially some of the most recent practice, suggests a dramatic shift in the policy and approach of the international community to civil conflict, and anticipates fundamental upheaval in this field. Contrary to widespread assumptions, civil conflict is no longer considered a domestic matter, is recognised as having a severe impact on the peace and stability of the world, and is increasingly rejected and condemned by the international community in broad terms.

This section reviews the emerging practice rejecting recourse to force for political aims and the normative environment within which the practice is taking place. It then considers the exceptions that would need to be incorporated into such a principle to address established rights. It is argued that the practice represents early but crucial indications that, assuming the current trend continues, all recourse to force for political aims in civil conflicts (other than in self-defence against illegal overthrow or violent oppression) will, in time, become prohibited. This would constitute a dramatic change in international law akin to the outlawing of the use of force (barring self-defence and other limited exceptions) in international relations. It is nonetheless the strong and surprising conclusion of this thesis.

2.4.1 Council Practice

As discussed in chapter 1, there is extensive Council practice rejecting force and violence in civil conflicts. The practice has been shown to be part of a trend of increasing concern over politically motivated violence. It is also supported by the corollary principle of an obligation to settle conflict by peaceful means. The section first provides a brief overview of the practice drawing on the review in chapters 1 and 2; it then discusses possible conclusions.

Overview

The practice of the Council ranges from condemnation to demands that parties renounce violence, and to measures seeking to enforce these demands. The Council has intervened in 32 civil conflicts since 1945.[868] There is a trend of increasing interventionism with the majority of interventions taking place after 1991.[869] The Council has condemned (which is stronger than simply expressing concern) the violence or force in at least 18 civil conflicts:

- Albania (condemned all acts of violence)
- Angola (condemned UNITA armed attacks)
- Burundi (condemned those responsible for increasing violence and condemned those that resort to violence for political objectives)
- Côte d'Ivoire (condemned those that seize power by force of arms)
- Croatia (condemned attacks leading to loss of civilian and military life)
- Cyprus (condemned the outbreak of violence and the continuing bloodshed)
- CAR (condemned the attempted coup)
- DRC (condemned all acts of violence)
- East Timor (condemned all acts of violence)

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[868] According to the definition of civil conflict adopted in this thesis, these are: Afghanistan, Albania, Armenia, The Former Yugoslavia, The Federal Republic of Yugoslavia and Kosovo, Croatia, Bosnia and Herzegovina, Burundi, Cambodia, Central African Republic, The Republic of Congo (Brazzaville), The Democratic Republic of Congo, Colombia, Cote d'Ivoire, Cyprus, East Timor, El Salvador, Georgia, Guatemala, Guinea Bissau, Haiti, Lebanon, Iraq (Kurds), Liberia, the Former Yugoslav Republic of Macedonia, Mozambique, Nicaragua, Rwanda, Sierra Leone, South Africa, Somalia, and Western Sahara.

[869] The exceptions are the Republic of Congo (Brazzaville) (1961), Cyprus (1964), El Salvador (1989), Lebanon (1978), Nicaragua (1983), South Africa (1960), and Western Sahara (1975).

- Former Yugoslavia (condemned continuing military attacks within Croatia and Bosnia Herzegovina)
- Former Yugoslav Republic of Macedonia (condemned the actions of ethnic Albanian extremists and condemned violence for political aims)
- Georgia (condemned the acts of violence by armed groups)
- Haiti (condemned extra-judicial killings, arbitrary arrests, abductions, rapes and enforced disappearances)
- Kosovo (condemned violence by either party and condemned the use of excessive force by Serbian police forces)
- Lebanon (condemned efforts to disrupt by violence return of government and condemned the violence)
- Liberia (condemned violence by signatories to the peace agreement and condemned fighting and armed attacks)
- Rwanda (condemned violence against civilians)
- Somalia (condemned fighting and condemned violence against humanitarian efforts)
- South Africa (condemned massive violence against and killings of the African people)

It has made explicit demands and called on parties (which is a stronger form of practice than condemnation) to renounce force or violence in 22 of the conflicts:

- Afghanistan (all parties to renounce the use of force and to stop fighting immediately) (decided under Chapter VII that parties were to comply or face coercive enforcement)
- Albania (an end to violence after determining that situation was a threat to international peace and security)
- Angola (hostilities cease and that UNITA to stop armed attacks)

- Bosnia and Herzegovina (rejected any attempt to resolve the conflict by military means) (all irregular forces in Bosnia and Herzegovina be disbanded and disarmed, and all parties and others concerned in Bosnia and Herzegovina stop the fighting immediately)

Burundi (all concerned refrain from acts of violence)

- Cambodia (all parties put an end to all acts of violence and to all threats and intimidation committed on political or ethnic grounds)

CAR (government to take urgent steps to bring an end to all acts of violence)

- Congo (Brazzaville) (cease hostilities)
- Croatia (parties stop the fighting immediately) (decided under Chapter VII that parties were to comply or face coercive enforcement)
- Cyprus (parties cease hostilities and refrain from the threat or use of force or violence as a means to resolve the Cyprus problem)
- DRC (parties cease hostilities and end violence against refugees)
- East Timor (immediate end of all acts of violence)
- Former Republic of Macedonia (all those who are currently engaged in armed action against the authorities of those States immediately cease all such actions, lay down their weapons and return to their homes)
- Former Yugoslavia (parties not resort to violence)
- Georgia (parties refrain from the use of force)
- Haiti (parties renounce violence as a means of political expression, and all factions in Haiti explicitly and publicly to renounce, and to direct their supporters to renounce, violence as a means of political expression)
- Kosovo (parties cease hostilities pursuant to Chapter VII, and end all offensive actions, and the parties to put an immediate and verifiable end to violence and repression)
- Lebanon (all those involved in hostilities in Lebanon to put an end to acts of violence)

- Liberia (parties cease hostilities)
- Rwanda (an end to the mindless violence and carnage which are engulfing Rwanda and parties cease hostilities)
- Sierra Leone (the RUF lay down arms immediately and disband) (resolutions were passed pursuant to Chapter VII and were thus explicitly binding)
- Somalia ("strongly urged" parties to cease hostilities immediately) (maintained that those that resorted to violence would be accountable by the Somali people and the international community) (an immediate end to all acts of violence)

And, it has imposed enforcement measures under Chapter VII in 14 of the conflicts. 13 of these interventions have taken place since 1991.

