

TOWARDS A THEORY OF DEMOCRATIC  
COMPLIANCE: SECURITY COUNCIL LEGITIMACY  
AND EFFECTIVENESS AFTER IRAQ

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Today, no nation can possibly claim that Iraq has disarmed . . . . Yet, some permanent members of the Security Council have publicly announced they will veto any resolution that compels the disarmament of Iraq. These governments share our assessment of the danger, but not our resolve to meet it . . . . [The] Security Council has not lived up to its responsibilities, so we will rise to ours.<sup>1</sup>

President George W. Bush

[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.<sup>2</sup>

Professor Louis Henkin

I. INTRODUCTION

President George W. Bush's March 17, 2003, speech was notable for a number of reasons, not least of which was his claim that the Security Council's failure to authorize an inva-

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1. President George W. Bush, Remarks in Address to the Nation (March 17, 2003) (transcript available at <http://www.whitehouse.gov/news/releases/2003/03/print/20030317-7.html>).

2. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

sion of Iraq justified unilateral action by the United States. While his administration rested its formal legal argument on the prior authorization granted by Security Council Resolutions 678,<sup>3</sup> 687,<sup>4</sup> and 1441,<sup>5</sup> Bush's remarks clearly express the underlying view held by his administration and perceived by the international community: The United States would not be held hostage by a Security Council that was unable, or unwilling, to effectively address and counter threats to the American public.<sup>6</sup> Rather, U.S. policy would be dictated by U.S. interests, a view firmly established by the Bush administration's *National Security Strategy (NSS)*.<sup>7</sup>

What role does international law play in this new strategic thinking? A cursory glance through the *NSS* yields one answer: not much. In propounding a new policy of preventive war,<sup>8</sup> the *NSS* pays scant attention to substantive international law, and even less attention to procedural questions: *Who* implements international law, decides *what* it means, and *when* it has been broken? *What* procedures should be followed in making such determinations? Even read charitably, the *NSS* fails to address any of these questions, ostensibly leaving their answers to individual states. A more cynical assessment might view the *NSS* as an explicit attempt by the Bush administration to wrest power from established international institutions.

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3. S.C. Res. 678, U.N. SCOR, 2963d mtg., U.N. Doc. S/RES/678 (1990).

4. S.C. Res. 687, U.N. SCOR, 2981st mtg., U.N. Doc. S/RES/687 (1991).

5. S.C. Res. 1441, U.N. SCOR, 4644th mtg., U.N. Doc. S/RES/1441 (2002).

6. See Robert D. Blackwill, *The War in Iraq Has a Firm Legal Basis* (Apr. 7, 2003), available at <http://usinfo.state.gov/topical/pol/terror/texts/03040704.htm> (containing an op-ed disseminated by the U.S. Department of State's International Information Programs).

7. THE WHITE HOUSE, *The National Security Strategy of the United States of America* (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.html> [hereinafter *NSS*].

8. The *NSS* itself focuses on preemptive attack. See *id.* at 15-16. However, international relations literature typically defines a preemptive attack as an attack launched to destroy an enemy's capacity to launch an imminent armed attack. "Preventive attack" typically refers to attacks on an adversary's capabilities, regardless of its actual hostile intent, or the temporal imminence of any attack. See, e.g., Richard A. Falk, *What Future for the U.N. Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 598 (2003).

If the NSS suggests a U.S. policy of unilateralism, the United States' recent invasion of Iraq is a concrete example of that policy in action. In the wake of the unauthorized U.S. action and subsequent occupation, one is left to ponder whether the United Nation's system of multilateral peacekeeping has been irrevocably altered. Some believe that the unauthorized U.S. invasion demonstrates that states are no longer constrained by the Security Council in fact or law, and perhaps never were.<sup>9</sup> Others argue that U.S. actions were atypical, and were recognized as violative by the international community;<sup>10</sup> consequently, the machinery of international law operated as expected, and should not be considered dysfunctional.<sup>11</sup>

