

## **Non-Permanent Members of the United Nations Security Council and the Promotion of the International Rule of Law**

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## Abstract

Non-permanent members of the United Nations Security Council experience clear and well-known limits. Yet, there are certain tools at their disposal which, beyond lucky political constellations, allow them to exercise a more systemic influence on the Council's work and outcomes. These tools are of a juridical nature, often established and developed through the organ's practice, but their efficient use depends primarily on diplomatic expertise and imagination channeled through informal venues. The present article shows how said tools have been used in the case of the promotion of the 'international rule of law'. However contested the concept and restricted its practical consequences on the organ's functions, the evolution of its promotion within the Security Council is both a demonstration of and a further vehicle for non-permanent members' influence on this body. That this in turn serves to legitimate the Council under its current configuration can be seen critically. However, it seems important to underline that the UN Security Council's efficiency depends ever more on the legitimacy that non-permanent members can best imprint on it. In a non-polar world, this tendency can be expected to increase.

## A. Introduction

An increased 'global responsibility' and the accompanying risk of assuming high political costs in the face of inescapable limitations, make it understandable why some States' foreign policy communities are divided regarding the convenience of aspiring to a temporary seat on the United Nations Security Council (SC).<sup>1</sup> To downplay the limits that non-permanent members of the SC (NPM)<sup>2</sup> experience would be gullible, at best. Beyond their diminished formal powers according to Article 27 *Charter of the United Nations* (UN Charter),<sup>3</sup> they have to get accustomed to an organ which works very differently and in relative isolation from the rest of the Organization, and when they begin to do so, their term already nears the end. This article does not intend to hide these hurdles,

<sup>1</sup> Other considerations of a more politico-economical character may play a role too, though there are less visible in the public debates on the pros and cons of a State's application for a Security Council (SC) candidacy. For example, findings on correlations between the increase of U.S. and UN aid allocation to States currently in the SC have been made. See I. Kuziemko & E. Werker, 'How Much is a Seat on the Security Council Worth? Foreign Aid and Bribery at the United Nations', 114 *Journal of Political Economy* (2006) 5, 905.

<sup>2</sup> Also called 'elected Council members' or 'elected ten' ('E10').

<sup>3</sup> *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI [UN Charter].

quite to the contrary. It could, nevertheless, be read as an argument *contra* those who oppose their countries' participation in the SC, but this contribution will not dwell on this issue. In trying to show that despite all the difficulties there are some very useful instruments at the disposal of NPM, this article does certainly intend to contribute to some awareness-raising in this regard. Most important, however, is the proposition that the promotion of the rule of law within the SC has been mostly an achievement of NPM, and that with it, these States have found and tuned a vehicle at their own service. Since rule of law promotion by NPM deals mostly with the international level, it also favors the openness of the SC towards the wider membership of the United Nations (UN) and facilitates a certain degree of legal control of the Council's actions.

This 'achievement' can be critically questioned by regarding it mainly as a means to legitimate the Council under its current structures. After all, imprinting a few vague rule of law standards on the Council's work would not make a real difference in its practice; in turn, the whole 'rule of law talk' could be quite useful for refreshing its image, helping it thus to continue imposing its own standards. Ultimately, the whole enterprise would be in service of the permanent five (P5), and NPM which question the Council's legitimacy under its current configuration would have every reason not to do anything that does not aim at transforming this body radically. There is indeed some plausibility underlying this argument. However, States also have a clear interest in playing the game even under uneven rules, and cannot afford to wait aside until radical transformation occurs. Shaping rules and structures, however modestly, and contributing to their gradual change are often preferred, for equally valid reasons. That most States follow the latter, moderate approach, has not only to do with the tremendous obstacles any significant SC reform faces, but is also related to a wide acceptance of the existing system as a whole and certain unpreparedness for major change on behalf of even those who favor it in principle.

It should be clarified that this article is not about SC reform.<sup>4</sup> The role of NPM is, however, inevitably linked to the Council's structure and therefore

<sup>4</sup> Reform plans and debates around the different proposals began in the early 1990s. See B. Fassbender, *UN Security Council Reform and the Right of Veto, A Constitutional Perspective* (1998), 221-275; B. Fassbender, 'On the Boulevard of Broken Dreams: The Project of a Reform of the UN After the 2005 World Summit', 2 *International Organizations Law Review* (2005) 2, 391, 400; I. Hurd, 'Myths of Membership: The Politics of Legitimation in UN Security Council Reform', 14 *Global Governance* (2008) 2, 199, 205; T. Rensmann, 'Reform', in B. Simma *et al.* (eds), *The Charter of the United Nations: A Commentary*, Vol. I, 3rd ed. (2012), 25, 63-64, paras 125-134 [Simma *et al.*, UN Charter Commentary, Vol. I].

does necessarily throw some questions related to said reform. It should also be mentioned that although arguments are shared in the sense that the current configuration of the Council does not match the state of affairs of today's world,<sup>5</sup> this article focuses on how and to what extent NPM can make a difference within the structure as it is – and as it will probably continue to be for quite some time. Articles 108 and 109 *UN Charter* endow the P5 with the power to block any significant reform of the SC – and of any of the principle organs of the UN – which would necessarily require a formal amendment of the *UN Charter*.<sup>6</sup> Changes in the system, on the other hand, occur from time to time through other, less rigid, legal means, especially through 'practice'.<sup>7</sup> Change is

<sup>5</sup> An early and pointed articulation of this can be found in M. Seara Vázquez, 'The UN Security Council at Fifty: Midlife Crisis or Terminal Illness?', 1 *Global Governance* (1995) 3, 285. It is useful to recall the report of the Secretary-General (SG), *In Larger Freedom*, which states that "a change in the Council's composition is needed to make it more broadly representative of the international community as a whole, as well as of the geopolitical realities of today" (General Assembly (GA), *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, UN Doc A/59/2005, 21 March 2005, 42, para. 168).

<sup>6</sup> Apart from the discussions about the viability of amending the Charter through recourse to 'informal' venues, i.e., basically practice, or subsidiarily to the law of treaties (*Vienna Convention on the Law of Treaties*, 23 May 1969, Arts 39-41, 1155 UNTS 331, 341-342 [VCLT]). See also G. Witschel, 'Article 108', in B. Simma *et al.* (eds), *The Charter of the United Nations: A Commentary*, Vol. II, 3rd ed. (2012), 2199, 2204-2205, paras 8-11), it is clear that any institutional change to the principle organs, as well as any reform "affecting the institutional balance within the UN" (Rensmann, *supra* note 4, 30, para. 13, with further references) would require a formal amendment according to Arts 108 & 109 *UN Charter*.

<sup>7</sup> Admittedly, 'practice' is a rather vague expression, but it is intentionally left open in this context in order to highlight its function as a vehicle through which change can be achieved and legally recognized in various forms, be it as matter of treaty interpretation in terms of Arts 31 (3) (b) & 32 VCLT; as being part of the "rules of the organization" (VCLT, Art. 5, *supra* note 6, 334). See also *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, 21 March 1985, Art. 2 (j), UN Doc A/CONF.129/15, 25 ILM 543, 547 [VCLT-IO] and the International Law Commission's (ILC) *Draft Articles on the Responsibility of International Organizations*, 3 June 2011, Art. 2 (b), UN Doc A/66/10, 54, 54) or as a case of *desuetudo*. The practice of an organization is not always easily differentiated from the practice of the parties to the constituent treaty of that organization, and there are good reasons for not trying to impose *a priori* divisions in this regard. In the present case, an 'established practice' of the SC can be viewed as a rule of the Organization, a subsequent practice of a *UN Charter* provision, or both. For a different view, see C. Peters, 'Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?', 3 *Goettingen Journal of International Law* (2011) 2, 617.

thus not that improbable as is often believed, though the step-by-step approach followed in multilateral diplomacy and especially in formal fora often leads to the impatience of outside observers, and consequently jeopardizes the already fragile credibility of multilateral institutions. In this regard, the present text is also an attempt at showing that what often appears as insignificant has sometimes an important potential as part of an incremental multilateral process, which should not be underestimated.

The efficient use of the said legal means for change depends primarily on diplomatic expertise and imagination channeled through informal venues. When NPM refer with a certain irony to themselves as ‘permanent members of the General Assembly (GA)’, they do not only allude to their limitations within the Council but also to their potential strengths derived from good communication and coordination with their ‘natural’ allies in the GA. As we shall see in the case of the promotion of the international rule of law, ‘groups of friends’<sup>8</sup> and other informal platforms of coordination, which tend to be open to all UN member States, play a significant role in supporting NPM in their efforts to influence the Council’s outcomes, and sometimes also in introducing changes to its ways of procedure, i.e., changes that transcend the temporary participation of NPM. This indicates that, at least in some cases, it might take more than “five to rule them all”,<sup>9</sup> and that the Council’s core is not hermetically sealed. It might very well be the case that this cautious openness has been only permitted by the ‘guardians of the Council’, i.e., the P5 and the SC Secretariat, in some concrete instances and in pure self-interest, but that would still be a clear sign for the increasing need of the P5 to engage constructively with emerging powers and other important actors. A case in point is that of ‘contact groups’ and other informal diplomatic groupings, like the ‘friends of the Secretary-General (SG)’,<sup>10</sup> where also non-members of the SC participate, and which

<sup>8</sup> There is some terminological confusion in regard to the term ‘group of friends’. In the present article it refers exclusively to informal partnerships of like-minded UN member States, which promote specific issues in the UN. It does not designate the so-called ‘friends of the SG’. See *infra* note 10.

<sup>9</sup> Borrowing the phrase from D. L. Bosco, *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (2009).

<sup>10</sup> ‘Friends of the SG’ refer to informal groups of States that support specific peace efforts of the UN Secretariat. They emerged in the early 1990s with the ‘Friends of the SG on El Salvador’, which derived from the ‘Contadora Group’, a joint diplomatic initiative of Latin American States. ‘Contact groups’ do not usually work in close coordination with the SG, but are rather diplomatic coalitions of interested countries which often work in parallel to the UN, like the P5 + 1 (Germany) on the Iranian nuclear program. On the emergence of these informal venues as a response to the difficulties faced by the SC after

have become something like an extension of the SC, and indeed of its core, in those issues where it is just not viable for the five to rule alone. Another type of informal extension of the Council can be observed in the increasing reliance of the SC subsidiary organs in charge of counterterrorism and non-proliferation of weapons of mass destruction<sup>11</sup> on ‘coalitions of the willing’ created and led by the United States (U.S.) – sometimes in conjunction with a few other partners – such as the Financial Action Task Force (FATF), the Proliferation Security Initiative (PSI), or the more recent Global Counterterrorism Forum (GCTF).<sup>12</sup>

These evolutions go beyond the role of NPM and the purposes of the present article, but they are all indications of how the post-Cold War period and the disorder that we are witnessing today,<sup>13</sup> which might be best characterized as “the age of non-polarity”,<sup>14</sup> have altered the ‘sovereignty’ of the SC, forcing it to adapt to the major shifts in world order. For NPM this represents an opportunity: Non-polarity not only means the augment of the relative strength of several potential NPM, the diminishing power of some of the P5, and eventually the loss of dominance of its most powerful member, the U.S., it also

the end of the bipolar world, see J. Prantl, *The UN Security Council and Informal Groups of States: Complementing or Competing for Governance?* (2006). On the ‘Contadora Group’, see C. H. Heller, ‘Las Gestiones del Grupo Contadora 30 Años Después’, 13 *Foreign Affairs Latinoamérica* (2013) 2, 74.

<sup>11</sup> The three main organs in these closely interrelated areas are the Committee established pursuant to SC Res. 1373, UN Doc S/RES/1373 (2001), 28 September 2001 concerning Counter-Terrorism (CTC), the Committee pursuant to SC Res. 1267, UN Doc S/RES/1267 (1999), 15 October 1999, and SC Res. 1989, UN Doc S/RES/1989 (2011), 17 June 2011 concerning Al-Qaida and associated individuals and entities, and the Committee established pursuant to SC Res. 1540, UN Doc S/RES/1540 (2004), 28 April 2004.

<sup>12</sup> On the relationship of FATF and PSI with the SC and the evolution of informal international law, see E. Benvenisti, ‘Coalitions of the Willing and the Evolution of Informal International Law’, in C. Calliess, G. Nolte & P.-T. Stoll (eds), *Coalitions of the Willing: Avantgarde or Threat?* (2007), 1, 4-9, 17-21; A. Rodiles, ‘Coalitions of the Willing: Coyuntura, Contexto y Propiedades: Un Primer Esbozo’, 7 *Anuario Mexicano de Derecho Internacional* (2007), 675, 686-689 & 696-699.