- Congo (Brazzaville) (1961) (peacekeeping force to prevent the occurrence of civil war)
- Former Yugoslavia (1991) (complete arms embargo on all parties to establish peace and stability) (deplored that its demands in prior resolutions had not been complied with) (1992) (UNPROFOR to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav Crisis)
- Somalia (1992) (weapons embargo) (1992) (authorised forceful intervention to restore peace, stability and law and order with a view to facilitating the process of a political settlement under the auspices of the United Nations)
- Croatia (1993) (UNPROFOR to monitor withdrawal of the Yugoslav Army from Croatia and demilitarisation of the Prevlaka peninsula)
- Bosnia and Herzegovina (1993) (UNPROFOR to deter attacks against the safe areas)
- Haiti (1993, 2004) (trade embargo on petrol and arms) (1994) (multinational force), (2004) (new peacekeeping force).
- DRC (1996) strengthened in (2003) (multinational intervention to stabilize the security conditions and improve the humanitarian situation in Bunia as well as contribute to the safety of the civilian population) (protect civilians under imminent threat of physical violence)

- Sierra Leone (1997) (arms and petrol embargo), (1998) (arms embargo on RUF), (1999) (peacekeeping force) (2000) (embargo on non-government diamond export).

- Albania (1997) (peacekeeping force to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organisations) (the call to end all acts of violence was not stated as an aim of the multilateral force, it is implicit in the authorisation that the civil conflict and acts of violence should cease)

- Kosovo (1998) (arms embargo to foster peace and stability) (1999) (international civil and security presences)

- Afghanistan (1999) (to cease all armed hostilities, to renounce the use of force, to put aside their differences and to engage in a political dialogue) followed by (call on states to end immediately the supply of arms and ammunition to the parties of the conflict)

- East Timor (1999) (multinational force led by Australia to restore peace and security in East Timor)

- Côte d'Ivoire (2003) (peacekeeping troops for the protection of civilians immediately threatened with physical violence)

- Liberia (1992, 2003) (1992) (implement the cease-fire, establish conditions for disarmament and demobilization, using all necessary measures) (weapons embargo for the purpose of establishing peace and stability in Liberia) (2003) (multinational force)

In addition, in many of the conflicts, quite separately from the instances of condemnation of violence listed above, the Council has expressed *concern* over the violence:

- Afghanistan (concern over the continuation and recent intensification of the military confrontation)[870]

- Cambodia (concern over the increasing number of acts of violence perpetrated on political grounds)[871]

- Croatia (concern over the rapid and violent deterioration of the situation)[872]

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[870] SC Res 1076 (1996) preamble, SC Res 1193 (1998) preamble.
[871] SC Res 810 (1993).

- El Salvador (urged both parties to exercise maximum and continuing restraint)[873]
- Guinea Bissau (grave concern at the serious humanitarian situation affecting the civilian population)[874]
- Haiti (concern over escalation of politically motivated violence)[875]
- Lebanon (deep grievance at the "loss of life, human suffering and physical destruction")876
- Rwanda (deeply disturbed by the magnitude of the human suffering) (concern that the parties should cease hostilities and bring to an end the violence and carnage)[877]
- South Africa (concern over the violence that was destabilising the peaceful negotiations)[878]
- The former Yugoslavia (concern about the fighting in Yugoslavia, which is causing a heavy loss of human life and material damage)[879]
- Western Sahara (appealed to parties to exercise restraint and moderation)[880]

Analysis

The practice shows that the Council has repeatedly rejected the use of "violence", which appears to be used as a synonym for "force". The most striking practice is that since the 1990s. However, one instance of early practice is worth highlighting because it did prefigure the principles emerging: the practice of the Council in Congo Brazzaville in 1961[881] explicitly aimed to prevent civil conflict. The Council sent a peacekeeping force to "prevent the occurrence of civil war".[882] It highlighted the threat to international peace and security and went on to urge the forces to "take immediately all appropriate measures to

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[872] SC Res 802 (1993) preamble.
[873] SC Res 714 (1991) para 6, SC Res 729 (1992).
[874] SC Res 1216 (1998).
[875] SC Res 867 (1993).
[876] SC Res 436 (1978), see also SC Res 490 (1981), SC Res 512 (1982), SC Res 542 (1983).
[877] SC Res 918 (1994) SC Res 925 (1994), SC Res 929 (1994).
[878] SC Res 765 (1992).
[879] SC Res 713 (1991), preamble. See also SC Res 721 (1991).
[880] SC Res 377 (1975).
[881] Note that the practice of the Security Council in relation to the more recent civil uprising in 1997 has been very limited. It did not send peacekeepers despite requests by the OAU and the Congolese government. It did find that the factional fighting, the plight of civilians, and the severe humanitarian conditions were "likely to endanger peace, stability and security in the region". However, it maintained that a force would only be sent if there was "complete adherence to an agreed and viable ceasefire, agreement to the international control of Brazzaville airport and a clear commitment to a negotiated settlement covering all political and military aspects of the crisis". S/PRST/1997/43.
[882] SC Res 161 (1961) para 1.

prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes and the use of force if necessary in the last resort".[883] For many years after this intervention, the Council seemed to have retreated from this principle, and did not intervene in further civil conflicts.

However, the practice of the last decade and a half supports the principles underlying that early intervention. The explicit rejection of force to resolve conflict has been a central aspect of the Council practice in relation to many conflicts. Increasingly, the Council has emphasised that it is the use of force to achieve a political outcome that it rejects. The approach of the Council has evolved through the early Balkan practice to that in Kosovo, Macedonia, Liberia and Côte d'Ivoire where the Council adopted a principle rejecting recourse to force for political means without relying on other justifications (such as peace agreements).