In assessing the continued efficacy and relevance of the Security Council, one should avoid the non-critical acceptance of either of these extreme views. Clearly, all is not well for the Council, but it is too soon to declare it dead. Instead, the situation calls for a bit of exploratory surgery, to identify why the Council failed in this instance (and indeed why it might fail in others), and to suggest an appropriate course of treatment. This sort of diagnosis, of course, requires more than an analysis of the Council itself. An accurate assessment of the Council requires a careful evaluation of how it interacts with other powerful forces within the international system.<sup>12</sup>

This is particularly true in assessing state-level compliance with the Council's decisions. The Council's effectiveness depends on its ability to impose those decisions on powerful states, which may have incentives to ignore the Council's authority. In light of recent events, it is worth reexamining whether those incentives have grown, particularly for a powerful state like the United States. Although a definitive answer to this question may be premature, there is widespread concern that the ease with which the United States sidestepped the re-

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9. See, e.g., Michael J. Glennon, Editorial, *How War Left the Law Behind*, N.Y. TIMES, Nov. 21, 2002, at A37.

10. One might query what "recognition" entails in this context. Does the fact that some nations believe the United States acted illegally matter in any significant way? This question is answered, in part, by the remainder of this paper.

11. See Jochen A. Frowein, *Letter to the Editor*, INT'L HERALD TRIB., Dec. 4, 2002, at O9.

12. See generally Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993).

quirements of the U.N. Charter is symptomatic of the impotence of international law. Scholars have traced this alleged shift to a diverse array of sources, including the increased threat posed by non-state actors,<sup>13</sup> the end of the Cold War,<sup>14</sup> and the rise of U.S. hegemony.<sup>15</sup>

All of these explanations, however, shift focus away from the Council itself. While exogenous factors certainly play an important role in shaping the interactions in which the Council engages, they do not fully determine either the Council's actions or the compliance or noncompliance of target states. Endogenous factors play an equally important role; one should not ignore the Council's internal operations, and their impact on the Council's ability to secure compliance with its directives. I attempt to flesh out this neglected element of the compliance debate by exploring the internal processes of the Council, and their links to the compliance or non-compliance of states with the Council's decisions. In particular, I focus on the notion of institutional legitimacy and the structural and normative effects of such legitimacy on Council decision-making in the first instance, and state-level compliance in the second. I argue that, within democratic states, leaders face powerful pressures, many of which are exerted through public opinion and the electoral process, to comply with the decisions of international institutions. I further argue that these pressures are strongest when the institution in question is perceived to be legitimate by the general population.

Accordingly, the United States' failure to comply may be attributed, in part, to the perception of illegitimacy in the Council's operations, and the resultant failure of that institution to fully leverage domestic political forces that might constrain the actions of the Bush administration. However, rather than tracing the Council's legitimacy problems to the usual suspects (membership and veto allocation), I argue that many of the Council's difficulties stem from the political nature of its operations, and the lack of transparency and accountability to the rule of law. I model the difficulties created by this

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13. See Patrick McLain, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 DUKE J. COMP. & INT'L L. 233, 272 (2003).

14. See generally David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 553 (1993).

15. *Id.*

politicization using a simplified game theoretic model of the compliance interaction, and use this model to suggest remedial measures which might enhance legitimacy, and thus increase the likelihood of compliance by democratic states.

The remainder of this Note proceeds in five parts. Part II provides an overview of the most prominent theories of international relations—realism, institutionalism, and liberalism—and discuss the treatment of international law and compliance within each paradigm. Part III builds on this foundation by constructing a hybrid theory of democratic compliance with legitimate international institutions, borrowing from the democratic peace literature and extending its findings to a more general appraisal of compliance with international law. Part IV applies this hybrid theory to the Security Council, discussing potential sources of illegitimacy within the Council before constructing a game theoretic model demonstrating how this illegitimacy might cause non-compliance. Part V uses the insights drawn from the game theoretic model to suggest several remedial approaches that would further leverage the theory of democratic compliance. Rather than focusing on representation and the veto, I analyze mechanisms for separating the legal and political questions addressed by the Council in its Chapter VII inquiries. Finally, Part VI draws several conclusions, and suggests points of departure for future research in this area.