<sup>13</sup> Andrew Hurrell explains how the ending of the post-Cold War era is giving place to a new phase of “tectonic [...] shifting” of the global order, and analyses the role of international law in this regard. See A. Hurrell, ‘International Law 1989-2010: A Performance Appraisal’, in J. Crawford & S. Nouwen (eds), *Select Proceedings of the European Society of International Law: Third Volume, International Law 1989-2010: A Performance Appraisal* (2012), 3, 3 *et seq.*

<sup>14</sup> For a precise account of this notion, see R. N. Haass, ‘The Age of Nonpolarity: What Will Follow U.S. Dominance’, 87 *Foreign Affairs* (2008) 3, 44. See also C. A. Kupchan, *No One’s World: The West, The Rising Rest, and the Coming Global Turn* (2012).

stands for continuously changing power constellations in international affairs.<sup>15</sup> A global (dis)order without a center of gravity or even poles, but with several and flexible nodes connecting varying actors according to their current strength on the issues at hand, considerably increases the bargaining power of those that were left outside the centers; these centers include the core of the SC, which is being softened by these evolutions. Today, NPM have more possibilities of forming powerful *ad hoc* alliances on several issues among them, as well as with some permanent members, who rely more and more on the former, and this tendency is likely to increase. In short, non-polarity might very well translate in a growing potential for NPM to influence mechanisms and outcomes of the most important organ of the UN, which in order to remain vital in world affairs needs to respond to these changes and challenges.

In the following pages, the contribution will first present some of the characteristics of NPM, the major differences among them according to their degree of participation, as well as the environment in which they perform (B.). After that, the article will explain what the promotion of the ‘international rule of law’ by NPM means and how it differs from other kinds of rule of law activities traditionally carried out by the UN and the SC in particular (C.). A closer look to the concrete measures promoted by NPM within the Council in order to strengthen its adherence to the rule of law, especially the organization of thematic debates on the matter, will follow (D.). Before concluding, some of the legal and diplomatic tools through which NPM successfully facilitate legal control and introduce incremental changes will be further analyzed (E.).

## B. Different Types of Non-Permanent Members

It is of course too vague to speak of ‘non-permanent members’ in general terms without due regard to the huge diversity among them. Independently from regional and country specificities, there are those who follow a clear policy of continuity regarding their participation in the Council, those who only occasionally form part of it, and the ones in the middle who return to the table every once in a while. According to the ‘candidacy-policy’ of each State (and its success) one might speak of ‘frequent-NPM’, ‘recurrent-NPM’, and ‘occasional-NPM’, although it is clear that the lines among these categories are not always clear cut, let alone for the fact that some States became UN members

<sup>15</sup> This distinguishes ‘non-polarity’ from ‘multi-polarity’, i.e., the idea of a more stable and ordered redistribution of power.

only at a later point in time.<sup>16</sup> Still, this proposed classification might prove to be useful as it implies important differences not only in regard to increased quantitative probabilities to impact certain outcomes, but also in connection to the qualitative possibilities to shape processes in the long run. Returning to the SC while certain issues are still on the top of the agenda increases the probabilities of continuity in the defense of one's postures and interests, which is further strengthened through the cumulative acquaintance of a know-how of the Council's 'ways of proceeding', including of its powerful Secretariat.

While 'occasional' and, to a lesser extent, 'recurrent NPM' spend usually a year or so in getting familiar with working methods and practices, 'frequent-NPM' do not only rely on a richer 'institutional memory'<sup>17</sup> but can eventually appoint the same experienced diplomats, who do also benefit from personal contacts – an indispensable tool for permanent and non-permanent members alike. Foreign ministries of all kinds of NPM have to reinforce their permanent missions in New York, assigning extra posts and sometimes hiring extra personnel. Nonetheless, 'frequent-NPM' can often rely on a continued structure in regard to the SC, which, although obviously reduced during the time when they are not acting members, functions as a follow-up mechanism of the Council's work. This allows them to exert more influence from the outside through constant, informed, and more focused participations in open debates, letters to the SC, and other channels of communication between the SC and non-members; more important from their perspective, it already prepares the ground for their next participation. Prospects of returning within a foreseeable future to the table help to counter the eroding importance that NPM experience in the last two months of their two-year term, something which is due both to

<sup>16</sup> It is no coincidence that two States aspiring for permanent seats, i.e., Brazil and Japan, lead the list of countries elected to the SC with ten times each, followed by Argentina with nine, and Colombia, India, and Pakistan with seven times each. In those cases, we can safely speak of 'frequent-NPM'. Canada and Italy, with six times respectively, and Germany with five but only since 1973, are certainly very close, but might also be part of those States with a less steady but still significant presence in the SC over the years, and which varies between 4 and 6 memberships. Here, we can also find Australia, Belgium, Netherlands, Panama, and Poland with five participations, as well as Chile, Denmark, Egypt, Mexico, Nigeria, Norway, Peru, Philippines, Spain, Turkey, and Venezuela with four memberships each. SC, 'Countries Elected Members of the Security Council', available at <http://www.un.org/en/sc/members/elected.shtml> (last visited 31 January 2014).

<sup>17</sup> On the importance of the 'institutional memory' of the SC and the disadvantages NPM experience in this regard, see K. Mahbubani, 'The Permanent and Elected Council Members', in D. M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (2004), 253, 260.

the fact that negotiations on certain issues already begin to take place between the P5, the five other States which still have a year to go, and the new elected five, who attend Council meetings as a sort of observers during November and December each year, as well as to the lack of incentives for those leaving without prospects of continuity in the near future. These discontinuities do affect all three types of NPM,<sup>18</sup> though 'frequent-NPM' are in a slightly better position to forge new alliances with newcomers as their chances of having already worked with some of them in the Council in the past are obviously higher.

In regard to the promotion of the rule of law within the Council, there are differences among NPM too. However, these differences have more to do with specific attitudes of individual States concerning the diffusion of rule of law aspects at the national level than to their participation policies towards the SC. This relates to the tensions between the rule of law at the national and international levels and to the contested nature of the concept of the 'rule of law' in international affairs, which the article will address in the next section (C.). For now, suffice to mention that many NPM have adopted the promotion of the rule of law as an important tactic in multilateral diplomacy. Most of these States form part of the 'Friends of the Rule of Law', an informal group of like-minded UN Member States that emerged around 2005 from an Austrian initiative and promotes rule of law activities in and around the UN.<sup>19</sup> Although this group is considerably large (about 30 States) and has participants from every region, it is not representative of the wider membership. For instance, 'frequent-NPM' such as Brazil, India, and Japan are not part of this group. Nevertheless, when it comes to promoting the adherence of the SC to basic rule of law principles, most NPM become 'friends' by necessity regardless of their membership in this

<sup>18</sup> For example, in 2009, Austria, Costa Rica, and Mexico had a strong cooperation on human rights, international humanitarian law, and other rule of law related aspects. Unfortunately for Austria and Mexico, Costa Rica's term ended on 31 December 2010 when the other two States had still a year to go. A positive effect of this was, however, an even stronger partnership between the Austrian and Mexican delegations on said issues. For an overview of how these partnerships worked in regard to the negotiations that resulted in the adoption of SC Res. 1904, UN Doc S/RES/1904 (2009), 17 December 2009 establishing the Ombudsperson of the Al-Qaida sanctions regime, see K. T. Huber & A. Rodiles, 'An Ombudsperson in the United Nations Security Council: A Paradigm Shift?', *Anuario Mexicano de Derecho Internacional* (Tenth Anniversary Special Edition) (2012), 107, 121-127 [Huber & Rodiles, An Ombudsperson in the SC].

<sup>19</sup> See K. G. Bühler, 'The Austrian Rule of Law Initiative 2004 - 2008: The Panel Series, the Advisory Group and the Final Report on the UN Security Council and the Rule of Law', 12 *Max Planck Yearbook of United Nations Law* (2008), 409, 413-414 [Bühler, Austrian Rule of Law Initiative 2004 - 2008].

or that group: It is in their self-interest to work together in favor of a more transparent and inclusive Council that operates in a less unpredictable manner.

### C. Non-Permanent Members and the Promotion of the *International Rule of Law*

The ‘rule of law’ is a “multi-faceted ideal”<sup>20</sup> with no determinate meaning but several conceptions. The concept is thus a disputed one. On the international plane its applicability has been questioned.<sup>21</sup> It is indeed true that this ideal as it has evolved within national legal and political systems cannot be easily transposed to international relations.<sup>22</sup> Take, for instance, the ‘UN definition’ as articulated by one of the promoters of the rule of law within the Organization, former SG Kofi Annan:

“The ‘rule of law’ is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>23</sup>

This enumeration of ideals is just too broad to reflect what most States are actually willing to accept today at the international level. Even if read as a programmatic enunciation of goals to be achieved in the long term, it would still

<sup>20</sup> J. Waldron, ‘The Concept and the Rule of Law’, 43 *Georgia Law Review* (2008) 1, 1, 6.

<sup>21</sup> In this sense, see M. Wood, ‘The Law of Treaties and the UN Security Council: Some Reflections’, in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), 244, 247 (note 14).

<sup>22</sup> See R. Higgins, ‘The Rule of Law: Some Sceptical Thoughts’, in R. Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, Vol. II (2009), 1330, 1334 [Higgins, The Rule of Law].

<sup>23</sup> SC, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc S/2004/616, 23 August 2004, 4, para. 6.

be too loaded with domestic analogies in order to be functional in the foreseeable future, showing some of the inherent difficulties of articulating the concept in the international realm.<sup>24</sup> In addition to its disputed definitional properties – or intension, i.e., the sufficient and necessary elements that would define its meaning, according to the classical theory of concepts<sup>25</sup> – there is, following Jeremy Waldron, this other level of complexity which refers to “the several values which arguably might be served by the Rule of Law”.<sup>26</sup> Here, we are confronted with the potential instrumentality of the concept, which again raises serious doubts regarding its very meaning. As the representative of India put it during the annual debate in the Sixth Committee of the GA on its agenda item on ‘The Rule of Law at the National and International Levels’,<sup>27</sup> this notion is

“often advanced as a solution to the abuse of government power, economic stagnation and corruption [...] considered essential to the promotion of democracy, human rights, free and fair markets and to the battle against international crime and terrorism [as well as] an indispensable component for promoting peace in post-conflict societies. The rule of law might therefore have a different meaning and content depending on the objective assigned to it.”<sup>28</sup>

The instrumentalist uses of the rule of law<sup>29</sup> at the global level are often the subject of what has become known as ‘rule of law promotion’, i.e., the coordinated endeavors of international organizations and agencies as well as of some Western governments to advance on a transnational plane certain values

<sup>24</sup> For a similar reading, see S. Chesterman, ‘I’ll Take Manhattan’: The International Rule of Law and the United Nations Security Council’, 1 *Hague Journal on the Rule of Law* (2009) 1, 67, 68.

<sup>25</sup> For a good overview, see E. Margolis & S. Laurence, ‘Concepts’, in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2012), available at <http://plato.stanford.edu/archives/fall2012/entries/concepts/> (last visited 31 January 2014).

<sup>26</sup> J. Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’, 21 *Law and Philosophy* (2002) 2, 137, 158.

<sup>27</sup> See *infra* note 47.

<sup>28</sup> GA, *Sixth Committee: Summary Record of the 7th Meeting*, UN Doc A/C.6/61/SR.7, 7 November 2006, 13, para. 74; also quoted in Higgins, ‘The Rule of Law’, *supra* note 22, 1337.

<sup>29</sup> On the different uses of the ‘rule of law’ especially in regard to economic and development policies, see A. Santos, ‘The World Bank’s Uses of the “Rule of Law” Promise in Economic Development’, in D. M. Trubek & A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006), 253.

such as free trade, democracy, and – more recently – security.<sup>30</sup> The World Bank and the UN, on the one hand, and the U.S., the European Union (EU), and some European countries, on the other, are the most prominent promoters of the ‘rule of law’ in this sense of the term. The measures undertaken under this strategic use of the ‘rule of law’ notion concern primarily the delivery of financial aid and development assistance on behalf of the donor-States and institutions just mentioned to the recipient States in the ‘developing’ world or the ‘global south’, which in turn are required to undertake substantial legal and economic reforms domestically. As Stephen Humphreys mentions, these reforms deal “with serious stuff: the deliberate re-engineering, at a legal-structural level, of the economic, political and social basics of countries throughout the world”.<sup>31</sup> It is therefore no surprise that the whole ‘rule of law talk’ has awakened some suspicion among the States usually addressed as recipient countries in regard to the actual goals behind the invocation of this notion. Due regard to national needs and realities has been an increasing demand by these States, which has led the GA to call for enhanced dialogue among donors, recipients, and other actors involved, “with a view to placing national perspectives at the centre of rule of law assistance in order to strengthen national ownership”.<sup>32</sup>

As this situation shows, UN rule of law activities are basically part of a transnational enterprise which focuses on the promotion of certain values within States, mostly from the south. This divide between donors and recipients, between the ‘west’ and the ‘rest’, reflects the distinction between the rule of law at the national and the international levels, i.e., between “the rule of international law and the *internationalisation* of the rule of law”, as Sundhya Pahuja adequately frames it.<sup>33</sup> It has been a traditional preoccupation of less powerful States to strengthen the role of international law in world affairs.<sup>34</sup> Here, international law clearly fulfils functions too: Formal procedures serve a less unequal access to decision-making, and normative principles between States help alleviate the existing asymmetries in international relations. These functions of international law are, however, closer to the reasons why one expects law to

<sup>30</sup> On this transnational enterprise, see the excellent study of S. Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (2010).

<sup>31</sup> *Ibid.*, 8.

<sup>32</sup> GA Res. 67/197, UN Doc A/RES/67/197, 14 January 2013, 2 (op. 8).

<sup>33</sup> See S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011), 172-185 (emphasis added).

<sup>34</sup> *Ibid.*, 173-179, especially in regard to the UN Decade of International Law-initiative launched by the Non-Aligned Movement (NAM) and proclaimed in GA Res. 44/23, UN Doc A/RES/44/23, 17 November 1989.

rule anyway, i.e., to achieve equality (before the law) and constraints to (the exercise of) sheer power. In other words, international law is not just promoted to serve as *a* means for advancing particular substantive values, but is conceived as *the* vehicle for achieving some predictability and certainty through formal procedures (secondary rules) that permit the continuous construction of a common language (or frame of reference) for recognizing what counts and what not as obligations (primary rules); or to put it dryly: as the way to refer expected parameters of behavior to an objective sphere of validity, and not just to the subjective will of (a few) States.<sup>35</sup>

Rule of law contestation in the international realm is usually described as the dispute between the ‘thinner’, or formalistic accounts, on the one hand, and the ‘thicker’ or substantive versions, on the other. Whilst the latter are presented in the language of human rights and democracy and are usually attached to western nations and international bureaucracies, it is sometimes conceded that in order to avoid deeper divisions in the ‘international community’, it might be wiser to stick to the former for a while, i.e., as long as the ‘rest’ is not ready for the substance. However, this very same division is seldom articulated as the tensions that do exist between the rule of law at the national and the international levels, i.e., the struggle between the functions of international law, and where the ‘thinner versions’ concern very thick issues on the law which governs between States and at the institutional level of international organizations. It is this ‘thinner version’ to which the author refers in regard to the role of NPM. As a brief account on the history of rule of law debates in the SC will show,<sup>36</sup> and despite some regresses in recent times, it has been the merit of these States to focus on the international rule of law in the Council, especially on the exigency that it shall itself abide by international law. Before turning to this evolution, it is appropriate to make a short remark on the role of dialogue and its relation to the so-called ‘thicker’ and ‘thinner’ versions of the rule of law.

<sup>35</sup> These lines rely on Lauterpacht’s refutation of the political exemption according to the interests of sovereign States to submit their disputes to legal settlement, i.e., the argument in favor of the function of law as “the subjection of the totality of international relations to the rule of law” (H. Lauterpacht, ‘The Grotian Tradition in International Law’, 23 *The British Yearbook of International Law* (1946), 1, 19 (capital letters omitted); as well as H. Lauterpacht, *The Function of Law in the International Community* (1933) [2012], and the Introduction by M. Koskeniemi, xxix); Hart’s notion of law as the unity between primary and secondary rules (H. L. A. Hart, *The Concept of Law*, 2nd ed. (1994) [1997], 94-99); and Kelsen’s ‘*objektiver Geltungsgrund*’ (H. Kelsen, *Reine Rechtslehre*, 2nd ed. (1960), 2-15, 200-204).

<sup>36</sup> See *infra*, section D.

One thing that is not disputed about the concept of the ‘rule of law’ is that its meaning is highly disputed, leading thus to its characterization as an “essentially contested” one.<sup>37</sup> But, as Waldron reminds us, the idea of ‘essentially contested concepts’ as conceived by philosopher Walter Bryce Gallie, does not refer to fruitless disputes about a concept’s meaning; quite the contrary, it “implies recognition of rival uses [...] as not only logically possible and humanly ‘likely’, but as of permanent potential critical value to one’s own use or interpretation of the concept in question”.<sup>38</sup> This notion is of great value when confronted with claims about the unviability of the rule of law in the international realm;<sup>39</sup> at the end, the dialogue among States – and other actors – becomes in itself an intrinsic element of the rule of law. Accordingly, the debates at the UN do not (and should not) aspire to a definition of the ‘rule of law’, neither at the international nor at the national levels, but to a sort of conceptual rapprochement through contestation. This has been acknowledged by several State representatives during the respective debates in the Sixth Committee of the GA as well as in the SC.<sup>40</sup> The common ground that enables this process

<sup>37</sup> See R. H. Fallon Jr., “‘The Rule of Law’ as a Concept in Constitutional Discourse”, 97 *Columbia Law Review* (1997) 1, 1, 7; Waldron, *supra* note 26.

<sup>38</sup> W. B. Gallie, ‘Essentially Contested Concepts’, 56 *Proceedings of the Aristotelian Society* (1955-1956), 167, 193, also cited in Waldron, *supra* note 26, 151. For Ernst-Wolfgang Böckenförde, ‘*Rechtsstaat*’ belongs, together with other fundamental juridical concepts, to the category of ‘*Schleusenbegriffe*’, i.e., ‘floodgate concepts’ which cannot be defined once and for all but are open to the ‘flood’ of changing political and constitutional ideas. Hence, only through the knowledge of their historical evolution, a more systemic understanding can be achieved. The evolutions Böckenförde has in mind are the history of the rival uses of the concept such as the ‘liberal’ versus the ‘social’ ‘*Rechtsstaat*’; the understanding is thus dialectical and not far away from the idea underlying ‘essentially contested concepts’. It is interesting to see how Böckenförde and Waldron arrive at a similar observation. For the former, the historical evolution shows the persisting perplexity of the ‘*Rechtsstaatsbegriff vis-à-vis* political power as it postulates the primacy of law but does not explain the conditions of its own existence. Waldron, on his part, mentions that “the Rule of Law is a form of contestation which amounts to an on-going debate among jurists and political theorists about the practicability of law being in charge in a society”. See E.-W. Böckenförde, ‘Entstehung und Wandel des Rechtsstaatsbegriffs’, in E.-W. Böckenförde, *Recht, Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, 2nd ed. (2006), 143, 143-144, 168-169; Waldron, *supra* note 26, 157.

<sup>39</sup> Cf. Wood, *supra* note 21, 247 (note 14).

<sup>40</sup> On States’ positions expressed in this regard in the Sixth Committee, see S. Barriga & A. Alday, ‘The General Assembly and the Rule of Law: Daring to Succeed? The Perspectives of Member States’, 12 *Max Planck Yearbook of United Nations Law* (2008), 381, 397-403. For the views expressed in the SC, see A. Rodiles, ‘México y la Promoción del Estado de Derecho en el Consejo de Seguridad’, in R. Dondisch (ed.), *México en el Consejo de*

in the first place is necessarily ‘thin’, since it has indeed to accommodate all the different views. It is not much more than the principled equality already entailed in the concept’s contestation, and nothing less than the *sine qua non* for arriving at any ‘thicker’ version, if the latter is to reflect any substantive agreement and not just particular views on substance.

## D. The Rule of Law in the Security Council

### I. A (Re)newed Commitment to the International Rule of Law at the UN

The SC has traditionally engaged in two kinds of rule of law activities: the promotion of legal reform within States which have been affected by armed conflict or are facing other problems of political stability;<sup>41</sup> and those which are aimed at ensuring respect for international law, especially international humanitarian law (IHL) and human rights law (IHR), by the parties to an armed conflict. Some do understand the latter kind of activity as encompassing not only compliance with IHL and IHR in conflict and post-conflict situations but generally as the idea of the strengthening of international law by the Council, including its measures on counter-terrorism and non-proliferation of weapons of mass destruction. In her capacity as former President of the International Court of Justice (ICJ), Rosalyn Higgins explained this as “the idea of embedding international law into many of the contemporary activities overseen by the Security Council [...] and increasing the level of compliance with the rules of international law”.<sup>42</sup> Be that as it may, while the former clearly concerns the rule of law at the national level, the latter can be characterized as promotion of the rule of international law. However, a fundamental aspect of this latter

*Seguridad de la ONU: La Historia tras Bambalinas* (2012), 199, 203-204 [Rodiles, México y la Promoción del Estado de Derecho].

<sup>41</sup> See further H. P. Aust & G. Nolte, ‘International Law and the Rule of Law at the National Level’, in M. Zürn, A. Nollkaemper & R. Peerenboom (eds), *Rule of Law Dynamics in an Era of International and Transnational Governance* (2012), 48, 53-57. See also the remarks by the former Legal Adviser of the Mexican Ministry of Foreign Affairs (Ambassador Joel Hernández), ‘Taking Stock: The UN Security Council and the Rule of Law’ (28 October 2010), available at <http://www.unrol.org/files/Ambassador%20Joel%20Hern%C3%A1ndez%20on%20the%20SC%20and%20RoL.pdf> (last visited 31 December 2013).

<sup>42</sup> SC, *Verbatim Record of the 5474th Meeting*, UN Doc S/PV.5474, 22 June 2006, 6 [SC, *Verbatim Record of the 5474th Meeting*]. Although she did not relate this directly with the rule of law, her remarks were on the frame of a SC rule of law debate.

notion was traditionally left aside: its institutional dimension.<sup>43</sup> Concerns about respect for international law by the Council itself were first introduced to the discourse through the insistence of NPM, and this was only possible after the rule of international law was heavily undermined by the U.S. and its coalition partners with the invasion of Iraq in 2003. The general indignation that this war provoked, favored the momentum for a strong call to respect the international rule of law; it was under this ambiance that the *World Summit Outcome* of 2005 was negotiated.<sup>44</sup>

The commitment of the heads of State and government to “an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States”<sup>45</sup> may sound like another general statement with no real teeth, but it has been followed by a series of initiatives which remind of those of the kind of the “decade of international law”<sup>46</sup> promoted by the Non-Aligned Movement (NAM) and adopted by the GA at the ending of the Cold War. First, there are the annual debates at the Sixth Committee of the GA regarding ‘the rule of law at the national and international levels’, which go back to an initiative that was born in the framework of the Friends of the Rule of Law and spearheaded by Liechtenstein and Mexico.<sup>47</sup> This initiative has also led to a recent high level meeting of the GA on the rule of law, celebrated in autumn 2012, and the adoption of a declaration by heads of State, government, and delegation.<sup>48</sup> Although it can be argued that the overall tone of the declaration is more focused on the rule of law at the national level, it is

<sup>43</sup> For some States within the ‘Friends of the Rule of Law’, like Austria, the ‘institutional level’ represents a third layer of the rule of law, which should be promoted along the national and international levels. On this see Bühler, ‘Austrian Rule of Law Initiative 2004 - 2008’, *supra* note 19, 414.

<sup>44</sup> See Humphreys, *supra* note 30, 155. See also Rodiles, ‘México y la Promoción del Estado de Derecho’, *supra* note 40, 200-201.

<sup>45</sup> GA Res. 60/1, UN Doc A/RES/60/1, 24 October 2005, 29, para. 134 (a).

<sup>46</sup> GA Res. 44/23, *supra* note 34 (capital letters omitted). On this initiative, see Pahuja, *supra* note 33, 173-179.

<sup>47</sup> Following a request by the Permanent Representatives of Liechtenstein and Mexico (see GA, *Request for the Inclusion of an Item in the Provisional Agenda of the Sixty-first Session: The Rule of Law at the National and International Levels*, UN Doc A/61/142, 22 May 2006), the topic was introduced to the *Programme of Work* of the 61st session of the 6th Committee in 2006, and has since been debated annually at this forum. See GA Res. 61/39, UN Doc A/RES/61/39, 18 December 2006 and subsequent resolutions. On the origins of this initiative within the ‘Friends of the Rule of Law’, see Bühler, ‘Austrian Rule of Law Initiative 2004 - 2008’, *supra* note 19, 416.

<sup>48</sup> GA Res. 67/1, UN Doc A/RES/67/1, 30 November 2012.

interesting to observe how the “voluntary pledges” on rule of law commitments that States are encouraged to deliver can also deal with multilateral measures aimed at enhancing international cooperation, “including regional and South-South cooperation”.<sup>49</sup>

## II. Thematic Debates on the Rule of Law

In the SC, thematic debates on the rule of law have been held since 2003. The first one took place following an initiative by a P5, the UK, who has played an outstanding role in rule of law promotion by the SC and has been an important and constructive partner of NPM in this subject. However, it must also be stressed that the UK traditionally focuses on the rule of law in conflict and post-conflict situations, i.e., on the kind of UN mainstream rule of law activities aimed and carried out at the national level. The debate of 24 September 2003 was chaired by the former Foreign Secretary Jack Straw, and focused on how to harness the work of the UN, especially the SC, in relation with peacekeeping operations, the respect for IHL, in particular the protection of civilians during armed conflict, and with international criminal justice.<sup>50</sup> Still, a NPM, Mexico, took the opportunity to question a series of practices of the SC in regard to the law on the use of force, mentioned the need to debate about the principle of proportionality that the SC should observe in its actions under Chapter VII of the *UN Charter*, and strongly advocated a more extensive use of Chapter VI measures.<sup>51</sup> The 2003 debate was a public meeting, but not an open debate, i.e., non-members did not have the opportunity to be invited to participate upon their request.<sup>52</sup> It was, however, agreed to convene a new, open debate on the same item, only a few days later, in order to have the views of all UN Member States who wished to participate and of “other parts of the United

<sup>49</sup> *Ibid.*, 6, para. 42. The pledges so far delivered can be consulted at [http://www.unrol.org/article.aspx?article\\_id=170](http://www.unrol.org/article.aspx?article_id=170) (last visited 31 January 2014).

<sup>50</sup> See SC, *Verbatim Record of the 4833rd Meeting*, UN Doc S/PV.4833, 24 September 2003 [SC, Verbatim Record of the 4833rd Meeting] and the resulting presidential statement (SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2003/15, 24 September 2003) [SC, Presidential Statement, UN Doc S/PRST/2003/15].

<sup>51</sup> See SC, *Verbatim Record of the 4833rd Meeting*, *supra* note 50, 9-10. On the principle of proportionality and SC actions, see S. Talmon, ‘The Security Council as World Legislature’, 99 *American Journal of International Law* (2005) 1, 175, 184-185.

<sup>52</sup> See UN, *Provisional Rules of Procedure of the Security Council*, UN Doc S/96/Rev.7 (1983), 9, Rule 48 [UN, Provisional Rules of Procedure of the SC] and SC, *Note by the President of the Security Council*, UN Doc S/2010/507, 26 July 2010, 6-7, para. 36 [SC, Presidential Note, UN Doc S/2010/507].

Nations system”.<sup>53</sup> The meeting of 30 September 2003, and the following five SC debates on the rule of law, i.e., 2004, 2006, 2010, and the two organized in 2012 have been held under an open format. At least in the case of the 2010 debate organized by Mexico, it was explained from the very beginning of the informal negotiations that a debate on the rule of law in the SC can, almost by definition, only be open to the wider membership.<sup>54</sup> It is hence regrettable that the latest meeting on this subject, held on 30 January 2013 under the chairmanship of Pakistan,<sup>55</sup> was conducted as a briefing by the Secretariat without any outcome, followed by informal consultations of the whole, where non-Council members are not invited and no official record is made available.<sup>56</sup>

In October 2004, again under British leadership, the SC discussed a report of the SG on transitional justice and the rule of law in conflict and post-conflict societies.<sup>57</sup> Despite the agenda item, Mexico insisted, this time as an invited non-member, to direct its remarks on the Council’s adherence to international law, recalling the words of former SG Kofi Annan, who mentioned that “[t]hose who seek to bestow legitimacy must themselves embody it; and those who invoke international law must themselves submit to it”.<sup>58</sup> This tone marks the approach taken in the next rule of law debate, which took place in June 2006 and was convened by a NPM, Denmark, under the title ‘Strengthening International Law: Rule of Law and Maintenance of International Peace and Security’.<sup>59</sup>

The organization of this debate responded directly to the recognition of the rule of law at the international level underscored in the *2005 World Summit Outcome*; in a sense, it was a measure aimed at implementing the commitments of the heads of State and government by bringing the discussions on the need to observe international law to the most important organ of the UN, which due to its political nature and its all-important primary responsibility has traditionally not felt compelled to contrast its actions and ways of proceeding with the exigencies

<sup>53</sup> SC, *Presidential Statement*, UN Doc S/PRST/2003/15, *supra* note 50, 1 (para. 3).

<sup>54</sup> See Rodiles, ‘México y la Promoción del Estado de Derecho’, *supra* note 40, 210.

<sup>55</sup> SC, *Verbatim Record of the 6913th Meeting*, UN Doc S/PV.6913, 30 January 2013.

<sup>56</sup> See SC, *Presidential Note*, UN Doc S/2010/507, *supra* note 52, 5, paras 20-27.

<sup>57</sup> See *supra* note 23.

<sup>58</sup> GA, *Official Records of the 3rd Plenary Meeting (59th Session)*, UN Doc A/59/PV.3, 21 September 2004, 3. Although Annan made this Statement in connection with those States in the former Commission on Human Rights who invoked the rule of law but did not always practice it at home, his remarks also followed a critical passage on the Council’s fairness. For Mexico’s statement, see SC, *Verbatim Record of the 5052nd Meeting*, UN Doc S/PV.5052 (Resumption 1), 6 October 2004, 33-34.

<sup>59</sup> SC, *Verbatim Record of the 5474th Meeting*, *supra* note 42.

of the rule of law. The decision taken by the Danish presidency of the Council was also in line with an ambitious initiative on the 'UN Security Council and the Rule of Law', launched by Austria in 2004 and which was attracting a lot of attention by the time the Danish debate was announced. It consisted of the creation of an 'advisory group', which became the Friends of the Rule of Law, the convening of a series of panel discussions among diplomats, representatives from NGOs, and scholars on the role of the SC in strengthening a rules-based international system, and a resulting *Final Report and Recommendations*, finalized by Simon Chesterman and published as a UN document in 2008.<sup>60</sup> Austria's initiative influenced the evolution of the subject in the SC in a significant way. It was based on the idea expressed in the GA by former Foreign Minister Benita Ferrero-Waldner that for smaller and medium sized countries in particular, an international order based on the rule of law is of paramount importance.<sup>61</sup> All this is not to "demonize' the Council".<sup>62</sup> It is of course true that its primary responsibility demands a great deal of efficiency, which in turn presupposes flexibility and a certain dose of ad-hocism. But the SC abuses this privilege and has made ad-hocism its normal way of procedure, preventing "the development and subsequent enforcement of consistent patterns of normative standards and policies".<sup>63</sup> Recognizing and understanding the Council's primary responsibility does not mean to uncritically accept its self-perception as being through and through 'the master of its own decisions', as is so often underlined by the P5 and the SC Secretariat.

In addition to issues related to conflict and post-conflict situations, which were not abandoned, the discussions during the Danish debate and its outcome introduced several aspects related to the respect for international law by the Council, including a general commitment to the *UN Charter* and international law, the recognition of the role of law in fostering stability and order in international relations, and a commitment to support peaceful settlement of disputes in accordance with Chapter VI, including an emphasis on the role

<sup>60</sup> Austrian Federal Ministry for European and International Affairs & Institute for International Law and Justice, New York University School of Law, *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System*, UN Doc A/63/69-S/2008/270, 7 May 2008. See also Bühler, 'Austrian Rule of Law Initiative 2004 - 2008', *supra* note 19.

<sup>61</sup> Bühler, 'Austrian Rule of Law Initiative 2004 - 2008', *supra* note 19, 411.

<sup>62</sup> Cf. Wood, *supra* note 21, 247-248.

<sup>63</sup> A. Bianchi, 'Ad-hocism and the Rule of Law', 13 *European Journal of International Law* (2002) 1, 263, 270.

of the ICJ, following Article 36 *UN Charter*.<sup>64</sup> Most striking at that time, the presidential statement (PRST) negotiated under the coordination of the Danish delegation contains an element, which should begin to change many things in the SC: the pledge to ensuring ‘fair and clear procedures’<sup>65</sup> regarding the listing and delisting of individuals and entities in the frame of the various sanctions regimes.<sup>66</sup>

The 2006 debate can be viewed today as a sea change in regard to the rule of law in the SC, as it shifted its focus from the internationalization of the rule of law to the international rule of law. The three thematic debates that followed on the subject, organized in 2010 by Mexico, in January 2012 by South Africa, and in October 2012 by Guatemala, continued the path taken by Denmark – though, as we shall see below, the South African debate showed a slight tendency to refocus on transnational rule of law promotion. The Guatemalan debate, on its part, dealt entirely with international criminal justice, concretely with the International Criminal Court (ICC) and its relationship with the SC, and how it can support the latter in upholding the rule of law.<sup>67</sup> Highlighting the importance of the ICC in the international order entails aspects of both, rule of law promotion at the national and international levels.

As opposed to the open debate organized by Guatemala, where no action was taken, the debates from 2010 and January 2012 produced each a statement by the president of the SC. Both echo the PRST adopted at the Danish debate, by restating the commitments of the Council to international law and the *UN Charter*, with an emphasis on Chapter VI and the role of the ICJ in the peaceful settlement of disputes. They do also include a paragraph on the need to ensure ‘fair and clear procedures’ in the case of targeted sanctions.<sup>68</sup> Some

<sup>64</sup> *UN Charter*, Art. 36, *supra* note 3.

<sup>65</sup> The term was coined by the heads of State and government in the *2005 World Summit Outcome* (GA Res. 60/1, *supra* note 45, 26, para. 109) and refers to due process rights of designated targets on SC sanctions lists. For an overview of the usage of this term of art in the UN, see Huber & Rodiles, ‘An Ombudsperson in the SC’, *supra* note 18, 109 (note 2) and accompanying text.

<sup>66</sup> SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2006/28, 22 June 2006, 2 (para. 5).

<sup>67</sup> See the *Concept Note* attached to the *Letter Dated 1 October 2012 From the Permanent Representative of Guatemala to the United Nations Addressed to the Secretary-General*, UN Doc S/2012/731, 1 October 2012, 2.

<sup>68</sup> See SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2010/11, 29 June 2010, 2 (para. 10) [SC, Presidential Statement, UN Doc S/PRST/2010/11] and SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2012/1, 19 January 2012, 3 (para. 15) [SC, Presidential Statement, UN Doc S/PRST/2012/1].

new interesting elements are introduced. The outcome of the 2010 debate reinforces the call to make greater use of Chapter VI of the *UN Charter* not only by extending to other adjudication instances beyond the ICJ through its call to resort to international and regional courts and tribunals, but also by emphasizing the role of the SG in mediation, according to Article 33 *UN Charter*.<sup>69</sup> Most significant in this regard is the call upon States that have not done so – including the P5 with the notable exception of the UK – to consider accepting the compulsory jurisdiction of the ICJ. Two more aspects deserve mention. First, S/PRST/2010/11 takes note of the review conference to the *Rome Statute*<sup>70</sup> of the ICC, held in Kampala, Uganda, just a few weeks before the said presidential statement entered into its final rounds of informal negotiations. What might look like a vague recognition of something the entry-into-force of which is still pending and subject to all sorts of legal questions,<sup>71</sup> is regarded by many as a welcomed and not so self-evident support by the SC for the agreements reached in Kampala, including the definition of the crime aggression.<sup>72</sup> Second, in regard to peacebuilding and peacekeeping operations, the 2010 presidential statement contains the commitment of the SC “to ensure that all UN efforts to restore peace and security *themselves* respect and promote the rule of law”.<sup>73</sup>

The PRST adopted under the South African presidency in January 2012 reiterates some of the elements introduced two years before, like the call to consider the acceptance of the compulsory jurisdiction of the ICJ, and brings in new aspects, such as the recognition of the “importance of national ownership in rule of law assistance activities”,<sup>74</sup> as the GA already did before.<sup>75</sup> On the

<sup>69</sup> *UN Charter*, Art. 33, *supra* note 3. The importance of the role of ‘good offices’ of the SG, including in the mediation of disputes, is another theme highlighted in the *2005 World Summit Outcome* (see GA Res. 60/1, *supra* note 45, 21, para. 76), and has been the subject of another thematic debate coordinated by Mexico in 2009 (see SC, *Verbatim Record of the 6108 Meeting*, UN Doc S/PV.6108 (Resumption 1), 21 April 2009).

<sup>70</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3.

<sup>71</sup> On this, see S. Barriga & L. Grover, ‘A Historic Breakthrough on the Crime of Aggression’, 105 *American Journal of International Law* (2011) 3, 517. For critical views, see K. J. Heller, ‘The Uncertain Legal Status of the Aggression Understandings’, 10 *Journal of International Criminal Justice* (2012) 1, 229; A. Zimmerman, ‘Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties’, 10 *Journal of International Criminal Justice* (2012) 1, 209.