Early Council practice in the Balkans in the early 1990s involved condemnations and calls to cease the recourse to force, but its practice was reliant on the OSCE declarations that "no territorial gains or changes within Yugoslavia brought about by violence are acceptable".[884] The Council also emphasised its alarm at the violations of the cease-fire and the continuation of the fighting. The focus was on enforcing and abiding by the peace agreements and the principles put forward by the European Commission. The formulation rejecting violence was tentative and seems more policy driven than a binding principle. Moreover, the Council emphasised that the peacekeepers would not be sent until violence stopped, implying a traditional view of their role in conflicts.[885]

In Georgia, in 1993, however, the Council demanded that all parties "refrain from the use of force",[886] and also explicitly welcomed the "commitment of the parties not to use force for the resolution of any disputed questions" and to refrain from "propaganda aimed at the solution of the conflict by force".[887] In Kosovo, by the late 1990s, the practice was even more striking. The Council condemned violence by both sides and called on them both to cease using violence and demanded under Chapter VII "that all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo".[888] Here, the Council did not rely on a peace agreement or a regional agreement, although its demands were in line with the view of the OSCE member States. While there was a strong underlying concern about the humanitarian impact of the conflict, particularly suggestions of ethnic cleansing, these were not explicitly

[883] SC Res 161 (1961) para 1.
[884] OSCE conference of 3 September 1991.
[885] SC Res 721 (1991).
[886] SC Res 876 (1993), see also SC Res 881 (1993), para 3.
[887] SC Res 1311 (2000) para 5.
[888] SC Res 1199 (1998).

relied on to justify or shape the calls for a political and peaceful resolution. The Council simply condemned the violence in that conflict and demanded an end to recourse to force for political aims.

By the time the Council considered the violence in the Former Yugoslav Republic of Macedonia in 2001, it reacted with determination rejecting recourse to force in civil conflicts. Even before any peace agreement, the Council called on all political leaders to isolate the forces behind the violence and shoulder their responsibility for peace and stability,[889] and condemned violence by armed ethnic extremists and the killing of soldiers.[890] The Council explicitly demanded that those that were engaged in armed action against the State must "immediately cease all such actions, lay down their weapons and return to their homes".[891] Moreover, in 1371 (2001), the Council specifically rejected recourse to force for political aims: [892]

> rejects the use of violence in pursuit of political aims and stresses that only peaceful political solutions can assure a stable and democratic future for the Former Yugoslav Republic of Macedonia

The practice of the Council in the recent conflict in Liberia also supports this position, where the Council urged "the LURD and MODEL to refrain from any attempt to seize power by force, bearing in mind the position of the African Union on unconstitutional changes of government as stated in the 1999 Algiers Decision and the 2000 Lomé Declaration".[893]

During the middle to late 1990s demands that parties renounce recourse to force were also made, with varying formulations, in a range of other conflicts: see Burundi,[894] Central African Republic,[895] East

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[889] S/PRST/2001/7.
[890] Statement of the President S/PRST/2001/7 (2001), also 1345 (2001) para 1.
[891] SC Res 1345 (2001) para 8.
[892] SC Res 1371 (2001) para 3.
[893] SC Res 1497 (2003) para 13. Note that this statement took place once President Taylor had stepped down, and does seem to stretch the intention of the AU agreement, given the clear doubts surrounding Taylor's democratic legitimacy at that point.
[894] SC Res 1049 (1996) para 3 and 4, and SC Res 1072 (1996). "parties refrain from incitement to violence", SC Res 1049 (1996) para 3 and 4. See also in the DRC expressing concern at "acts of and incitement to ethnic hatred and violence by all parties to the conflict", SC Res 1234 (1999).
[895] The Security Council called on the Government "to take urgent steps to bring an end to all acts of violence." Statement of the President S/PRST/2001/18 (2001).

Timor,[896] Rwanda,[897] Lebanon,[898] and Cambodia.[899] In Albania, the calls to end violence were pursuant to a finding of a threat to international peace and security,[900] as they were in Sierra Leone.[901]

It is implicit in much of this practice that what is being condemned is recourse to force for political aims. The Council has expressed this explicitly in some conflicts.[902] For instance, the Council linked its demand in Georgia that all parties "refrain from the use of force"[903] to its support for the "commitment of the parties not to use force for the resolution of any disputed questions" and called on parties to refrain from "propaganda aimed at the solution of the conflict by force".[904] In Cyprus, the Council called on both sides to "refrain from the threat or use of force or violence as a means to resolve the Cyprus problem".[905] In Burundi, it demanded that all parties refrain from "seeking to destabilize the security situation or depose the Government by force or by other unconstitutional means".[906] In Côte d'Ivoire, the Council stated that it "firmly condemns attempts to use force to influence the political situation in Côte d'Ivoire."[907] In Liberia, the Council similarly rejected "any attempt to seize power by force", acknowledging the Lomé Declaration on unconstitutional changes of government.[908] In Haiti, it called "upon all factions in Haiti explicitly and publicly to renounce, and to direct their supporters to renounce, violence as a means of political expression".[909]

Once again, the emergence of any such principle must be investigated in light of the conflicts that the Council has not addressed, particularly: Algeria, Burma, Chechnya, Colombia, Fiji, The Gambia, Ireland, Spain, Sri Lanka, and Sudan. However, the extent to which this practice undermines the principles considered above is a complex matter. As discussed in chapter 1, there are two principal views: Non-intervention could reflect geopolitical realities without denying the emergence of a new principle, or it could reflect a belief that the Council is precluded from intervening because of the domestic nature of the

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[896] The Security Council repeatedly condemned "all acts of violence in East Timor" and called for their immediate end. SC Res 1264 (1999) para 1, acting under Chapter VII, see also SC Res 1246 (1999) para 11, SC Res 1272 (1999) para 12, 16.

[897] The Security Council did ultimately demand "an end to the mindless violence and carnage which are engulfing Rwanda", SC Res 912 (1994) para 6, SC Res 918 (1994), SC Res 925 (1994).

[898] The Security Council condemned the violence and called on "all those involved in hostilities in Lebanon to put an end to acts of violence", SC Res 436 (1978) para 1, SC Res 490 (1981) para 1, SC Res 512 (1982) para 1, see also SC Res 513 (1982) para 1 with respect to violence against civilians.

[899] SC Res 880 (1993) para 5.

[900] SC Res 1101 (1997) para 1, this formulation was repeated in SC Res 1114 (1997) para 1. Albania SC Res 1101 (1997) preamble.

[901] SC Res 1132 (1997) para 2.

[902] See Burundi, Cote d'Ivoire, CAR, Cyprus, Georgia, Haiti, Former Yugoslav Republic of Macedonia, and Lebanon, Liberia.