## II. INTERNATIONAL LAW AND THE COMPLIANCE PROBLEM

### A. *Cooperation, Compliance, and Credible Commitments*

International relations (IR) theorists have long sought to isolate the sources of international conflict, making this inquiry one of the most central in all IR scholarship. Fearon, in one notable exploration, identifies misperception and uncertainty as the chief sources of conflict.<sup>16</sup> While these are important drivers, scholars are now aware that conflict is not always the result of the parties' failure to understand the situation in which they find themselves, or to appreciate the capabilities of their opponents. Rather, scholars are now aware that conflict frequently emerges from states' failure to credibly subordinate

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16. See James D. Fearon, *Rationalist Explanations for War*, 49 INT'L ORG. 379 (1995).

short-term interests in favor of more important long-term concerns.<sup>17</sup> In other words, although all states might benefit in the long-term from peace and cooperation, short-term incentives may make defection from the cooperative agreement (or noncompliance) attractive.

A similar problem arises when states attempt to bind each other to a substantive body of international law, or to institutions intended to create or enforce that law. While all states might benefit in the long-term from a functional international legal system, individual states may have incentives to violate legal rules in particular instances. How can this commitment problem be addressed? How can states credibly signal to other states that they intend to honor their international commitments, and effectively bind other states to comply with international law? In the face of such questions, there is a temptation to either assume that the commitment problem can be overcome, or to assume that it cannot.<sup>18</sup> Both of these extremes leave much to be desired, and ignore the complex interplay between international law and other forces within the international system.

A more complex answer must necessarily analyze the role of international law in the context of broader theories of the international system generally. After all, "to paraphrase Clausewitz, 'law is a continuation of political intercourse, with the addition of other means.'"<sup>19</sup> In short, the compliance question should be addressed using an interdisciplinary approach that neither assumes the value inherent in international law, nor assumes its failure in all circumstances. The particular contours of expected compliance behavior will turn, in large part, on one's assumptions about the meaning and value of international law within the larger system of international politics. As such, a basic understanding of the dominant theo-

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17. See, e.g., LISA MARTIN, *DEMOCRATIC COMMITMENTS* 37 (2000) (surveying recent work on credible commitments).

18. Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 178 (1993).

19. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 419 (2000).

retical paradigms of international relations—realism, institutionalism, and liberalism—is essential.<sup>20</sup>

### B. *Realist Assessments of International Law*

Realist theory has its ancient origins in the writings of Thucydides,<sup>21</sup> but its modern incarnations are usually traced to the work of Kennan and Morgenthau, who argued that the interests of the state should be defined primarily in terms of power.<sup>22</sup> Over time, their ideas have been refined into realism's more modern structural incarnation, typified by the work of Waltz<sup>23</sup> and Mearsheimer.<sup>24</sup> Structural realism, in essence, holds that the anarchic nature of the international system, combined with the uncertainty states have about the inherent offensive capabilities and potentially hostile intentions of other states, compel states to maximize their chances of survival through the maximization of their own power.<sup>25</sup>

How does realism view international law and international institutions? First, realism rejects international law to the extent that law is conceived as intrinsically valuable rather than instrumental. Limited cooperation with other states may be a viable strategy when such cooperation serves the interests of the state, but a more generalized, unqualified commitment to international law remains imprudent.<sup>26</sup> This is particularly true given that international law serves as a source of asymmetric power for weaker states. Since realism dictates power maximization at any given point in time, it eschews policies which constrain the range of potential state actions, or that require

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20. See generally Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998).

21. See generally THUCYDIDES, *THE PELOPONNESIAN WAR* (Richard Crawley trans., Random House Inc., 1982). For a critique of the neo-realist interpretation of Thucydides, see Daniel Garst, *Thucydides and Neorealism*, 33 INT'L STUD. Q. 3 (1989).

22. See generally GEORGE F. KENNAN, *AMERICAN DIPLOMACY: 1900-1950* 98-99 (1951); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. 1973).

23. See generally KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

24. See generally JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001).

25. *Id.* at 30-36.