<sup>72</sup> ICC Review Conference Res. RC/Res.6, 11 June 2010.

<sup>73</sup> SC, *Presidential Statement*, UN Doc S/PRST/2010/11, *supra* note 68, 2 (para. 9) (emphasis added).

<sup>74</sup> SC, *Presidential Statement*, UN Doc S/PRST/2012/1, *supra* note 68, 2 (para. 7).

<sup>75</sup> GA Res. 67/197, *supra* note 32, 2 (op. 8).

other hand, and following the current trend in the SC, it focuses much more on what have become known as “evolving challenges to international peace and security”,<sup>76</sup> including transnational organized crime, drug trafficking, and piracy. This shift deserves attention in the present context. As Humphreys’ thoroughly documented study shows,<sup>77</sup> ‘security and criminal justice’ has been a priority for the UN since the 1990s and since been integrated into the ‘competing mandates’ of several UN agencies, especially the United Nations Development Programme (UNDP), the Department of Peacekeeping Operations (DPKO), and the United Nations Office on Drugs and Crime (UNODC). Despite of – or rather contributing further to – the resulting coordination problems,<sup>78</sup> all of these agencies have learned to take advantage of the notion’s strong appeal, framing their work in terms of the ‘rule of law’. As mentioned above, under British leadership these issues were definitely brought under the ‘rule of law umbrella’ of the SC through the debates and presidential statements of September 2003 and October 2004, and they remain until today for several reasons. Without questioning the appropriateness of this, it can be said that the continuity of these important issues under the rubric of ‘the SC and the rule of law’ has been a trade-off between NPM and the P5, especially the UK, for the inclusion of the rule of law at the international level, particularly the discussions about the submission of the UN and the Council themselves to the rule of law.<sup>79</sup> The consideration by the SC of ‘security and criminal justice’ has evolved and transcended conflict and post-conflict situations as global ‘challenges to peace and security’ have done, or so the narrative goes. Just like ‘rule of law and justice’ became the way of framing ‘criminal justice and security’, so are now those measures aimed at transnational security and law enforcement<sup>80</sup> being articulated under the theme of ‘the promotion and strengthening of the rule of law in the maintenance of international peace and security’.

<sup>76</sup> See, for instance, SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2012/16, 25 April 2012, 1 (para. 2).

<sup>77</sup> See Humphreys, *supra* note 30, 155-162.

<sup>78</sup> Bad coordination – or the lack of it – among UN agencies has become a serious problem that is very often ill-treated with the creation of more agencies, which are supposed to coordinate among the pre-existing ones but usually degenerate in even more inter-agency competition and lack of coordination. UN rule of law work is a case in point.

<sup>79</sup> At least that was the experience of the negotiations of the 2010 debate, which the present author coordinated at the expert level as a member of the Mexican delegation.

<sup>80</sup> Whereby law enforcement measures do often merge with actions that are short-of-war, as the international fights against ‘terrorism’, ‘piracy and armed robbery at sea’, and against ‘crime’ show.

This was not intended when said title was introduced to the agenda item of the SC by Mexico in 2010, despite certain reluctance by Russia, in order to give account of “two different but closely interrelated objectives”: the desire to more strongly embed the rule of law and international law in the daily work of the SC, on the one hand, and the need to increase the level of adherence to the rule of law and international law by the UN and the SC themselves, on the other.<sup>81</sup> In other words, this reflects the need to strike a balance between rule of law promotion by the Council throughout the world and the strengthening of the rule of law within the Council’s work. The 2012 debate and its outcome, S/PRST/2012/1, seems to have slightly inclined in favor of the first objective. This is also visible in its paragraph dealing with peacekeeping and peacebuilding measures, where the commitment of the SC expressed two years before to ensure that UN activities themselves respect the rule of law is deleted.<sup>82</sup> The 2013 briefing organized by Pakistan, followed by a closed and unrecorded meeting, is not precisely a step towards more transparency in the Council’s work. These two debates were convened by NPM, and the decisions and efforts to organize them are important in themselves, also in order to keep the item on the top of the Council’s agenda. It is also clear that at times measures belonging to the first general objective will gain more weight due to political circumstances and current events, and NPM have strong and sometimes legitimate interests in certain of these issues, especially those which affect their (national) security. They should, however, be careful not to let the subject return to be a one-sided enterprise, be it only for their self-interest.

## E. Explaining the Tool-Kit: Subsidiary Organs and Rotating Presidencies

Thematic debates are not the only means through which NPM have favored the international rule of law in the SC. In addition to the day-to-day work, there is the influence NPM can exercise as chairs of the various subsidiary organs. Three examples should suffice here: Austria and Germany chairing the most notorious sanctions regime, the Committee pursuant to SC *Resolutions 1267* (1999) and *1989* (2011) concerning Al-Qaida and associated individuals and entities, and Japan’s work in front of the Informal Working Group on

<sup>81</sup> See the *Concept Note* attached to the *Letter Dated 18 June 2010 From the Permanent Representative of Mexico to the United Nations Addressed to the Secretary-General*, UN Doc S/2010/322, 21 June 2010, 2, 2-3.

<sup>82</sup> SC, *Presidential Statement*, UN Doc S/PRST/2012/1, *supra* note 68, 2 (para. 6).

Documentation and other Procedural Questions (IWG). The work of these subsidiary organs and the contributions of the said NPM cannot be treated here in great detail,<sup>83</sup> but some outstanding achievements should be shortly mentioned since they are clear indicators of how NPM can and have indeed contributed to the respect of the rule of law by the Council.

## I. The Al-Qaida and Taliban Sanctions Regime

The Austrian leadership of the Al-Qaida and Taliban sanctions regime (2009-2010), which was divided during Germany's presidency (2011-2012) into the Al-Qaida and the Taliban sanctions committees,<sup>84</sup> was clearly devoted to improving the rule of law and it was pragmatic at the same time, something shown by Austria's decision not to apply for membership in the 'Like-Minded Group on Targeted Sanctions'<sup>85</sup> during the time it chaired the 1267 Committee. This 'principled pragmatism' proved to be very fruitful as it helped construct confidence between the P5 and the Austrian presidency, without sacrificing a strong coordination with other NPM, especially with Costa Rica and Mexico.<sup>86</sup> An open dialogue with the Group's participants, other interested delegations of the wider membership, NGOs and the press, was also favored by the Austrian delegation. It might sound obvious but it cannot be sufficiently stressed how important it is that those who try to change the Council's vices, be it NPM,

<sup>83</sup> On the Al-Qaida sanctions regime and the role of the Austrian presidency from 2009-2010, see Huber & Rodiles, 'An Ombudsperson in the SC', *supra* note 18. On the IWG and Japan's presidencies, see K. G. Bühler, 'Article 28', in Simma *et al.*, *UN Charter Commentary*, Vol. I, *supra* note 4, 939, 963-965, paras 62-70 [Bühler, Article 28 UN Charter].

<sup>84</sup> See SC Res. 1988, UN Doc S/RES/1988 (2011), 17 June 2011 and SC Res. 1989, UN Doc S/RES/1989 (2011), 17 June 2011. As is well-known, the decision to divide the Committee obeyed political considerations related to the peace and reconciliation process in Afghanistan and the related negotiations with certain fractions of the Taliban. See in particular SC Res. 1988, 7 (operative part 25).

<sup>85</sup> An informal group of like-minded States that advocates the improvement of fair and clear procedures of SC sanctions regimes, from which several important proposals on the subject have emerged and are still emerging. The group consists of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden, and Switzerland. See 'Statement by the Permanent Representative of Liechtenstein on Behalf of the Group of Like-Minded States on Targeted Sanctions' (10 May 2013), available at [http://www.regierung.li/fileadmin/dateien/botschaften/ny\\_dokumente/2013-5-10\\_Statement\\_Like-Minded\\_Briefing\\_SC\\_Subsiary\\_Bodies\\_final\\_1\\_.pdf](http://www.regierung.li/fileadmin/dateien/botschaften/ny_dokumente/2013-5-10_Statement_Like-Minded_Briefing_SC_Subsiary_Bodies_final_1_.pdf) (last visited 31 January 2014), 1.

<sup>86</sup> See *supra* note 18.

NGOs or engaged scholars, make an effort to better understand the reasons for the reluctance of the P5, notwithstanding that these are not shared or even vehemently opposed. This often leads to only small, incremental changes in the system, but too much of a confrontational attitude risks stagnation altogether. And this is not only based on the (cynical) observation that NPM might better take the P5 very seriously as nothing goes without them; it is also a strategic argument since understanding their legitimate and not so legitimate needs clearly strengthens the bargaining position of the former.

The Austrian delegation had two important and difficult tasks: First to carry out and complete the comprehensive review of “the [c]onsolidated [l]ist” as mandated by SC *Resolution 1822* (2008);<sup>87</sup> and second to prepare the ground for the informal negotiations on the successor resolution, which became SC *Resolution 1904* (2009) and by which the institution of the Ombudsperson is established.<sup>88</sup> Both tasks were interrelated, or at least this was the way the Austrian presidency dealt with them. The review process had the purpose of discussing each and every entry on the sanctions list. It was conducted thoroughly, evaluating all available information and generating a lot of a pressure on those who had proposed the entry or wished to maintain it to give reasons and discuss them at the Committee; where appropriate, the chairman encouraged new delisting requests. This performed an important function in awareness-raising on all the shortcomings related to fair and clear procedures which showed-up during the review, and thus the pressing need to do something significant in this regard became more than evident. This awareness-raising was further strengthened through other activities initiated and conducted by the Austrian chairmanship, such as a visit of the Committee to Brussels in order to discuss the difficulties the EU was experiencing with regard to sanction’s implementation after the *Kadi I* judgment of the (European) Court of Justice (ECJ)<sup>89</sup> of September 2008.<sup>90</sup>

<sup>87</sup> SC Res. 1822, UN Doc S/RES/1822 (2008), 30 June 2008, 6 (op. 25).

<sup>88</sup> SC Res. 1904, *supra* note 18, 5-6 (op. 20).

<sup>89</sup> In this article, ‘ECJ’ is used as the well-known abbreviation even though its new name, after the Treaty of Lisbon, is simply the ‘Court of Justice’.

<sup>90</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joint Cases C-402/05 P & C-415/05 P, [2008] ECR I-6351 [Kadi I]. In the recently delivered *Kadi II* judgment, the ECJ restates some of its fundamental concerns of 2008, noting that “there has been no change [...] which could justify a reconsideration of that position”. See *European Commission and Others v. Yassin Abdullah Kadi*, Judgment of 18 July 2013, ECJ Joint Cases C-584/10 P, C-593/10 P & C-595/10 P, para. 66 (Court decision not yet published) [Kadi II].

The *Tenth Report* of the expert group of the Committee,<sup>91</sup> the Monitoring Team, was also discussed in detail by the Committee in view of the forthcoming negotiations on the successor resolution to *Resolution 1822* (2008). This Report summarizes a series of proposals to reform the sanctions regime previously made by the Like-Minded Group and other delegations, as well as by academic institutions, like the ‘White Paper’ of the Watson Institute for International Studies.<sup>92</sup> Among the several suggestions, the Report recalls a proposal formulated by Denmark in 2006, consisting in the creation of an ombudsperson to review delisting requests.<sup>93</sup> Not least due to intensive lobbying by the Austrian chairman, this proposal was already contained in the first draft presented by the U.S. delegation, and the competences of the Office of the Ombudsperson were further enhanced during the negotiations of *Resolution 1904* (2009), in great part due to the insistence and coordinated efforts of several NPM.

When Germany succeeded Austria as president of the Al-Qaida and Taliban sanctions Committee, in 2011, there were strong demands to strengthen due process elements in the mechanism created in December 2009. Germany, a member of the Like-Minded Group, saw the need for reform, and understood its role in front of the committee, indeed its “main assignment”, as “[h]elping [to] find a consensus for reform”.<sup>94</sup> In line with Austria but choosing different methods and style, Germany was determined to build a bridge between the

<sup>91</sup> SC, *Tenth Report of the Analytical Support and Sanctions Implementation Monitoring Team Submitted Pursuant to Resolution 1822 (2008) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, UN Doc S/2009/502, 2 October 2009, 3 [SC, Tenth Report of the Analytical Support and Sanctions Implementation Monitoring Team].

<sup>92</sup> T. J. Bierstecker & S. E. Eckert, ‘Strengthening Targeted Sanctions Through Fair and Clear Procedures’ (30 March 2006), available at [http://www.watsoninstitute.org/pub/S\\_trengthening\\_Targeted\\_Sanctions.pdf](http://www.watsoninstitute.org/pub/S_trengthening_Targeted_Sanctions.pdf) (last visited 31 December 2013). This report, its update from October 2009 (see T. J. Bierstecker & S. E. Eckert, ‘Addressing the Challenges to Targeted Sanctions: An Up-date of the “Watson Report”’ (October 2009), available at [http://www.watsoninstitute.org/pub/2009\\_10\\_targeted\\_sanctions.pdf](http://www.watsoninstitute.org/pub/2009_10_targeted_sanctions.pdf) (last visited 31 December 2013)), and the study commissioned by the UN Legal Counsel and finalized by Bardo Fassbender in 2006 (see B. Fassbender, ‘Targeted Sanctions Imposed By the UN Security Council and Due Process Rights: A Study Commissioned By the UN Office of Legal Affairs and Follow-Up Action by the United Nations’, 3 *International Organizations Law Review* (2006) 2, 437), were all discussed in panels and meetings organized by interested delegations before the negotiations of SC Res. 1904 (*supra* note 18).

<sup>93</sup> SC, *Tenth Report of the Analytical Support and Sanctions Implementation Monitoring Team*, *supra* note 91, 19, para. 46.

<sup>94</sup> The Permanent Mission of Germany to the United Nations, ‘Introductory Remarks by Ambassador Wittig on the Future of the 1267/1989 Al-Qaida Sanctions Regime’ (4 December 2012), available at <http://www.new-york-un.diplo.de/Vertretung/newyorkv>

Council's core, which in general terms remains reluctant to further reforms of the sanctions regime, and the group of UN members most fervently advocating due process rights. During Germany's presidency, several resolutions on this sanctions regime were adopted. As already mentioned, the Committee was split in two by taking the Taliban to a separate list.<sup>95</sup> The mandates of the Monitoring Team and of the Ombudsperson were extended and revised in June 2011 and December 2012. Particularly in regard to the Ombudsperson, further improvements to fair and clear procedures were achieved by substantially strengthening her competences. By far, the most important measure is the upgrading of the 'observations' she could formulate under *Resolution 1904* (2009) to 'recommendations' on delisting requests.

The original proposal by Denmark consisted of 'recommendations', and although several NPM, including Austria, Costa Rica, Libya, and Mexico, tried to restore this proposal during the negotiations of *Resolution 1904* (2009), it was then strongly opposed by China, Russia, and the U.S., while France and the UK, who under strong pressure at home derived from the EU courts' rulings<sup>96</sup> favored several improvements to the already far-reaching U.S. draft, remained rather silent on the matter. Under the mechanism established in Annex II of the *Resolution 1904* (2009), the Committee decided to approve delisting requests after consideration of the Ombudsperson's observations and according to "its normal decision-making procedures",<sup>97</sup> and if it decided to reject the request, it just needed to convey this to the Ombudsperson "including, as appropriate, explanatory comments".<sup>98</sup> The requirement of giving 'explanatory comments',

n/en/\_pr/speeches-statements/2012/20121204-wittig-1267-1898.html (last visited 31 January 2014).

<sup>95</sup> See *supra* note 84.

<sup>96</sup> In addition to the ECJ's *Kadi I* judgment of 2008 (see *supra* note 90), the General Court of the European Union (GC) delivered in September 2010, i.e., only a few months before the beginning of the negotiations on SC Res. 1904 (*supra* note 18), a new ruling which annulled the EC regulation adopted by the Commission in response to the *Kadi I* judgment in so far as it concerned Mr. Kadi, on the ground that the review carried out by the Commission equalled a mere 'simulacrum' and violated Mr. Kadi's right of defence and effective judicial review. See *Yassin Abdullah Kadi v. European Commission*, Case T-85/09, [2010] ECR II-5177, paras 179-188. It is important to mention that the ECJ dismissed the appeals against the GC in its *Kadi II* judgment of 18 July 2013 (see *supra* note 90). On the judgment of the GC and its reception in the SC prior and during the negotiations of SC Res. 1904 (*supra* note 18), see Huber & Rodiles, 'An Ombudsperson in the SC', *supra* note 18, 136-142.

<sup>97</sup> SC Res. 1904, *supra* note 18, 15, para. 10 (annex II).

<sup>98</sup> *Ibid.*, 15, para. 12.

even only ‘as appropriate’, was not easy to achieve in 2009, but for the above mentioned NPM, it was considered indispensable after their efforts to endow the Ombudsperson with the capacity to make recommendations failed. *Resolution 1989* (2011) not only introduces the notion of ‘recommendations’,<sup>99</sup> it actually gives them normative force: If the Ombudsperson recommends the delisting of an entry, sanctions shall automatically terminate with respect to that individual or entity within 60 days after the Committee completes the consideration of the Ombudsperson’s comprehensive report, “unless the Committee decides by consensus”<sup>100</sup> to retain the entry, or the question is referred to the SC. This has been qualified by the 2012 Watson Report as a “reverse veto”,<sup>101</sup> and it indeed represents a very high threshold that supposes considerable political costs for any Council member who wishes to override a recommendation of the Ombudsperson. And ‘political costs’ can be at least as effective as a deterrent as a formal determination of non-compliance. If this measure actually amounts to a “*de facto* judicial review” might be questioned though, especially in light of the fact that the effective remedy, as the same Report acknowledges, “continues to be outstanding issue”.<sup>102</sup> In any case, courts of law have begun to make clear that “despite the improvements added [...] the procedure for delisting and *ex officio* re-examination at UN level they do not provide to the person whose name is listed on the Sanctions Committee Consolidated List [...] the guarantee of effective judicial protection”.<sup>103</sup>

It is true that so far no recommendation has been overruled by the Committee or referred to the SC,<sup>104</sup> but as long as the possibility exists, the legal certainty that the issue will be decided by an independent instance is missing, and this is not just a juridical technicality but inherent to the very notion of an effective remedy, and a necessary element of the rule of law (*ubi ius ibi remedium*). Nevertheless, it is important to recall that a too confrontational approach in the Council may rapidly lead to stagnation. The establishment of an independent institution, competent to re-examine the work of a Council’s subsidiary organ

<sup>99</sup> SC Res. 1989, *supra* note 11, 6 (operative part 21).

<sup>100</sup> *Ibid.*, 17, para. 12 (annex II).

<sup>101</sup> S. E. Eckert & T. J. Bierstecker, ‘Due Process and Targeted Sanctions: An Update of the “Watson Report”’, (December 2012), available at [http://www.watsoninstitute.org/pub/Watson%20Report%20Update%202012\\_12.pdf](http://www.watsoninstitute.org/pub/Watson%20Report%20Update%202012_12.pdf) (last visited 31 December 2013), 37.

<sup>102</sup> *Ibid.*

<sup>103</sup> So the ECJ in the *Kadi II* decision (*supra* note 90, para. 133), referring to *Nada v. Switzerland*, ECtHR Application No. 10593/08, Judgment of 12 September 2012.

<sup>104</sup> See SC, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2083* (2012), UN Doc S/2013/71, 31 January 2013, 2, 7, paras 28-29.

in such a sensitive issue to States' security concerns was already a paradigm shift, and the progress achieved in just a couple of years in regard to its functions is surprising. The question is not about being too ambitious, but about when and how certain objectives can be better advanced. When *Resolution 1904* (2009) was adopted, there were many talks about putting the idea on the table that the Ombudsperson's mandate should be expanded to all sanctions regimes. According to the political environment at that time, interested delegations decided that it was prudent to wait until the institution's viability could be proven, to all sides involved. In the 2012 high-level meeting's declaration on the rule of law – adopted after the highly doubtful case of Jim'ale, who was put on the Somalia and Eritrea sanctions list the very same day he was released from the Al-Qaida sanctions regime<sup>105</sup> – the GA encourages the SC to further develop fair and clear procedures concerning targeted sanctions, without specifying any particular regime.<sup>106</sup> For the Like-Minded Group, Germany included, this should make the Council “start contemplating on how the benefits of the Office of the Ombudsperson could be extended beyond the Al-Qaida sanctions regime”,<sup>107</sup> and it accordingly presented the proposal formally to the SC in the letter issued on the eve of the negotiations of *Resolution 2083* (2012).<sup>108</sup> The said resolution extends the Ombudsperson's mandate in time (from 18 to 30 months),<sup>109</sup> considerably strengthening her Office, which nevertheless remains only competent for the Al-Qaida sanctions regime. The incremental approach is clear, though, and it is not that unlikely anymore that the desired extension is achieved in the next few years. What this could mean for the SC and the rule of law cannot be overstated. For now, the request remains on the table and is advocated by several States, including Germany, which as NPM successfully chaired the Committee, paying due regard to the expectations in and outside the Council.

<sup>105</sup> SC, ‘Security Council Committee on Somalia and Eritrea Adds One Individual to List of Individuals and Entities’, UN Press Release SC/10545, 17 February 2012, available at <http://www.un.org/News/Press/docs/2012/sc10545.doc.htm> (last visited 31 January 2014).

<sup>106</sup> GA Res. 67/1, *supra* note 48, 5, para. 29.

<sup>107</sup> GA & SC, *Identical Letters Dated 7 November 2012 From the Permanent Representative of Switzerland to the United Nations Addressed to the Secretary-General and the President of the Security Council*, UN Doc A/67/557-S/2012/805, 9 November 2012, 4 (enclosure).

<sup>108</sup> *Ibid.*

<sup>109</sup> SC Res. 2083, S/RES/2083 (2012), 17 December 2012, 6 (operative part 19).

## II. The Informal Working Group on Documentation and Other Procedural Questions (IWG)

Another subsidiary organ highly relevant for the rule of law is the IWG, created in 1993 as a response to criticisms related to the opaqueness of the Council's working methods.<sup>110</sup> Its principle aim is to make the documentation and working methods of the Council more accessible to the wider membership and to formulate recommendations on how to improve transparency and efficiency in the Council's work. It is thus obvious why it is so relevant for actual and potential NPM, and it is also not surprising that one of the States that has best understood the importance of the IWG and engaged most actively in it, is Japan, which together with Brazil has been the most frequent-NPM with ten participations each.<sup>111</sup> Japan has chaired the IWG twice, in 2006 and, as the only country for a whole biennium, from 2009 till 2010. It has been under the Japanese chairmanships of this subsidiary organ that its most significant documents have been issued: the presidential notes from 2006 and 2010.<sup>112</sup> The former represents the first comprehensive document of the IWG consolidating SC practice on the different meetings and their formats, respective outcomes and actions, as well as in regard to the *Programme of Work* of the Council, which is subject to difficult negotiations at the beginning of each month among the political coordinators of the fifteen members' Permanent Missions in New York. It also makes recommendations to enhance transparency and efficiency in regard to the issues just mentioned. A very important measure, which has been fully implemented, is the recommendation to invite new elected members to attend all Council meetings, including of the subsidiary bodies and the informal consultations of the whole, "six weeks immediately preceding their term of membership".<sup>113</sup>

The *Note of the President* of 2010, known as S/2010/507, updates and further codifies the working methods and practices of the SC in relation to the *Programme of Work*, the different meetings and their formats, and it makes

<sup>110</sup> See Bühler, 'Article 28 UN Charter', *supra* note 83, 962-963, paras 61-64.

<sup>111</sup> See *supra* note 16 and accompanying text.

<sup>112</sup> SC, *Note by the President of the Security Council*, UN Doc S/2006/507, 19 July 2006 [SC, Presidential Note, UN Doc S/2006/507] and SC, *Note by the President of the Security Council*, UN Doc S/2010/507, 26 July 2010 [SC, Presidential Note, UN Doc S/2010/507]. As opposed to presidential statements (see *infra* note 134), 'notes by the president' are informal documents of the SC, which nevertheless play an important role as they reflect understandings and intentions of the SC, expressed in 'agreed language', that can serve a sort of 'soft precedent' in future negotiations.

<sup>113</sup> SC, *Presidential Note*, UN Doc S/2006/507, *supra* note 112, 13, para. 61 (annex).

recommendations to improve transparency and efficiency related to said issues, as well as to the work of the subsidiary organs and SC missions. It proposes measures to engage, as appropriate, the broader UN membership in the drafting of resolutions and presidential statements, including through informal consultations with affected States and others that have a special interest, “as well as [...] regional organizations and Groups of Friends”.<sup>114</sup> The reference to ‘groups of friends’ is not only a general recognition of the significant role these informal alliances of like-minded States play in the UN’s treatment of certain issues, and how they influence from outside and in partnership with some of their members who happen to be the in SC the latter’s work on said topics, like the above mentioned cases of the Friends of the Rule of Law and the Like-Minded Group on Sanctions, it also reflects the particular influence of the former ‘Small-Five’ (S5) on the IWG.

The S5 is another creature of the *2005 World Summit Outcome*, originally composed of Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland, and does also owe a lot of its came-into-being to the personal relationships of the Permanent Representatives of said countries at that time; a genuine ‘group of friends’. It has focused on incrementing transparency and accountability in the working methods of the SC and in furthering the participation of non-Council members in its work. In 2006, the S5 circulated a draft resolution in the GA,<sup>115</sup> which was not put to a vote but is widely regarded as having supported Japan’s efforts in drafting and adopting *S/2006/507*, and influenced its contents.<sup>116</sup> This Group is best known for promoting higher thresholds in the exercise of the veto right, in particular through the demand that the P5 explain, based on the *UN Charter* and applicable international law, the reasons for resorting to it, when they so decide.<sup>117</sup> Other UN members have made suggestions that point in the same direction, like Mexico, who, in a broader sense, has maintained that the

<sup>114</sup> SC, *Presidential Note*, UN Doc S/2010/507, *supra* note 112, 9, para. 43 (annex).

<sup>115</sup> See GA, *Improving the Working Methods of the Security Council: Draft Resolution*, UN Doc A/60/L.49, 17 March 2006.

<sup>116</sup> See Security Council Report, ‘Security Council Working Methods’, *Update Report No. 1* (12 August 2008), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Update%20Report%2012%20August%20Working%20Methods.pdf> (last visited 31 January 2014), 3.

<sup>117</sup> See, for instance, the latest draft resolution circulated by the S5 in May 2012. SC, *Enhancing the Accountability, Transparency and Effectiveness of the Security Council*, UN Doc A/66/L.42/Rev.1, 3 May 2012, 4-5 (operative part 19) (annex) [SC, *Enhancing the Accountability, Transparency and Effectiveness of the SC*].

Council should ground and motivate its decisions in international law.<sup>118</sup> By favoring the giving of reasons in its decisions, these proposals could contribute to building a certain kind of SC-case law, as has been suggested elsewhere.<sup>119</sup> The most far-reaching proposal of the S5 requires that the P5 refrain altogether from the use of the veto when this could lead “to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity”.<sup>120</sup> This proposal has the purpose of making the ‘responsibility to protect’ (R2P) operational, which explains why it is often alluded to as the “responsibility not to veto”.<sup>121</sup> It was presented in a draft resolution in May 2012, which had to be withdrawn due to pressure from most of the P5,<sup>122</sup> and also because other UN members in fact do not like this initiative,<sup>123</sup> arguing that it could potentially affect SC reform plans but arguably because the R2P has caused many divisions inside the UN. Be that as it may, it seems that the S5 came out strengthened of this episode and has reconstituted itself as the ‘Accountability, Coherence and Transparency Group’ or ‘ACT’, a network of 21 States with the same goal as the S5, but a more systematic, ‘multi-tiered’ approach that includes among its principle strategies the continuation of direct interaction with the SC, especially through the IWG.<sup>124</sup>

<sup>118</sup> See SC, *Verbatim Record of the 5474th Meeting*, *supra* note 42, 30.

<sup>119</sup> See B. Fassbender, ‘The Security Council: Progress is Possible but Unlikely’, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012), 52, 59 [Fassbender, *The SC: Progress is Possible but Unlikely*].

<sup>120</sup> SC, *Enhancing the Accountability, Transparency and Effectiveness of the SC*, *supra* note 117, 5 (op. 20) (annex).

<sup>121</sup> See Citizens for Global Solutions (CGS), ‘The Responsibility not to Veto: A Way Forward’ (2010), available at [http://www.globalsolutions.org/files/public/documents/RN2V\\_White\\_Paper\\_CGS.pdf](http://www.globalsolutions.org/files/public/documents/RN2V_White_Paper_CGS.pdf) (last visited 31 January 2014).

<sup>122</sup> France, a strong supporter of R2P, has later on stated that the P5 should “voluntarily and jointly” forego the use of the veto in situations “which pertain to the responsibility to protect”. SC, *Verbatim Record of the 6870 Meeting*, UN Doc S/PV.6870, 26 November 2012, 15 [SC, *Verbatim Record of the 6870 Meeting*].

<sup>123</sup> See C. Lynch, ‘Rise of the Lilliputians’ (10 May 2012), available at [http://blog.foreignpolicy.com/posts/2012/05/10/rise\\_of\\_the\\_lilliputians#sthash.suDLzLxS.dpbs](http://blog.foreignpolicy.com/posts/2012/05/10/rise_of_the_lilliputians#sthash.suDLzLxS.dpbs) (last visited 31 January 2014).

<sup>124</sup> The author thanks Thomas Bierstecker for drawing its attention to this recent evolution in ‘coalition diplomacy’. For more information on ACT, see the factsheet by the Swiss Mission to the UN, ‘ACT: The Accountability, Coherence and Transparency Group Better Working Methods for Today’s UN Security Council’ (May 2013), available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intorg/un/missny/other.Par.0165.File.tmp/ACT%20Fact%20Sheet.pdf> (last visited 31 January 2014).

The presidential notes on the IWG which have followed S/2010/507 contain further measures to implement the former, partly introducing additional recommendations. An interesting suggestion is the putting in place of an informal process of consultations among all Council members and newly elected ones for the purposes of appointing in a more transparent and inclusive manner the new chairpersons of the subsidiary bodies.<sup>125</sup> This process has been conducted so far in closed, almost secrete, negotiations among the interested new members and the P5, with the participation of certain influential heads of the respective expert bodies, and where the P5 are known to have the final say.

As of today, S/2010/507 is not only the frame under which the IWG continues its efforts to enhance transparency and broader participation, but also a reference document for better understanding the work of the Council; it is not an exaggeration to say that the note prepared and negotiated under the Japanese leadership of the IWG is of the greatest utility for those who cannot count, as a result of their permanent presence in the SC, on a comprehensive ‘institutional memory’ in their archives. From a legal point view and due to the concise ‘codification’ of SC ‘established practice’ that it contains, S/2010/507 and other notes of the president emanating from the IWG have to be read into the *Provisional Rules of Procedure* (PRP), as well as some Charter provisions: These documents do actually represent a good source of evidence of the ‘rules of the Organization’ and of the subsequent practice of certain Charter provisions.<sup>126</sup> For instance, the PRP only speak of “private” and “public” meetings,<sup>127</sup> however, the Council meets under a great variety of formats, which keep evolving over time. On the meetings’ format depends a lot of important questions, such as who may be invited, if at all, to attend from outside the SC; who may be allowed to make a statement; will there be official and accessible records; will the agenda of the meetings be made available in advance in the UN Journal, something of especial interest in regard to the subsidiary bodies, which often do pack everything important under the rubric of ‘informal consultations’; and, of course, what kind of action can be expected from the meeting. All these issues cannot be discerned from the *UN Charter* and the PRP alone. Article 31 regulates the participation in SC discussions of UN Member States which are outside the Council and not

<sup>125</sup> See SC, *Note by the President of the Security Council*, UN Doc S/2012/937, 17 December 2012.

<sup>126</sup> As mentioned above, the author does not think that these two concepts of the law of treaties can always be differentiated from each other. See *supra* note 7 and accompanying text.

<sup>127</sup> UN, *Provisional Rules of Procedure of the SC*, *supra* note 52, 9, Rule 48 (in particular). On the different formats of SC meetings, see Bühler, ‘Article 28 UN Charter’, *supra* note 83.

necessarily involved in a dispute.<sup>128</sup> Accordingly, “specially affected” members of the UN may be invited by the SC to participate without a vote, something that is reiterated in the PRP.<sup>129</sup> But, when does this participation entail a right to make a statement and what does ‘specially affected’ actually mean? The practice of the SC and also of the broader UN membership participating in SC discussions has led to a rather broad and flexible interpretation of Article 31, as the establishment of the so-called ‘open debates’, sometimes also known as ‘open thematic debates’, demonstrates. Here, all UN Member States are invited to be present and to make statements if they so require. S/2010/507 mentions in this regard that “non-Council members”, without further classification, “may also be invited to participate in the discussion upon their request”.<sup>130</sup> These institutional evolutions achieved through practice permit to question if the Council is truly in each and every instance ‘the master of its own decisions’ – by which the Council’s core or its gatekeepers are usually meant.

### III. The Rotating Presidencies of the SC

Beyond hollow solemnities, the rotating presidencies of the SC offer an especially valuable tool-kit for non-permanent members given the relative agenda-setting power they entail, including the leading role of SC presidents in the negotiation of the Council’s *Monthly Programme of Work*. In the frame of SC reform plans that aspire to strengthen the role of NPM, it would be worth considering the design of a mechanism that could extend the duration of the rotating presidencies while guaranteeing the participation of each member at some point. The said powers are based on the PRP and have evolved over time through the organ’s practice,<sup>131</sup> and include, if not a prerogative, at least a clear preference to propose the organization of debates on themes that are of special interest to them; the powers of SC presidents entail thus a sort of ‘right of initiative’.<sup>132</sup> As seen above, NPM have played a predominant role in organizing recent debates on the rule of law and, most important, in signaling the direction

<sup>128</sup> *UN Charter*, Art. 31, *supra* note 3.

<sup>129</sup> UN, *Provisional Rules of Procedure of the SC*, *supra* note 52, esp. 7, Rule 37.

<sup>130</sup> SC, *Presidential Note*, UN Doc S/2010/507, *supra* note 52, 7, para. 36 (a) (iii) a.

<sup>131</sup> See UN, *Provisional Rules of Procedure of the SC*, *supra* note 52, esp. 1 & 2, Rules 1-3 & 7. Regarding the *Programme of Work*, see SC, *Presidential Note*, UN Doc S/2010/507, *supra* note 52, 7, paras 38-41.

<sup>132</sup> See Rodiles, ‘México y la Promoción del Estado de Derecho’, *supra* note 40, 212.

these discussions should follow. So-called ‘concept notes’<sup>133</sup> are crucial in this respect as they serve the purpose of specifying the contents of a subject to be discussed and to suggest the specific issues that participants, Council and non-Council members as well as special invitees, should address. These notes are not negotiated as such – though aspects of them are often presented to interested delegations, in and outside the Council, before issuing them, and might be very well the result of consultations within groups of like-minded States of which the Council member holding the rotating presidency, non-permanent or permanent, is a part of. They thus give considerable margin to the delegation of the initiative to prepare the ground for the discussion, and, in a certain way, for the negotiations among SC members on the presidential statement, which is the typical outcome of thematic debates.<sup>134</sup>

Usually, the themes to be discussed already form part of the Council’s agenda, but they can be modified as the evolution of the debates on the rule of law reveal.<sup>135</sup> New topics are not *a priori* excluded, but they normally face much greater resistance, especially from China and Russia, which not without having a point are particularly reluctant to expand the Council’s agenda, and indirectly its mandate – a reluctance which is however not that consistent when dealing with ‘evolving security challenges’, especially in Russia’s case.

An interesting case in this regard is the consideration of climate change by the SC. This has been a priority of a P5, the UK, which managed to bring the subject to the Council for the first time in 2007. The debate took place but many countries expressed their disagreement with the treatment by the SC of this subject, and no outcome could be achieved.<sup>136</sup> Four years later, another European country attaching great importance to the topic, Germany, not only

<sup>133</sup> ‘Concept notes’ on thematic debates in the SC are usually attached to the letters from the Permanent Representatives to the SG, through which the debate is announced to the wider membership. See, for instance, *supra* notes 67 and 81.

<sup>134</sup> ‘Statements by the President of the Security Council’ or ‘PRST’ are formal decisions of the SC and can thus be seen as a case of subsequent practice to Art. 27 *UN Charter*. For an excellent study on the juridical nature and legal implications of presidential statements, see S. Talmon, ‘The Statements by the President of the Security Council’, 2 *Chinese Journal of International Law* (2003) 2, 419. On the negotiation process of these important SC decisions, see Rodiles, ‘México y la Promoción del Estado de Derecho’, *supra* note 40, 211-221.

<sup>135</sup> See *supra*, section D.

<sup>136</sup> SC, ‘Security Council Holds First-Ever Debate on Impact of Climate Change on Peace, Security, Hearing Over 50 Speakers’, UN Press Release SC/9000, 17 April 2007, available at <http://www.un.org/News/Press/docs/2007/sc9000.doc.htm> (last visited 31 December 2013).

organized the second open debate but also delivered a presidential statement. After recognizing the responsibility of other UN organs and fora with regard to climate change, the presidential statement acknowledges the “possible adverse effects of climate change, in the long run, [on] [...] certain existing threats to international peace and security”.<sup>137</sup> Whatever one may think of the appropriateness of the SC dealing with climate change, which the author doubts, it is noteworthy how Germany understood that a classical concern of those outside the Council’s core is that the SC does respect the mandates of other UN organs, especially of the GA. It is of course true that the divisions regarding the treatment of climate change by the SC reflect to a large extent the general political differences on the subject, especially the developed-developing divide, the discrepancy between the European and the U.S. approaches, and the special role of the most affected, coalesced under the ‘Alliance of Small Island States’ (AOSIS).<sup>138</sup> It is thus not a matter between permanent and non-permanent members of the SC, or between the P5 and the rest. Even the differences among those who are skeptical are clear: For Russia, the linkages between the adverse consequences of climate change and international peace and security are not proved – a very different threshold as the one required by the same State in regard to terrorism and organized crime – whereas China relies on a historical argument about the different stages of economic and industrial development and its juridical expression of ‘common but differentiated responsibilities’, underlining at the same time that the Council is not the right forum for guaranteeing an extensive participation that can lead to widely acceptable proposals.<sup>139</sup> Nonetheless, Germany, as NPM, was able to build an admittedly weak consensus in the SC<sup>140</sup> – PRST are adopted by consensus – which can be attributed to its recognition of the importance of other UN organs and mechanism of the system.

The inflation of the Council’s agenda is not unproblematic, including for the rule of law. The episode described above is nevertheless revealing for an aspect which is related to the rule of law and where NPM have played, and have a great

<sup>137</sup> SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2011/15, 20 July 2011, 1 (para. 6).

<sup>138</sup> For further information, see <http://www.aosis.org/> (last visited 31 December 2013).

<sup>139</sup> See SC, *Verbatim Record of the 6587 Meeting*, UN Doc S/PV.6587, 20 July 2011, 9 & 13.

<sup>140</sup> See the statement of the Russian Federation, *ibid.*, 13, signaling its opposition to continue to consider the subject, which was evidenced in February 2013, when Pakistan and the UK had to resort to an ‘Arria-formula meeting’ to deal with climate change. See ‘Arria Formula Meeting on Climate Change’ (14 February 2013), available at <http://www.whatsinblue.org/2013/02/arrria-formula-meeting-on-climate-change.php> (last visited 31 December 2013). On ‘Arria-formula meetings’, see *infra* note 147 and accompanying text.

potential of continue playing a very active role. Bardo Fassbender has argued in favor of a SC that “attaches more importance to collective goods and interests of all peoples inhabiting the earth than to the individual goods and interests of the states represented in the Council”.<sup>141</sup> This has two among other possible readings. First, inasmuch as the SC keeps expanding its functions in order to keep pace with the dynamic nature of global threats to international peace and security, as it has done most notoriously by affecting fundamental rights of individuals through targeted sanctions, it cannot, at the same time, ignore the consequences – legal and political – of its actions. It must therefore grapple with ways to ensure review and accountability; with how it can itself improve respect for human rights and the rule of law. Open thematic debates offer a venue for this by facilitating the advice of independent experts who might be invited according to Rule 39 of its PRP,<sup>142</sup> and, more important, they ‘open’ the Council through dialogue and by actually granting a most suitable means for the reception of its actions by the broader membership, giving thus rise to what Georg Nolte calls the “residual power” of the international community and individual Member States of the UN “to determine the legality of Security Council action”.<sup>143</sup> Statements delivered during said debates are useful indicators of how the parties to the *UN Charter*, beyond those seating at the SC, evaluate the actions and decisions of the latter, including in respect to the purposes and principles of the *UN Charter* and international law. Independently from issues related to the formation of customary law, this not only represents a kind of political checks-and-balances mechanism but can eventually lead to the formation of subsequent practice in regard to *UN Charter* provisions relevant to the Council’s work and actions, or, to the contrary, demonstrate that certain evolutions inside the SC are not shared by the wider membership, and hence do not establish an agreement on a given interpretation of the Charter, in the sense of Art. 31 (3) (b) VCLT.<sup>144</sup> Of course, open thematic debates are not the only fora where States can express their legal views on SC actions, but due to their thematic nature, they facilitate – and are meant to do so – States’ pronouncements on certain issue-areas related to the

<sup>141</sup> Fassbender, ‘The SC: Progress is Possible but Unlikely’, *supra* note 119, 58.

<sup>142</sup> See UN, *Provisional Rules of Procedure of the SC*, *supra* note 52, 7, Rule 39.

<sup>143</sup> G. Nolte, ‘The Limits of the Security Council’s Powers and its Functions in the International Legal System: Some Reflections’, in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000), 315, 318.

<sup>144</sup> VCLT, Art. 31 (3) (b), *supra* note 6, 340. On subsequent practice, see further ILC, *First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, UN Doc, A/CN.4/660, 19 March 2013. See also G. Nolte (ed.), *Treaties and Subsequent Practice* (2013).

Council's work more broadly, i.e., beyond specific actions. Rule of law debates have proved to be particularly valuable in assessing the opinion of the wider membership on questions such as the extent to which the Council met or did not meet clear and fair procedures within its sanctions regimes, and in how far these measures might (still) violate international law.<sup>145</sup> In the frame of thematic debates on working methods, States have expressed their views on such matters as the proper implementation of Articles 31 and 32 *UN Charter*.<sup>146</sup>

It is no surprise that NPM have a greater interest in assessing the legality of the Council's actions than the P5, which also explains their willingness to convene open thematic debates rather frequently. In cases where this has not been possible, NPM have come-up with innovative formats, such as 'Arria-formula-meetings'. A now established practice named after its inventor, Venezuelan Ambassador Diego Arria, these meetings are very informal ('informal/informal' in UN parlance), no official records are made, and they take place outside the Council's conference rooms. They allow SC members to discuss those issues that are not (yet) able to be dealt with in an official Council meeting, and serve for the purpose of inviting non-state actors, apart from UN officials, to participate in the debates.<sup>147</sup> Mexico, for instance, organized an Arria-formula meeting in late 2009 on the impact of SC counter-terrorism measures on human rights with the participation of the International Commission of Jurists, which had previously launched a comprehensive report on the matter.<sup>148</sup>

Another possible way of reading Fassbender's suggestion is that in today's global disorder characterized by an increasing non-polarity,<sup>149</sup> it would be very unwise for the P5 to stick to a self-perception of the Council as the formal international sovereign at their sole service. If the Council is to remain relevant, it needs to incorporate the demands of those outside its core and beyond. This is even more palpable in face of the growing importance of the G-20 and other

<sup>145</sup> During the 2010 debate on the rule of law several States expressed their views on how far SC Res. 1904 (*supra* note 18) addressed due process concerns. See SC, *Verbatim Record of the 6347 Meeting*, UN Doc S/PV.6347, 29 June 2010 and SC, *Verbatim Record of the 6347 Meeting*, S/PV.6347 (Resumption 1), 29 June 2010.

<sup>146</sup> India and Pakistan expressed the view that more needs to be done to implement these UN Charter provisions. See SC, *Verbatim Record of the 6870 Meeting*, *supra* note 122, 11 & 20.

<sup>147</sup> See SC, *Presidential Note*, UN Doc S/2010/507, *supra* note 52, 12, para. 65.

<sup>148</sup> International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009).

<sup>149</sup> See *supra* notes 14 & 15 and accompanying text.

manifestations of “institutionalized summitry”.<sup>150</sup> It is not difficult to see why elected members are best-suited to augment the sphere of interests of the SC, and here the contributions of ‘recurrent’ and ‘occasional-NPM’ are especially valuable. But NPM members do not only bring their interests to the table, they do often represent the views of their friends outside the Council, too; be it informal groups of like-minded States or the more traditional G77, the NAM or even regional organizations. This is so because they rely on informal coalitions and standing alliances to augment their stance *vis-à-vis* the P5, but also because as ‘permanent members of the GA’, they are better advised not to forget where their alliances are stronger and more significant in the long run. In the same sense, NPM – as Germany’s handling of climate change in the SC may suggest – are, by necessity, more conscious of the risks that SC encroachment in other UN organs’ mandates entail. This might lead to more prudence while considering which situations and to what extent are “likely to endanger the maintenance of international peace and security”.<sup>151</sup> It is thus not so much about loyalties but about diplomatic calculations, and a greater sensitivity towards the needs and views ‘of the rest’ is above all a matter of identification. Precisely because of this, NPM can be regarded as being a most efficient vehicle to bring the Council closer to ‘collective goods and interests of all peoples’.

## F. Conclusions

There are good reasons for arguing that NPM are key players for incrementally improving the Council’s adherence to the rule of law. This holds true beyond a State’s particular rule of law rhetoric and actual practice, and might be just in their self-interest, since the promotion of transparency and participation within the SC has proven to be a powerful vehicle for guaranteeing, in the long term, non-permanent members’ influence on this body. It really does not need much explanation to understand why NPM are interested in clear working methods over sheer ad-hocism and excessive flexibility, just as it is quite clear that it is more difficult to keep secrets among five than fifteen – or twenty. This not only means greater transparency – the good relationship of many NPM

<sup>150</sup> Borrowing the expression from R. Feinberg, ‘Institutionalized Summitry’, in A. F. Cooper, J. Heine & R. Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (2013), 303. However, the author uses the expression here circumscribed to informal fora, such as the several ‘Gs’ and other summits that take place on a regular basis without being attached to a formal institution, like the ‘Nuclear Security Summit’.

<sup>151</sup> *UN Charter*, Art. 34, *supra* note 3. See also Fassbender, ‘The SC: Progress is Possible but Unlikely’, *supra* note 119, 60.

with the press and NGOs like *Security Council Report* is a good indicator of this<sup>152</sup> – it also favors a ‘culture of justification’, which given the importance of the Council in the international legal order can significantly contribute to “publicness in international law”.<sup>153</sup> The efforts of NPM here described might be deceptively characterized as ‘law-fare’, but this can only be taken seriously if international law is to be abandoned altogether. Otherwise, the strength of the ‘weak’, channeled through demands of objective predictability and procedural fairness, might indeed be a necessary component for the very existence of international law and for avoiding the collapse of a global order, however chaotic this may be today.

The improvements achieved so far through the insistence of NPM on the strengthening of the rule of law at the international level, as opposed to the one-sided transnational enterprise of rule of law promotion within States typically carried out by the UN, are rarely groundbreaking and rather incremental, as so much else in multilateral diplomacy. This is also the result of the need on behalf of NPM to make serious efforts for understanding the reasons for the reluctance of the P5, notwithstanding that these reasons might not be shared or even vehemently opposed. This step-by-step approach reminds of the limits NPM encounter, but should not be underestimated: A vague commitment to respect the *UN Charter* and international law by the Council might cause some arrogant laughter or sincere disappointment, but it can prepare the ground for later expressing a further commitment to fair and clear procedures, which in turn can path the way to effectively integrate due process rights into the sanctions regimes. It is nothing popular to say, but the author does not think that there is much value in introducing certain concepts or formulas to SC resolutions and other documents, which are *en vogue* in academic circles and inflate expectations of activists and in the public, like ‘R2P’, if this, at the end, contributes to unnecessarily upset key decision-takers and fortify divisions in the international community.

By bringing more legitimacy to the Council, NPM do contribute to enhancing its efficiency, and in a non-polar world, the SC depends ever more on this contribution.<sup>154</sup> But this is not entirely unproblematic for those outside the

<sup>152</sup> On this see M. A. Morales, ‘Medios de Comunicación y el Consejo de Seguridad’, in Dondisch, *supra* note 40, 225.

<sup>153</sup> See B. Kingsbury, ‘International Law as Inter-Public Law’, in H. S. Richardson & M. S. Williams (eds), *Moral Universalism and Pluralism* (2009), 167, 178 & 179-183.

<sup>154</sup> See, for example, the remarks by the former Legal Adviser of Mexico (Ambassador Joel Hernández), *supra* note 41.

Council's core. Does legitimacy not reveal itself – again – as a rather conservative force that acts against change?<sup>155</sup> Would this not mean that NPM, through all their work in relation with the rule of law and other related aspects, end-up working in the service of the P5? The question is valid but it loses practical relevance in light of the fact that the vast majority of States is not prepared for a major change of the system. This is not only due to lack of alternatives but very much to the fact that States regard the system as their common construction, however imperfect and unfair in certain of its structures. As long as changes in the system are preferred, non-permanent membership in the SC remains a meaningful and powerful instrument for achieving them, including through practice as a legal means of institutional transformation over time. This article has tried to show how NPM have significantly contributed to changes in the system, especially in regard to the adherence of the Security Council to the international rule of law. From this point of view, increasing the number of permanent members does not seem to be desirable.

<sup>155</sup> Cf. Hurd, *supra* note 4, 203.