[903] SC Res 876 (1993), see also SC Res 881 (1993), para 3.

[904] SC Res 1311 (2000) para 5.

[905] SC Res 1251 (1999) para 9.

[906] SC Res 1049 (1996) para 3.

[907] Presidential Statement "Security Council condemns attempts at force to influence political situation, overthrow elected government in Côte d'Ivoire" S/PRST/2002/42. See also UN Security Council, "Press statement on Côte d'Ivoire by President of Security Council" (31 Oct 2002) AFR/506, SC/7558.

[908] SC Res 1497 (2003) para 13.

[909] SC Res 867 (1993) para 8. See also Cambodia, it demanded that all parties "put an end to all acts of violence and to all threats and intimidation committed on political or ethnic grounds". SC Res 810 (1993), and Macedonia, Cote d'Ivoire and Liberia above.

conflict.[910] As argued in chapter 1 it is the first view that is borne out by the evidence, the majority of the instances of non-response to civil conflict fall into situations where clear geopolitical or veto restrictions came into play. The Council did in many instances at least condemn the conflict, even if it did not take further steps to end it.[911]

In summary, it is clear that in the last decade and a half it has become routine, once the conflict has been placed on the Council agenda, for the Council to condemn the recourse to force and call on the parties to stop fighting and resolve the conflict by peaceful means. The explicit rejection of force to resolve conflict has been a central aspect of the Council practice in relation to many conflicts. Increasingly, the Council has emphasised that it is recourse to force to achieve a political outcome that it rejects. The practice can be seen to evolve through the early Balkan practice to that in Kosovo, Macedonia, Liberia and Côte d'Ivoire. In the latest conflicts the Council has adopted an explicit principle rejecting recourse to force for political means.

An Obligation to Resolve Conflicts Peacefully?

The prohibition on recourse to force in the international context is strengthened by the corollary obligation to settle conflicts through peaceful measures under Chapter VI of the Charter. Similarly, the practice supporting peaceful resolution of civil conflicts and even demanding that such resolution should be non-violent, supports the emergence of a norm prohibiting recourse to force for political aims in civil conflict.

There is extensive Council practice demanding or supporting peaceful resolution of conflict. The practice ranges from formulations that suggest a strong policy preference, to formulations that suggest a binding obligation. For instance, in calling on parties to settle their differences by peaceful means in Afghanistan, the Council urged "all Afghan parties to resolve their differences through peaceful means and achieve national reconciliation through political dialogue"[912] and expressly stated that "the Afghan crisis can be settled only by peaceful means".[913] It has also welcomed the express commitments of parties to seek a peaceful resolution, such as the commitment of the CAR President "to maintain peace in the Central African Republic through dialogue and consultation,"[914] and the Angola government's continued

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[910] See Teson "A Symposium on Re-Envisioning the Security Council: Collective Humanitarian Intervention" for a discussion of the interplay between Security Council intervention and Article 2(7). See also Higgins *The Development of International Law through the Political Organs of the United Nations* at 58-130.

[911] The Council has not reacted at all, only in a very small number of conflicts, namely Algeria, Sri Lanka and Colombia.

[912] SC Res 1076 (1996) preamble.

[913] SC Res 1193 (1998) para 1, SC Res 1076 (1996) para 1.

[914] Statement of the President S/PRST/1999/7.

disposition to reach a peaceful settlement of the conflict in conformity with the peace accords.[915] It stated that parties must resolve their differences through political dialogue in Georgia, Lebanon, Rwanda and Sierra Leone[916] or by national reconciliation, in East Timor, Congo (Brazzaville), and the CAR.[917]

Other formulations suggest that the Council increasingly considers the principle to be a binding obligation. In the Balkans, even before the Dayton Peace Accord,[918] the Council repeatedly upheld the principle of peaceful resolution of the conflicts. While it formulated its demands as arising from the Declaration of the EC or individual peace agreements,[919] the Council did explicitly adopt the principles and attempt to enforce them under Chapter VII.

In recent practice, the Council has explicitly declared its commitment to "an overall negotiated settlement of the conflicts".[920] In Croatia this was expressed as an "imperative need to find an urgent negotiated political solution".[921] The Council also called upon the government and the local Serb authorities "to refrain from the threat or use of force and to reaffirm their commitment to a peaceful resolution of their differences"[922] and backed up these demands by a statement under Chapter VII that parties were to comply or face coercive enforcement.[923]

In Kosovo, similarly, the Council called upon the FRY under Chapter VII "immediately to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue".[924] It emphasised that "all elements in the Kosovar Albanian community should pursue their goals by peaceful means only",[925] and underlined that "the way to defeat violence and terrorism in Kosovo is for the authorities in Belgrade to offer the Kosovar Albanian community a genuine political process".[926] The Council also called on the President of the FRY to implement his commitment of 16 June to resolve the problems by political means, and also insisted that the KLA "should pursue their goals by peaceful means only". It went on to impose an arms embargo "for the purposes of fostering peace and stability in

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[915] SC Res 864 (1993) para 4 and 5.
[916] Afghanistan SC Res 1076 (1996) preamble, Kosovo SC Res 1160 (1998) para 1, see also SC Res 1199 (1998) para 3 and 4, Lebanon SC Res 542 (1983) paras 3 and 4, Georgia SC Res 849 (1994), SC Res 896 (1994), SC Res 906 (1994) para 4, SC Res 937 (1994) para 2, SC Res 1311 (2000), Rwanda SC Res 1078 (1996) para 2, Sierra Leone SC Res 1162 (1998) para 3.
[917] Central African Republic SC Res 1271 (1999), East Timor SC Res 1264 (1999) preamble, Congo (Brazzaville) Statement of the President S/PRST/1997/47.
[918] General Framework for Peace in Bosnia and Herzegovina (The Dayton Peace Accord) on 21 November 1995.
[919] See discussion of this practice in chapter 2.
[920] SC Res 994 (1995) preamble, see also SC Res 981 (1995).
[921] SC Res 764 (1992) preamble and para 8.
[922] SC Res 981 (1995) para 8.
[923] See SC Res 994 (1995) para 10, SC Res 994 (1995). "Demands that the parties refrain from taking any further military measures or actions that could lead to the escalation of the situation and warns that in the event of failure to comply with this demand it will consider further steps needed to ensure such compliance."
[924] SC Res 1160 (1998) para 1, see also SC Res 1199 (1998) para 3 and 4.
[925] SC Res 1160 (1998) para 2.
[926] SC Res 1160 (1998) para 3.