26. See Burley, *supra* note 12, at 206.

involvement in external conflicts that would endanger national interests.<sup>27</sup> Thus, to the extent that international law precludes certain actions or requires others, it is anathema to realist theory.

Yet, it seems that most states have accepted the general system of international law, derived from custom, treaty, decisions of the ICJ and other international tribunals, and general principles.<sup>28</sup> How, then, do realist theorists explain the general acceptance of international law? Perhaps the most common response is that international law is not really law at all, at least in the traditional sense, but merely a reflection of underlying power dynamics within the international system. As Morgenthau writes, "Considerations of power rather than of law determine compliance" in every significant area.<sup>29</sup> Since power shapes international law, states should rationally use their power to extract concessions from other states through the structure of that law.<sup>30</sup> Compliance by all states might be rational given existing power relationships.<sup>31</sup> However, such compliance should not be mistaken for true *opinio juris*.

A second explanation might focus on the non-constraining functions of international law. Falk lists several, including: (1) specification of the constituents of minimum world order; (2) provisions for communication and dispute resolution; (3) bureaucratization and standardization of routine transactions; (4) enabling of cooperation in technical areas like telecommunications and health; and (5) the positing of "criteria by which national governments and other actors

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27. See also George Washington, *The Farewell Address*, AMERICAN DAILY ADVERTISER, Sept. 19, 1796, available at <http://gwpapers.virginia.edu/farewell/transcript.html> (cautioning against "entangling alliances").

28. See, e.g., HENKIN, *supra* note 2. But see Kingsbury, *supra* note 20, at 346-47 (noting the need for further empirical verification, and noting the indeterminate meaning of "compliance").

29. MORGENTHAU, *supra* note 22, at 291.

30. See, e.g., John A. C. Conybeare, *Public Goods, Prisoners' Dilemmas and the International Political Economy*, 28 INT'L STUD. Q'LY 5 (1984).

31. See Morgenthau, *supra* note 22, at 290-91 ("The great majority of the rules of international law are generally observed by all nations without actual compulsion, for it is generally in the interest of all nations concerned to honor their obligations under international law . . . [when] compliance with international law and its enforcement have a direct bearing upon the relative power of the nations concerned . . . [C]onsiderations of power rather than of law determine compliance and enforcement").

can act reasonably, if so inclined.”<sup>32</sup> Thus, compliance with much of international law may be rational, as no significant conflict between compliance and security-maximization exists. As Kirgis notes, “[l]egal institutions function best when vital interests are not at stake.”<sup>33</sup>

While international law is influenced by power dynamics, and compliance appears stronger when no vital security interests are at stake, law also seems to have the capacity to alter existing power relations, and, indeed, to protect the weak by constraining the strong.<sup>34</sup> Realism does little to explain compliance in these instances, perhaps because it ignores dynamic elements which likely influence the state’s compliance decision. Notably, realism treats states as unitary entities—the “billiard balls” of the international system—ignoring internal dynamics and decision-making processes.<sup>35</sup> Moreover, realist theory treats security as a monolithic, one-dimensional concept, failing to differentiate between competing interpretations of security or to specify precisely that which is to be secured. Together, these two assumptions mean that realism not only rests on an indeterminate conception of security, but also that the theory fails to specify any mechanism by which that indeterminacy can be eliminated at the state-level. As I argue in later sections, an examination of domestic structure and domestic opinion is critical to explaining compliance with international law.

### C. Institutional Assesments of International Law

Institutionalism rejects the unilateralist impulses of realism, concluding that the international system need not be treated as a zero-sum game. Rather, institutionalism asserts that there are instances in which cooperation between states is not only beneficial, but self-enforcing by virtue of the mutual gains realized by the cooperating parties. Thus, states will

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32. RICHARD A. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 330-31 (1970).

33. Frederick L. Kirgis, *Enforcing International Law*, AM. SOC. INT’L L. INSIGHTS (Am. Soc. of Int’l Law, Washington, D.C.), Jan. 1995, at <http://www.asil.org/insights/insight1.htm>.

34. The U.N. