

CLIMATE CHANGE AND THE SECURITY COUNCIL:
A PRELIMINARY FRAMEWORK FOR IMPLEMENTING REMEDIAL
MEASURES THROUGH CHAPTER VII OF THE UN CHARTER



Christopher K. Penny



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A CISDL WORKING PAPER

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1. Introduction

International cooperation, state compliance, and policy coherence are necessary elements in any strategy to address and mitigate the clear global threat posed by climate change. The 2005 entry-into force of the Kyoto Protocol¹ marked a significant step towards achieving these goals, building on general principles established in the 1992 Framework Convention.² Ongoing international efforts, including the 2005 COP11/MOP1 in Montreal, may further strengthen and expand this regime. However, despite these important developments, the continuing inadequacy of current responses to climate change suggests that voluntary measures alone may not be sufficient to meet this challenge. Recognizing this possibility, the following CISDL working paper assesses the potential for the United Nations [UN] to require states to cooperate to address the causes of climate change, proposing a preliminary framework for the coherent implementation of global remedial measures.³

This paper explores institutional mechanisms available to the Security Council to combat climate change, building upon arguments that the application of Chapter VII enforcement measures to address this threat falls within its jurisdiction as established in the UN Charter.⁴ Part 2 summarizes arguments establishing Security Council legal authority to address climate change as a ‘threat to international peace and security,’ followed in Part 3 by a discussion of the remedial mechanisms available to this institution following any such characterization. This analysis demonstrates that the establishment of a subordinate Environmental Security Committee to monitor and facilitate state implementation of mandatory legislative measures to combat the causes of climate change would be consistent with accepted understandings of Security Council

¹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, (1998) 37 I.L.M. 22 [Kyoto Protocol].

² United Nations Framework Convention on Climate Change, (1992) 31 I.L.M. 849 [Framework Convention].

³ This paper neither advocates nor foresees the immediate adoption of Chapter VII remedial measures by the Security Council through this framework. In fact, a workable legal and institutional framework is a necessary but not sufficient precondition for the Security Council to implement effective remedial measures. Establishing and maintaining the political will to invoke Chapter VII authority and impose any such mechanism, and to ensure continued practical state support, is a crucial additional element. Although these political issues are beyond the scope of the current paper, it is clear that voluntary mechanisms can and should be attempted first, recognizing that without first strengthening state acceptance of remedial climate change measures any mandatory implementation by the Security Council would be premature and likely ineffective. However, in the event that voluntary mechanisms prove insufficient to stem the causes of climate change, it is important to understand the authority available to the Security Council to require state action and the manner in which it might be implemented. This paper seeks to initiate discussion of this issue, with the long-term goal of developing an institutional framework to respond to this emerging threat in a rational and methodical manner, if and when required.

⁴ Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No. 7 <www.un.org/> [UN Charter]. Unless otherwise indicated, all references to Articles or Chapters refer to provisions of the UN Charter.

authority.⁵

2. Climate Change as an Emerging ‘Threat to International Peace and Security’

This Part outlines the practical and legal basis for addressing climate change as a threat falling within the jurisdiction of Security Council. Following a brief overview of the projected security implications of climate change, this Part summarizes legal arguments supporting its future characterization by the Security Council as a ‘threat to international peace and security’.⁶

2.1 Security Implications of Climate Change

There is little scientific disagreement that climate change is occurring and will continue for the foreseeable future, although estimates vary concerning its extent and severity.⁷ While this is an obvious environmental concern, it will also have significant security implications. The projected consequences of climate change, direct and indirect, pose clear and recognized threats both to individual well-being and to the maintenance of international peace and stability.⁸ Although these challenges have not yet fully materialized, this does not mean that the overall threat posed

⁵ This paper summarizes and expands upon arguments outlined in Christopher K. Penny, “Greening the Security Council: Climate Change as an Emerging ‘Threat to International Peace and Security’,” *Fragmentation: Diversification and Expansion of International Law*, 2005 Canadian Council on International Law Conference Proceedings (Ottawa: CCIL, 2006) [publication forthcoming].

⁶ The remedial mechanisms available to the Security Council following such a characterization are analysed in Part III, below.

⁷ A 2005 report of the Secretary-General underscored the threat posed by climate change, arguing that:

[o]ne of the greatest environmental and development challenges in the twenty-first century will be that of controlling and coping with climate change. The overwhelming majority of scientists now agree that human activity is having a significant impact on the climate. Since the advent of the industrial era in the mid-eighteenth century, atmospheric concentrations of greenhouse gases have increased significantly, the earth has warmed considerably and sea levels have risen measurably. The 1990s were the warmest decade on record, forcing glaciers and Arctic ice to retreat. With the concentration of greenhouse gases projected to rise still further over the next century, a corresponding increase in the global mean surface temperature is likely to trigger increased climate variability and greater incidence and intensity of extreme weather events, such as hurricanes and droughts.

UN Secretary-General Kofi Annan, *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, UN Doc. A/59/2005, 21 March 2005, <www.un.org/largerfreedom/report-largerfreedom.pdf> at ¶60 [*In larger freedom*].

⁸ The Framework Convention itself recognizes that climate change may have significant “adverse effects”, defined in Article 1(1) as “changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.” *Supra* note 2.

by climate change is any less real.⁹

There is little doubt that the global security implications of climate change will be significant, albeit for some states more than others.¹⁰ Climate change can be expected to contribute to resource scarcity in various regions, with corresponding negative security implications. In turn, this can be expected to generate long-term population displacement, both internal and international. Resource scarcity may also exacerbate conflict in regions already prone to violence, particularly in rural areas of the developing world, with corresponding additional cross border implications, including further destabilizing refugee flows.¹¹ Environmental conditions resulting from climate change may also exacerbate the spread of disease, compounded by the effects of population displacement and conflict.¹² Perhaps the most obvious security implication of climate change is posed by projected sea-level increases, which threaten to inundate low-lying coastal areas and islands and will almost certainly lead to significant population displacement and the disappearance of some UN Member states in their entirety.¹³

⁹ The following section briefly summarizes some of the potential security implications of climate change. For more detailed discussion of these projected consequences see, e.g., papers presented at the *Human Security and Climate Change* workshop <http://www.cicero.uio.no/humsec/list_participants.html> along with papers presented at the Centre for International Sustainable Development Law workshop on *Strengthening Climate Cooperation, Compliance and Coherence*, collected in this present volume. See also the Global Environmental Change and Human Security Program <www.gechs.org>.

¹⁰ The UN Secretary-General recently noted the inequitable national security implications of these developments for some states, observing that:

[t]he countries most vulnerable to such changes — small island developing States, coastal nations with large numbers of people living in low-lying areas, and countries in the arid and semi-arid tropics and subtropics — are least able to protect themselves. They also contribute least to the global emissions of greenhouse gases. Without action, they will pay a bitter price for the actions of others.

In larger freedom, *supra* note 7 at ¶60.

¹¹ See, e.g., Thomas Homer-Dixon, *Environment, Scarcity and Violence* (Princeton: Princeton University Press, 1999): 166-67, 179-80. See also J.R. McNeil, “Environmental Change and Security,” Chapter 8, *Grave New World: Security Challenges in the 21st Century*, ed. M.E. Brown (Washington, DC: Georgetown University Press, 2003): 178-196, at 185ff. Large refugee flows necessarily pose stability concerns for host governments, regardless of their ideological or physical motivation.

¹² See, e.g., United Nations, *A more secure world: Our shared responsibility: Report of the High-level Panel on Threats, Challenges and Change*, UN Doc. A/59/656 (2 December 2004) [High-level Panel], at ¶22, recognizing that “climate change exacerbates the occurrence of such infectious disease as malaria and dengue fever” and referring to a joint study of the World Health Organization, World Meteorological Organization and the United Nations Environment Programme.

¹³ Climate change will have some positive implications as well, at least for some states. For example, it may permit widespread farming on previously inhospitable terrain or commercial passage through now-frozen waterways. However, these potential benefits of climate change do not necessarily, or even likely, offset its projected long-term negative consequences. Indeed, political uncertainty generated by climate change, whatever its practical effects, raises substantial security concerns for states.

2.2 Security Council Authority to Address Climate Change

Given these implications, authority exists to address climate change through Security Council enforcement mechanisms. Within the UN, the Security Council is conferred “primary responsibility for the maintenance of international peace and security.”¹⁴ To fulfill this role, Member states endowed it with significant enforcement authority through the UN Charter, as interpreted and applied since the Organization’s establishment in 1945.¹⁵ Although the Security Council cannot act outside of the powers vested in it, implicitly or explicitly, by UN Members, this treaty vests it with significant authority to realize its ‘primary responsibility,’ provided that its mandatory decision-making threshold is achieved.¹⁶ Particularly since the end of the Cold War, the Security Council has begun to address emerging non-traditional security challenges within the enforcement framework delineated in Chapter VII of the UN Charter. Invocation of Security Council authority to address the threat posed by climate change would be consistent with this evolving institutional practice.

In addition to assisting states with the resolution of disputes¹⁷, the Security Council “may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security”, either in its own right or following a referral from a UN Member state.¹⁸ Subsequent characterization of the situation as a ‘threat to international peace and security’¹⁹ permits the Security Council to invoke the binding

¹⁴ UN Charter, Article 24(1).

¹⁵ For a detailed analysis of the UN Charter and its interpretation and application since 1945, see Bruno Simma *et al.*, ed., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002).

¹⁶ Article 27(3) provides that substantive Security Council decisions on non-procedural matters require “an affirmative vote of nine members including the concurring votes of the permanent members”. This effectively grants each permanent member a veto over Security Council decision making. However, it is now accepted as a result of UN practice that ‘concurring vote’ also includes abstention, with the result that substantive Security Council decisions may be taken with the affirmative vote of any nine members, so long as no P5 member actually casts a negative vote. See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, [1971] I.C.J. Rep. 16 [Namibia], at 16, 22. See also Simma, *ibid* at 493. The permanent members of the Security Council are: China, France, the Russian Federation, the United Kingdom, and the United States.

¹⁷ Chapter VI of the UN Charter outlines numerous non-binding mechanisms available to the Security Council to assist Members in the pacific resolution of disputes likely to threaten international peace and security, including “recommend[ing] appropriate procedures or methods of adjustment”. Article 36(1). See also Articles 33(2), 37(2), and 38. Although the Security Council has frequently exercised its authority under Chapter VI to assist in the maintenance of international peace and security, Members are not required to follow any resulting Security Council recommendations. Instead, implementation of Chapter VI measures rests on Member consent to the specific proposed measure.

¹⁸ Articles 34, 35(1).

¹⁹ Article 39 provides:

enforcement authority established by Chapter VII, and recommend or require remedial state action, up to and including the use of armed force.²⁰

For the Security Council to address climate change through Chapter VII, therefore, the principal substantive threshold issue is whether this phenomenon can properly be characterized as a ‘threat to international peace and security’. The UN Charter places such determinations within the discretion of the Security Council, without establishing formal decision-making criteria.²¹ As a result, the legal meaning of this concept has developed and evolved through actual organizational practice.²²

Traditional understandings of ‘threats to international peace and security’ focused on cross-border security issues. However, invocation of Chapter VII is not limited to international armed conflicts. Indeed, in the Organization’s recent practice, civil wars have frequently formed the basis for Security Council enforcement measures.²³ Over the past decade, massive internal humanitarian catastrophes have also led to the invocation of Chapter VII authority. Supporting these recent expanded interpretations of its authority, Security Council resolutions invoking Chapter VII typically continue to refer to the international security ramifications of the situation in question, in particular cross-border refugee flows and the potential for international conflict.²⁴

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.

The phrase ‘threat to international peace and security’ is used in this chapter to refer to any matter falling within this Security Council authority.

²⁰ See Article 39. Specific enforcement measures available to the Security Council are discussed in more detail in Part III below.

²¹ Despite its substantial scope, Security Council authority to maintain international peace and security is not unlimited. Article 24(2) expressly provides that “[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations”, which are defined in Articles 1 and 2, respectively. However, the UN Charter does not establish any formal review mechanisms to assess Security Council decision-making in this context. The ICJ does not expressly possess this authority, nor do other UN organs. In any event, state acquiescence in recent Security Council responses to non-traditional threats suggests that further expansive interpretations of Chapter VII based on these precedents would withstand legal challenge.

²² For a general overview see Simma, *supra* note 15 at 718-27.

²³ Recent situations where civil wars have formed the basis for a Chapter VII invocation include: the Democratic Republic of the Congo (Security Council Resolution 1493 (28 July 2003); and, Côte d’Ivoire (Security Council Resolution 1528 (27 February 2004));

²⁴ See, *e.g.*, Security Council responses to humanitarian crises in Côte d’Ivoire, the Democratic Republic of Congo, Haiti, Kosovo, Somalia and Sudan. Ratner argues that “resolutions included the usual transborder link to refugees or arms flows to placate states like China that feared a prodemocratization push under the guise of ending threats to the peace.” Steven R. Ratner, “The Security Council and International Law,” Chapter 37, *The UN Security Council: From the Cold War to the 21st Century* (Boulder, Co.: Lynne Rienner, 2004): 591-605, at 598. In at least some

Until recently, Security Council characterizations of ‘threats to international peace and security’ focused on discrete and geographically-restricted situations, with Chapter VII measures directed against specific states or non-state entities to remedy particular and defined threats.²⁵ However, starting in the late 1990s, the Security Council began to address broad issues relating to conflicts in general.²⁶ Following terrorist attacks in the United States on 11 September 2001, the Security Council further expanded the concept of ‘threat to international peace and security’, eliminating any reference to geographic or temporal restrictions in resolutions expressly invoking Chapter VII.²⁷ The Security Council has also recently turned itself to the potential security implications of other non-traditional threats, in particular the HIV/AIDS pandemic, signaling its willingness to further expand the concept of ‘threat to international peace and security’.²⁸

Characterization of climate change as a ‘threat to international peace and security’ would be consistent with this established Security Council practice. The projected cross-border implications of this environmental phenomenon, in particular large-scale refugee flows, are themselves sufficient to warrant the invocation of Chapter VII enforcement authority, bolstered by their potential for conflict exacerbation and profound national security implications for low-lying island states. Security Council interventionism on these bases has been accepted by UN Members in other circumstances, and rests on a solid legal foundation. Such a characterization would be consistent with evolving Security Council acceptance of non-traditional security issues as ‘threats to international peace and security’ within the meaning of Chapter VII.

3. A Preliminary Framework for the Implementation of

circumstances, Security Council characterization of the underlying situation as an actual threat to ‘international peace and security strains credibility. See, e.g., Security Council characterizations of the humanitarian disaster in Somalia and the military coup in Haiti, both in the early 1990s, as threats to international peace and security.

²⁵ See, e.g., Paul Szasz, “The Security Council Starts Legislating,” (2002) 96(4) Am. J. Int’l. L. 901 at 901-2.

²⁶ For example, the Security Council discussed the threats posed by armed conflict to civilians, and also specifically to children, though without specifically invoking Chapter VII or imposing mandatory enforcement measures following such characterizations. See, e.g., Security Council Resolutions 1265 (17 September 1999) and 1261 (30 August 1999), respectively. See also Szasz, *supra* note 25 at 902. Instead, the Security Council typically recommended (e.g. ‘called upon’ or ‘urged’) that Members ratify treaties or otherwise bring their actions into compliance with international standards.

²⁷ Not only did the Security Council declare these specific terrorist attacks to be ‘threats to international peace and security’, it also recognized the threat posed by international terrorism in general. See, in particular, Security Council Resolution 1373 (28 September 2001), which contains no specific reference to al-Qaeda.

²⁸ As early as 1992, a Presidential Statement of the Security Council recognized that “[t]he non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to international peace and security.” UN Doc. S/PV.3046 (31 January 1992), cited in Szasz, *supra* note 25 at 904 fn. 33. See also Security Council Resolution 1308 (17 July 2000), specifically addressing the threat posed by HIV/AIDS. Recent UN reform recommendations have advocated further Security Council treatment of HIV/AIDS as a ‘threat to international peace and security’. High-level Panel, *supra* note 12 at ¶67. However, the Security Council has not yet indicated a willingness to impose Chapter VII remedial measures to address this humanitarian catastrophe.

Remedial Measures

Following its invocation of Chapter VII, this Part assesses the institutional framework within which the Security Council may implement and oversee mandatory measures to mitigate the long-term security threat posed by climate change. In particular, it focuses on mechanisms available to this organ to address the causes of climate change resulting from human activity²⁹, specifically the production of greenhouse gases.³⁰ Building upon a discussion of relevant legal and organizational precedents, this Part illustrates that the creation of an Environmental Security Committee for the implementation and oversight of remedial measures designed to reduce human production of greenhouse gases would be consistent with current understandings of Security Council Chapter VII authority.³¹

3.1 Legal Authority

UN Member states are obligated as a matter of law to comply with mandatory measures established by the Security Council. Article 25 provides that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”³² This obligation extends not only to direct state implementation of Security Council decisions, but also to “action in the appropriate international agencies of which they are members”.³³ Member state obligations under the UN Charter supercede all other treaty

²⁹ There is almost certainly a direct and significant causal link between climate change and preventable human activity, in addition to the natural environmental factors influencing this phenomenon. As UN Secretary-General Kofi Annan observed, “[t]he overwhelming majority of scientists now agree that human activity is having a substantial impact on the climate.” *In larger freedom*, *supra* note 7 at ¶60. The Framework Convention itself defines “climate change” as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.” *Supra* note 2, Article 1(2).

³⁰ The principal man-made contributors to climate change have been identified as greenhouse gases. For the purposes of this paper, “greenhouse gases” are defined in accordance with the Framework Convention, *ibid*, as “those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.” Article 1(5).

³¹ To the extent that climate change fuels actual intra- or inter-state conflict, the Security Council also possesses clear legal authority to authorize and implement Chapter VII enforcement measures to restore international peace and security, including the use of force. Any such measures would be implemented through more traditional conflict management mechanisms used by the Security Council, such as the authorization of peacekeeping and military peace enforcement operations, and thus fall outside of the scope of this study.

³² Article 48(1) reiterates this obligation, establishing that:

[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

³³ Article 48(2).

commitments.³⁴

Once the Security Council has characterized a situation as a ‘threat to international peace and security,’ Chapter VII grants it substantial discretionary authority to take decisions requiring state action.³⁵ Article 41 establishes Security Council authority to implement non-forceful³⁶ measures, providing that:

[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

This authority has been interpreted broadly since the UN’s establishment in 1945, and it is now accepted that the measures specifically delineated in Article 41 are non-exhaustive, serving as “merely illustrative examples”.³⁷

While continuing to utilize more traditional enforcement measures, such as economic sanctions, the Security Council has also recently used Article 41 to require Member states to adopt national legislative measures. This dramatic evolution in Security Council practice occurred with its adoption of Resolution 1373 (28 September 2001), requiring domestic legislative enactments to address the threat to international peace and security posed by terrorism.³⁸ While Chapter VII resolutions have typically focused on a single situation in a specific geographical area, this Security Council imposition of legislative requirements addresses an open-ended and general

³⁴ Article 103 establishes this legal hierarchy, in which obligations under the UN Charter are paramount over all other international (treaty) obligations, providing that:

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

³⁵ The practical effectiveness of measures adopted pursuant to Chapter VII does not determine their legality. Indeed, the International Criminal Tribunal for the Former Yugoslavia concluded in *Tadic* that “[i]t would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends”. *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 October 1995), (1996) 35 I.L.M. 32 [*Tadic*] at 73.

³⁶ Chapter VII also permits the Security Council to authorize measures involving the use of armed force, through Article 42. However, given the focus of this chapter on mitigating the causes of climate change, this section focuses exclusively on remedial measures “not involving the use of armed force”.

³⁷ *Tadic*, *supra* note 35 at 71. See also *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, 1962 I.C.J. Rep. 151 [*Certain Expenses*]; Simma, *supra* note 15 at 740-6; Szasz, *supra* note 25 at 904.

³⁸ This resolution requires Member states to adopt wide-ranging counter-terrorism legislative measures, including in particular measures to stem terrorist financing and facilitate prosecution.

international security threat.³⁹ Resolution 1373 also demonstrates Security Council authority to create, and not simply codify, international legal obligations⁴⁰, bolstered by the presumption of Security Council legality when addressing threats to international peace and security.⁴¹ State acquiescence in this and other expansive historical interpretations of Article 41 support the continued exercise of this authority.⁴² In fact, a similar process was repeated in 2004 with the adoption of Resolution 1540, which imposed upon UN Member states non-proliferation obligations relating to weapons of mass destruction.⁴³

To ensure state compliance with Article 41 measures, the establishment of state reporting obligations pursuant to Chapter VII is an accepted Security Council practice. For example, Resolutions 1373 and 1540 both require Members to submit comprehensive reports detailing their progress in implementing mandatory enforcement measures. More invasive monitoring regimes may also be authorized through Article 41, such as the highly intrusive weapons inspections imposed upon Iraq by the Security Council in the 1990s.⁴⁴

To facilitate and ensure implementation of Chapter VII measures, the Security Council may establish subordinate bodies, for example to receive state reports or oversee inspection regimes. Express legal authority for it to establish “such subsidiary organs as it deems necessary for the performance of its duties” is provided in Article 29.⁴⁵ In recent UN practice, this mechanism has

³⁹ Without a defined temporal limitation, the measures imposed by Resolution 1373 will continue in force until terminated by the Security Council. See discussion in Ilias Bantekas, “The International Law of Terrorist Financing,” (2003) 97(2) Am. J. Int’l. L. 315 at 326, and Szasz, *supra* note 25 at 902.

⁴⁰ Codification of an existing principle of customary international law is within the legal authority of the Security Council. See, e.g., Security Council Resolution 827 (25 May 1993), codifying crimes against humanity in the Statute of the International Criminal Tribunal for the Former Yugoslavia, resting on existing customary legal prohibitions. In contrast, Resolution 1373 effectively imposes upon UN Members obligations drawn from the 1999 International Convention for the Suppression of the Financing of Terrorism [Terrorist Financing Convention]. December 1999, 39 I.L.M. 270 (2000). However, only four UN Members had ratified this treaty before the adoption of Resolution 1373, with another 46 signatories, and it had not even entered into force. This limited ratification, and inconsistent state practice, suggests that the provisions imposed by the Security Council had not necessarily obtained customary international legal status by 2001, despite their prior reflection in General Assembly resolutions over the preceding decade. See, e.g., Bantekas, *ibid*; Eric Rosand, “Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism,” (2003) 97(2) Am. J. Int’l. L. 331-341, at 334. Nonetheless, belying this uncertainty, Resolution 1373 imposed sweeping counter-terrorism obligations on all UN Members, many with significant domestic legislative implications. See Bantekas, *ibid*.

⁴¹ See, e.g., Certain Expenses, *supra* note 37 at 167-8.

⁴² See, e.g., Ratner, *supra* note 24 at 601; and, Szasz, *supra* note 25 at 903. But see Simma, *supra* note 15 at 708-9, noting the importance of continued state acquiescence in the exercise of quasi-legislative functions by the Security Council.

⁴³ Security Council Resolution 1540 (28 April 2004).

⁴⁴ See, e.g., Security Council Resolution 687 (3 April 1991).

⁴⁵ *Supra* note 4. For example, this authority supported the establishment of the *ad hoc* criminal tribunals by the Security Council. See, e.g., *Tadic*, *supra* note 35. See also Simma, *supra* note 15 at 539-563. This provision is in addition to the general authority established pursuant to Article 41 itself.

been adopted frequently to establish sanctions monitoring committees.⁴⁶ It has also been used to monitor state compliance with mandatory counter-terrorism and non-proliferation obligations.⁴⁷ In the latter cases, the Security Council expressly included capacity-building roles for its subordinate committees, in addition to their monitoring and oversight functions.

3.2 An Environmental Security Committee

To address a threat to international peace and security, the Security Council may establish a subsidiary committee to oversee state implementation of mandatory legislative measures. Given the global nature of the threat posed by climate change, this issue may in future warrant the implementation of coherent environmental policies through such a mechanism. Recognizing this fact, the following section discusses the potential establishment of an Environmental Security Committee by the Security Council to address the causes of climate change.

Security Council-imposed climate change measures would override other state treaty obligations by virtue of the primacy provisions of the UN Charter.⁴⁸ Thus, while the Framework Convention and Kyoto Protocol both reaffirm the principle of state sovereignty⁴⁹, this is not a legal bar to the implementation by the Security Council of Chapter VII enforcement measures to respond to the threat posed by climate change.⁵⁰ In fact, the practical and legal regimes established by these treaties provide a solid foundation upon which the Security Council may continue to build.

It would be within the authority of the Security Council to require state implementation and enforcement of legislation attacking the causes of climate change, in particular through the domestic reduction of greenhouse gas production.⁵¹ Although pre-existing legal principles are

⁴⁶ For example, the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities.

⁴⁷ With Resolution 1373, the Security Council established (what became) the Counter-Terrorism Committee, later bolstered by a Counter-Terrorism Executive Directorate through Security Council Resolution 1535 (26 March 2004). Resolution 1540 also established an oversight committee structure to monitor the implementation of non-proliferation obligations.

⁴⁸ In particular, Article 103.

⁴⁹ See, respectively, *supra* note 1, and *supra* note 2.

⁵⁰ As Ratner notes, Chapter VII and Article 103 give the Security Council “the ability to alter the international legal landscape instantaneously.” *Supra* note 24 at 592.

⁵¹ Specific legislative requirements could vary in content from overall emissions-reduction standards, leaving specific mechanisms to be determined by individual states, to targeted measures directed at identified industries. This may include adherence to standards enunciated in the Kyoto Protocol, or the implementation of an entirely different emissions control regime.

Even if scientific uncertainty remains concerning the specific causes of climate change and the most appropriate remedies, this would not bar Security Council enforcement action. Effectiveness is not a legal requirement for the invocation of Chapter VII measures. In any event, this would also be consistent with the ‘Precautionary Principle’

not required to found Chapter VII enforcement measures, there is already a substantial legal basis upon which the Security Council might build. Customary international law already clearly prohibits states from knowingly allowing their territory to be used to cause harm to other states.⁵² To date, a problematic issue for using this law to address climate change effects has been the establishment of individual state responsibility for particular environmental consequences in defined geographical areas. The Security Council could overcome this problem by requiring Member action based on the general legal principle prohibiting cross-border environmental harm, recognizing the threat posed to all states by irresponsible use of national territory leading to the excessive production of greenhouse gases, despite the absence of direct causal links between these emissions and specific and identifiable ‘victim’ states.⁵³ The Security Council may also draw upon more specific legal principles established in the Kyoto Protocol and other environmental treaties, should it so desire. It may, for example, impose varying levels of legal and practical obligations on states, recognizing their specific economic interests and contribution to climate change.⁵⁴ This would be consistent with the “common but differentiated responsibilities” recognized in both the Framework Convention and Kyoto Protocol.⁵⁵ To oversee the implementation of any such mandatory emissions-control measures, the Security Council would be within its authority to establish a subsidiary Environmental Security

delineated in the Framework Convention, which recognizes that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures”. *Supra* note 2, Article 3(3). See also Rio Declaration on Environment and Development, (1992) 31 I.L.M. 876 [Rio Declaration].

⁵² See, e.g., *Trail Smelter Arbitration*, (1941) 3 R.I.A.A. 1905; and, Rio Declaration, *ibid*, Principle 2. See also *Corfu Channel Case, Judgment of 9 April 1949*, 1949 I.C.J. Rep. 4. This general legal responsibility is acknowledged within the Preamble of the Framework Convention itself, *supra* note 2, which recognizes that:

that States have, in accordance with the Charter of the United Nations and the principles of international law, ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,

⁵³ Resolution 1373 establishes a precedent for responsibility resulting to address non-specific threats with indirect, or difficult to substantiate, causal links to particular state action. Prior to this resolution there was no clear international legal obligation to curtail terrorist financing in general. While a state could bear international legal responsibility for financing or otherwise supporting a particular attack, directly or indirectly, in the absence of a link to particular and specific harm, a state would not necessarily, or even likely, have attracted legal responsibility for permitting its territory to be used to raise funds for terrorist causes in general. Resolution 1373 altered this balance, requiring states to act against terrorism on the basis that it would eventually cause harm to some other as yet unidentified state and that it therefore threatened international peace and security in general. This Security Council action built on years of General Assembly condemnation of terrorism and other less-comprehensive international counter-terrorism measures, as would any Security Council enforcement measures to combat climate change.

⁵⁴ Indeed, in its early practice the CTC recognized varying levels of state capacity to implement Resolution 1373, despite the legally-uniform obligations established through this mechanism. This relative approach by the CTC garnered significant early support by UN Members. Rosand, *supra* note 93 at 335.

⁵⁵ *Supra* note 1, Preamble and *supra* note 2, Article 10. In addition, states could be compensated if disproportionately affected by enforcement measures enacted to combat climate change, whether through a purposive reading of Article 50 or as a result of authority established elsewhere in Chapter VII, in particular in Article 41.

Committee.⁵⁶ It could require periodic state reporting to this body on legislative implementation and emissions reduction, with detailed assessment of specific national remedial measures and their practical effect. As a matter of law, this body could even be vested with binding authority to conduct intrusive examinations on the territory of particular states to monitor their compliance and verify state reports. Capacity-building assistance may be also provided through such a subsidiary mechanism, to facilitate and strengthen state compliance with remedial measures. If necessary, the Security Council also possesses the legal authority to impose economic sanctions or other more forceful measures to compel state compliance with any such mandatory climate change regime.⁵⁷

4. Conclusion

Climate change poses a clear long-term threat to international peace and security. In 2000, UN Secretary-General Kofi Annan recognized that environmental issues and other current security challenges “require us to think creatively, and to adapt our traditional approaches to better meet the needs of our new era.”⁵⁸ While the past decade has witnessed substantial and necessary institutional adaptation to environmental degradation, ongoing creativity is required to respond to the clear long-term threats posed by global climate change.

Confronting this challenge as a threat to international peace and security would be consistent with evolving Security Council practice. If necessary, implementation of Chapter VII enforcement measures could facilitate the establishment of coherent global environmental policies and further state reduction of greenhouse gas production. While falling within Security Council authority, to the extent that legislative or institutional mechanisms are adopted to address climate change through Chapter VII mechanisms, political rather than legal concerns will dictate their success. As a result, any such measures will require general state recognition of the threat faced by the international community and the need for global action. Parties to the Framework Convention and Kyoto Protocol must work to build this foundation. Not only will this facilitate the implementation of Chapter VII measures, should the need arise, it may also help to ensure that Security Council environmental enforcement is never required.

⁵⁶ Current environmental institutions may provide additional existing mechanisms through which the Security Council could operate. This would be consistent with Article 48(2), which requires state support for enforcement measures individually and through international institutions of which they are members.

⁵⁷ Economic sanctions are expressly contemplated in Article 41, and have been used frequently by the Security Council as enforcement measures.

⁵⁸ *We the Peoples': The Role of the United Nations in the 21st Century*, Millennium Report of the Secretary-General, UN Doc. A/54/2000, 3 April 2000 <<http://www.un.org/millennium/sg/report/full.htm>> at ¶197.

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