Kosovo".[927] In the later resolution 1203 (1998), after the cease-fire agreement, it demanded compliance by both the KLA and the FRY with SC Res 1160 and 1199, under Chapter VII.[928]

In 2001 in the former Yugoslav Republic of Macedonia the Council stressed "the need for all differences to be resolved by dialogue among all legitimate parties",[929] and called on all political leaders "publicly to condemn violence and ethnic intolerance and to use their influence to secure peace"[930] Similarly, in 2002 in Côte d'Ivoire the Council called on the parties "to resolve the current crisis peacefully and to abstain from any actions or statements or demonstration that might jeopardize or otherwise hamper the search for a negotiated solution." It also emphasised that "only through a political solution can the crisis be solved."[931] In 2003 in Liberia, the Council called on the governments and rebels under Chapter VII "to enter without delay into bilateral ceasefire negotiations under the auspices of ECOWAS and the mediation of former President Abubakar of Nigeria".[932]

Thus, although the Charter obligation to resolve conflicts peacefully does not *prima facie* apply to civil conflict, unsurprisingly in practice resolving civil conflicts through non-violent means is a primary policy goal of the international community. This practice provides important evidence of the normative and moral views of the international community on recourse to force in civil conflict. In addition, the repeated support for the principle and determination with which it has been declared to apply, as well as instances of such demands being made under Chapter VII, suggest that the international community is adopting an increasingly firm position that conflict must be resolved peacefully. This bolsters the trend of emerging practice that supports a general prohibition against recourse to force for political aims.

2.4.2 The practice of State and Regional Organisations

Both of the principles identified above in the practice of the Council – a prohibition on recourse to force for political aims and an obligation to settle by peaceful means – are also reflected in the practice of States and Regional Organisations. This provides some corroborating evidence that the principles have support within and across major constituent parts of the international community.

The practice in both Côte d'Ivoire and Liberia is particularly illuminating. Even though the democratic legitimacy of the government was in doubt in those cases, the AU, ECOWAS, individual States and the Secretary-General nonetheless rejected the recourse to force. The principle was formulated as a

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[927] SC Res 1160 (1998) para 8.
[928] SC Res 1203 (1998) para 3 and 4.
[929] SC Res 1345 (2001) para 6.
[930] SC Res 1345 (2001) para 9.
[931] Statement of the President, press release AFR/506 SC/7558 (2002).
[932] SC Res 1478 (2003) para 5.

prohibition on attempts to gain power by force; an extension on the norm rejecting recourse to force to overthrow a democratic government. In Côte d'Ivoire, the AU condemned the attempts to take power by force, stating that it « Reitere également sa ferme condamnation de la tentative de prise du pouvoir par la force en Côte d'Ivoire. »[933] France explicitly condemned "les violences, les exactions, les ingérences, les interférences extérieures, le recours à la force" and emphasised that it supported the principles of «respect des élections démocratiques».[934] ECOWAS stated that it was prepared to act in support of the government as "any government that has to be changed must be changed through the ballot box".[935] These condemnatory statements were followed by enforcement action by France and ultimately by ECOWAS.

Similarly, in Liberia, the AU and ECOWAS warned rebels that that they would not recognize any group that took power in Liberia through "unconstitutional means or by force of arms".[936] The EU also condemned "the attempts by armed rebel groups to take power in Liberia by the use of force".[937] Moreover, such a principle was explicitly adopted in the later peace agreement in Liberia which included a pledge "forthwith to settle all past, present and future differences by peaceful and legal means and to refrain from the threat of, or use of force".[938]

In terms of formulation of a general principle, the Secretary-General has made statements of a general nature both in Liberia and Côte d'Ivoire. In Liberia, he condemned "any attempts to resolve political differences through armed violence."[939] He reiterated that "any attempt to seize power by force would be unacceptable to the international community."[940] In Côte d'Ivoire, the Secretary-General stated that he

> unequivocally condemns any attempt to settle disputes through violence. He calls on all those involved in these attacks to immediately and unconditionally cease their activities and submit to the constitutional order.[941]

In addition, the European Community in the Balkans highlighted the need for "a peaceful process" and "negotiations" before they recognised the new States.[942] It also explicitly required the FRY not to use

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[933] African Union, (12 Oct 2002) Communiqué de l'Union africaine: Erythrée, Soudan, Côte d'Ivoire. www.reliefweb.int/.
[934] Déclaration du porte-parole du Quai d'Orsay (Paris, 13 décembre 2002).
[935] Reuters "Exodus from Ivory Coast city under French guard" (26 Sept 2002) www.reliefweb.int/.
[936] Deutsche Presse Agentur "African, ECOWAS, leaders warn Liberian rebels: no recognition" (27 Jul 2003) www.reliefweb.int/.
[937] European Council "Bulletin EU 5-2002. Common Foreign and Security Policy (23/29). Liberia" (2002) europaeuint/abc/doc/off/bull/en/200205/p106023htm.
[938] Peace Agreement between Govt. of Liberia, LURD, MODEL and Political Parties (18 Aug 2003).
[939] Secretary-General deeply concerned at renewed fighting in Liberia, calls for immediate cessation of hostilities, Press Release SG/SM/8761, AFR/650.
[940] Secretary-General "Secretary-General condemns resumption of hostilities in Liberia; renews call for force deployment to restore calm" (21 Jul 2003) SG/SM/8787 AFR/670.
[941] Secretary-General "Secretary-General condemns armed attacks in Côte d'Ivoire" (20 Sept 2002) SG/SM/8395 AFR/485.
[942] Council of Ministers of the European Community: Declaration on Guidelines on the Recognition of New states in Eastern Europe and the Soviet Union, (16 December 1991). As extracted in the ICG report ICG *Current Legal Status of the Federal Republic of Yugoslavia and of Serbia and Montenegro, ICG Balkans Report N° 101.* Italics added. The criteria set out included a "Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes." European

force to settle questions related to the dissolution of Yugoslavia.[943] Unlike the case of Sierra Leone and the 1991 Haiti coup, the aim of these interventions was not to reinstate the governments. President Taylor was pressured to leave Liberia, and President Gbagbo was encouraged to compromise with the rebels in Côte d'Ivoire.

These cases adopt a broader formulation than the prohibition on force to overthrow a democratically elected government, and the contested democratic nature of the government, suggests that a broader principle may emerge. To what degree do these indications support the emergence of a new norm?

2.4.3 Analysis

The Council has condemned recourse to force in practically all of the civil conflicts it has intervened in, particularly since the 1990s. The formulation of its condemnations suggests that the Council intends its demands on the parties to renounce such force to be binding. The frequent repetition of the rejection and the range of circumstances in which it has been adopted certainly evidences a strong policy position, and, assuming the trend continues, supports the emergence of a prohibition on recourse to force for political gain.

Given the recent nature of much of the key practice, the range of circumstances in which the Council has intervened, the fluidity of its practice, and the fact that this issue has not been the subject of academic discussion or become incorporated into any treaties, it may be too early to conclusively establish that a binding norm has already emerged. Nonetheless, it is clear that this is the direction of evolution of this area of law, which will involve a dramatic change in the way in which civil conflict is viewed and addressed in international law.

Realpolitik and Normative trends

This is reinforced by corresponding realpolitik and normative trends. *Prima facie* such a norm would seem inconsistent with much realpolitik of the last few decades. During the Cold War there was extensive covert support by the superpowers for rebel groups aiming to overthrow regimes considered 'unfriendly' by the US or USSR: some of these wars involved the overthrow of undemocratic or dictatorial regimes, others involved the overthrow of democratic regimes. However, that practice is largely out of step with the broader trends in this area.

Community Declaration on Yugoslavia, (16 December 1991). The European Community then announced recognition of Slovenia and Croatia on 15 January 1992. On 6 April 1992 the European Community recognised Bosnia as an independent State. The European Community, however, denied recognition to Macedonia. European Community Declaration on Yugoslavia, Luxembourg, (6 April 1992). The United States then recognised Slovenia, Croatia and Bosnia as independent states on 7 April 1992.

[943] Declaration on the Formation of the Federal Republic of Yugoslavia (27 April 1992).

From a legal standpoint, such assistance has never been accepted as legitimate. Assistance to rebels remains prohibited irrespective of the level of conflict or of the purpose of the war.[944] The International Court of Justice in *Nicaragua* rejected any exceptions to the rule of non-intervention based on the rebels' aims or political or moral values.[945] It explicitly stated that even if Nicaragua had made, and then breached, a commitment to hold elections, the United States could not use force as a remedy.[946]

Moreover, there are no international law norms authorising rebel groups to have recourse to force to resolve internal affairs. Naturally, governments reject internal recourse to force against them for political aims, and consider themselves to have the power to suppress such rebellions.[947] As discussed in the Introduction, even in the case of wars of self-determination, where a right to self-determination is widely accepted and frequently repeated in General Assembly resolutions,[948] the use of force by such liberation movements has not been accepted as lawful under international law.[949] Similarly, recourse to force to secede is not authorised under international law.[950]

While the majority view among legal commentators has been that civil conflicts remain domestic matters and that they are not governed by international law, there is a growing belief in the international community that violent civil conflict is abhorrent and must be prevented. A norm rejecting recourse to force for political aims has a strong normative value, and would be supported by the current moral and normative attitudes towards civil conflicts.

The literature evidences growing acceptance of the view that new principles addressing such violence are needed. Writing in 1964, in one of the leading early articles on the topic, Falk states "The literature of international law has been slow to respond to this aspect of the altered condition of the contemporary world. At this stage, then, an inquiry into the international legal status of intrastate violence seems

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[944] Higgins "Internal War and International Law". Wilson *International Law and the Use of Force by National Liberation Movements* at 30, Cassese *International Law* at 66-69, O'Connell "Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy" in Charney, Anton, et al (eds.) *Politics, Values and Functions: International Law in the 21st Century* (Kluwer Law International, The Hague, 1998) 443 at 448, Rosenau *International Aspects of Civil Strife* (Princeton University Press, Princeton, 1964), See also Higgins *The Development of International Law through the Political Organs of the United Nations* at 210-211.

[945] *Nicaragua v United States of America* para 209.

[946] *Nicaragua v United States of America* at 131-133.

[947] See for instance Section 8 US Constitution, which empowers Congress to declare war, raise armies and provide militia to suppress insurrections. Article I, Section 9 also suspends the writ of habeas corpus "when in cases of Rebellion or Invasion the public Safety may require it" The Northern Irish Constitution of 1937 states in Article 28(3)(3) "Nothing in this Constitution shall be invoked to invalidate any law enacted [by the legislature] which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion". For a more general discussion of constitutional responses to political violence, particularly terrorism, see Finn *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford University Press, New York, 1991).

[948] See for instance the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (1965) GA Res 2131(XX). See also Wilson *International Law and the Use of Force by National Liberation Movements.*

[949] See *Wilson International Law and the Use of Force by National Liberation Movements.*

[950] See *Reference Re Secession of Quebec* at para 112. Crawford "State Practice and International Law in Relation to Secession".

dramatically appropriate."[951] This view has been taken up more and more frequently. As stated by Secretary-General Boutros-Ghali in 1992: "Civil wars are no longer civil, and the carnage they inflict will not let the world remain indifferent."[952]

In 1997, the Carnegie Commission on Conflict called on the international community to advance the fundamental principle that a State should not be recognised if it was created through force. The entire focus of the report was on how to prevent and bring to an end such recourse to force.[953] Similarly, the 2001 Commission on Sovereignty specifically included a duty to prevent all deadly conflict in its guiding principle of a responsibility to protect.[954] This duty was first the responsibility of the sovereign States and the communities within them, but then became a duty of the international community since the "failure of prevention can have wide international consequences and costs".[955] The Commission's approach takes as given that civil conflict must be prevented and resolved, most particularly where "full scale violence is in prospect or in occurrence".[956]

The World Bank's recent 2003 report on civil war upholds this trend and highlights the extent to which such conflicts are now considered problems appropriate for international resolution.[957] The report rejects the view that such conflicts should be left to resolve themselves as "foolish" given the extent to which civil wars cause civilian deaths, devastate economies, and affect the regional and global community through the spread of instability and conflict.[958] The report highlights that the "question is not whether the international community has the right to intervene, but whether interventions are available that are likely to be effective at a reasonable cost."[959]

This is in line also with the view taken by some commentators that the question is no longer whether to intervene but rather how to stop conflicts. Damrosch for instance argues that

> Instead of the view that interventions in internal conflicts must be presumptively illegitimate, the prevailing trend today is to take seriously the claim that the international community ought to intercede to prevent bloodshed by what ever means are available [...] arguments now focus not

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[951] Falk "Janus Tormented: The International Law of Internal Law" in Rosenau (ed.) *International Aspects of Civil Strife* (Princeton University Press, Princeton, 1964) at 185

[952] Statement by former Secretary-General Boutros Boutros-Ghali, United Nations Security Council Meeting on the Responsibility of the Security Council in the Maintenance of International Peace and Security (1992) SC Meeting 3046, S/PV.3046.

[953] Carnegie Commission on Preventing Deadly Conflict. Preventing Deadly Conflict: Final Report (The Commission, Washington, DC, 1997) Chapter 2 at 3-4 (page numbering from online document).

[954] International Commission on Intervention and State Sovereignty Responsibility to Protect para 2.24.

[955] Ibid para 3.2, 3.3.

[956] Ibid para 4.38.

[957] World Bank Group Breaking the Conflict Trap: Civil War and Development Policy Source (2003) //econ.worldbank.org/prr/CivilWarPRR/text-26671/.

[958] Ibid, Chapter 1 at 9.

[959] Ibid, Chapter 6 at 2.

> on condemning or justifying intervention in principle, but on how best to solve practical problems of mobilizing collective efforts to mitigate internal violence.[960]

Ramsbotham and Woodhouse claim that the basic post cold-war conflict question is: "If internal wars cause unacceptable human suffering, should the international community develop a collective mechanism for preventing or alleviating it?"[961]

It is increasingly taken for granted that the resolution of civil conflicts is a valid aim for the international community.[962] This is in accord with Moore's prescient call in the 1970s that the value of "the maintenance of world order and the minimization of destructive violence" should replace the traditional emphasis on State sovereignty in determining the validity of intervention.[963] This view has received support, notably by former Secretary-General Javier Perez de Cuellar, who emphasised that states could not have recourse to mass slaughter, or systematic campaigns of exodus of the civilian population "in the name of controlling civil strife or insurrection."[964]

Overall, thus, there are clear indications of increasing concern over the bloodshed and destructiveness of civil conflicts, accompanied by an emerging assumption that the regional and even global repercussions of such violence justify actions by the international community to prevent and terminate such conflicts.

Implied Exceptions to Such a Prohibition

Nonetheless, any emerging norm prohibiting recourse to force for political aims would need to incorporate appropriate exceptions to reflect the legitimate rights and interests of local governments and populations as well as international concern over the impact of violence on civilians, humanitarian concerns, and the overthrow of a democratic government. Essentially this would take the form of a right to self-defence by a government against the use of force against it, and a right to self-defence by a people against oppressive and violent regimes and against a denial of its right to self-determination.

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[960] Damrosch "Concluding Reflections" in Damrosch (ed.) *Enforcing Restraint: Collective Intervention in Internal Conflicts* (Council on Foreign Relations Press, New York, 1993) at 364.

[961] Ramsbotham and Woodhouse *Humanitarian Intervention in Contemporary Conflict: A Reconceptualization* (Polity, Cambridge, 1996) at 139.

[962] For instance, US President Bush, referring to the many thousands who died every year in conflicts in Africa, expressed support for the ceasefire in Liberia, called on Liberian President Taylor to step down, and insisted that all parties must "pursue a comprehensive peace agreement". In the same speech, President Bush claimed that the United States had an interest in "pressing forward to help end Africa's longest-running civil war in Sudan" maintaining that he had asked his Special Envoy for Peace in Sudan to "make clear that the only option on the table is peace". He also expressed support for "efforts by African governments to build effective peacekeeping forces" and supported the African Union forces in Burundi and ECOWAS forces in Ivory Coast. "President Bush Outlines His Agenda for US - African Relations" Remarks by the President to the Corporate Council on Africa's US - Africa Business Summit (26 June 2003).

[963] Moore "Introduction in Law and Civil War in the Modern World" at 18-19.

[964] Annual Report of the Secretary-General on the Work of the Organisation (1991) 11-13.

These exceptions already exist to some extent. When the right to self-determination is *denied* it becomes an international wrong[965] and may justify the exercise of self-determination by secession[966] or the authorisation of forceful assistance by the Council.[967] Similarly, massive violence against civilians is considered a crime against humanity and result in the loss of State immunity. As early as 1625 Grotius wrote

> Though it is a rule established by the laws of nature and of social order, and a rule confirmed by all the records of history, that every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere. Yet where a Busiris, a Phalaris or a Thracian Diomede provoke their people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.[968]

One question which remains uncertain is whether an exception would emerge on the prohibition to use force for the overthrow of a non-democratic regime. Further practice would be required to determine conclusively how this issue will be resolved. It is clear that if such a regime were also violently oppressive the recourse to force would fall within an already anticipated exception.

The difficult question is whether force may be used to overthrow a non-violent non-democratic government. As the practice stands, it would seem that unless a right to democratic governance emerges, recourse to force by rebels to overthrow a non-oppressive, non-democratic regime is prohibited. This follows for instance from the Council condemnation of recourse to force for political aims in Liberia, or Cote d'Ivoire, even though the uprisings were against non- or partially democratic regimes. Clearly this issue remains a controversial one. On the one hand, attempts to address issues of domestic governance or regime change through civil conflict have often in the last few decades led to devastation and extended violence, without necessarily resolving the disputes.[969] On the other, it is difficult to deny recourse to violence unless an alternative method of resolution of such disputes is available. A similarly difficult tension between peace and justice exists in the prohibition on the international war of aggression. In that context, the value of peace was chosen: "to save succeeding generations from the scourge of war",[970]

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[965] Bowett "The Interrelation of Theories of Intervention and Self-Defense" at 43.
[966] *Reference Re Secession of Quebec* at para 135 and 138.
[967] Ibid at 44. See also Jennings, Watts, et al. *Oppenheim's International Law* at 445-446, who limit the permissible assistance to humanitarian or economic.
[968] Grotius *De Jure Belli Et Pacis Libri Tres* (John W. Parker, London, 1853) at 88.
[969] See World Bank Group Breaking the Conflict Trap: Civil War and Development Policy Source (2003) //econ.worldbank.org/prr/CivilWarPRR/text-26671/. Examples range from Cambodia, Sudan, Sierra Leone, Liberia, Angola, Colombia to Western Sahara.
[970] UN Charter, Preamble.

although the debate continues in other guises (for instance with respect to the question of humanitarian intervention).

Conclusion

The notion that the current trend of practice suggests that recourse to force for political purposes in civil conflict will become illegal is surprising, given that civil conflict has long been thought of as a domestic matter beyond the regulation of international law. Such a notion does raise fundamental ethical and political questions as conflict has long been a measure of last resort to bring about political change.[971] However, the total devastation caused by most such conflicts, the decades of bloodshed and destruction, and the apparent rise in unjustifiable aims, such as ethnic cleansing or personal economic gain, do put into question the moral validity of this sort of violence. The fact that civil conflicts are not domestic matters – but matters that affect international peace and security – and that they have required great time, money and energy by the international community seeking to mitigate the negative impacts of such conflicts, and their power of destabilisation and their devastating effect on civilians, supports the emergence of a prohibition on recourse to force to seek political power.

The practice in the civil conflict context certainly establishes the emergence of moral and policy restrictions on civil conflict. This stage of development is reminiscent of the moral tradition of just war, which evolved before international aggressive war became formally illegal, and sought to restrict the legitimacy of war to wars undertaken by lawful authority to defend persons and property or inflict punishment on a State that has caused injury.[972] The Just War doctrine played a central role in the transition between the 200 years of history until World War I when international war was accepted as a valid form of international relations, and the 1928 Kellogg-Briand pact which sought to entrench the renunciation of war as an instrument of national policy.[973]

The practice rejecting recourse to force for political aims is of a recent nature, but is accompanied by normative changes in the perception of civil conflict. This practice provides crucial indications of the direction of evolution of this field, and suggests that all recourse to force for political aims in civil conflicts (other than in self-defence against illegal overthrow or violent oppression) will, in time, become prohibited.

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[971] O'Connell "Regulating the Use of Force in the 21st Century" at 450-451.

[972] Grotius *De Jure Belli Ac Pacis*, Libri Tres (Paris, 1625). See Johnson *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton University Press, Princeton, 1981).

[973] This was then re-formulated in Article 2(4) of the Charter as a prohibition on use or threat of force against the territorial integrity or political independence of any State, and has since become the cornerstone of the international legal system. For a discussion of these developments, see Arend and Beck *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge, London, 1993) at 11-25.

CONCLUSION

This thesis has charted a dramatic shift in the attitude of the international community towards civil conflict over the last decade and a half. A great chasm is opening up between the theoretical legal position and the practice of the international community in response to such conflicts, however there has up to now been little discussion in the literature of whether this practice reflects a change in perception about the legality of recourse to force in civil conflict. The question considered in this thesis is therefore: Does the practice evidence the emergence of new *jus ad bellum internum* norms prohibiting recourse to force in civil conflict?

The question was investigated through the lens of emerging norms of customary international law. This paradigm was chosen because customary international law norms are the best established binding international law in the non-treaty spectrum, and remains the most established doctrine for characterising emerging legal principles. The methodological approach adopted, took the view that the existence of a legal obligation can be inferred from the protests of the international community against particular conduct. Such an approach relies on the proposition that repeated and consistent rejection and condemnation of certain conduct by the international community can evidence that the conduct is considered to be legally prohibited. Any extensions of more conventional methodologies must remain speculative to a degree. However, invoking an inductive step between the responses of the international community to the civil conflict (condemnation, acts of enforcement) on the one hand, and the legality of the conduct, on the other, seems to be justified in light of the extensive body of condemnatory practice.

Moreover, the thesis relied on extensive Security Council practice in evaluating emerging norms. The role of the Council in shaping customary law was examined in depth, and it was determined that such practice is relevant as more than evidence of *opinio juris*, in that it shapes the attitudes, behaviour and practice of States through its actions, and can reflect and crystallize a consensus position on particular conduct. The Council can also establish quasi-legislative prohibitions on conduct where its practice takes the form of broadly formulated resolutions prohibiting certain conduct, and the Council seeks to enforce these resolutions.

Ultimately, a review of the practice consistently establishes that civil conflict is no longer a matter of domestic concern only – either in principle or in practice. Further, the new phenomenon – consisting of extensive practice of States, regional organisations, and the Security Council condemning recourse to force in civil conflict and intervening in such conflict – is dependent on, and creative of, legal obligations.

The thesis shows that at least one rule emerging from this practice is legally substantive and significant, in that it affects behaviour, is considered to be binding and is sought to be enforced. A prohibition against recourse to force to overthrow a democratically elected government is considered to have emerged as a norm of *jus ad bellum internum.*

A possible norm against recourse to force aiming to cause or involving massive violence against civilians was, in contrast, formulated in moral not legal terms, and lacked a systematic, or conscious, element. The practice was seen to remain somewhat undeveloped and uncertain in that case and not to evidence the emergence of a new norm.

Nonetheless, an overview of the whole practice does evidence a remarkable shift in the approach of the international community to civil conflict, and discussion of the direction of evolution of this trend suggested that new norms of jus ad bellum internum may emerge in due course. In particular, there is practice indicating that, at some stage, all recourse to force for political aims in civil conflicts (other than in self-defence by a State against violent uprising or in self-defence by a people against violent oppression) could, in time, become prohibited. Although this conclusion remains speculative at present, since the practice which most clearly formulates this norm is also the most recent, the norm is implicitly or explicitly at the core of much of the practice reviewed. The depth and extent of this trend reviewed in the practice, and the normative context, strongly indicate that such a general prohibition could emerge.

Thus, contrary to long-held assumptions, civil conflicts are no longer considered to be wholly domestic matters, and are increasingly recognised as having a major damaging impact on the peace and stability of the world. A major and continuing shift in practice supports predictions of fundamental change in the perception of the legality of recourse to force in civil conflict, even where this takes place entirely within one sovereign State.

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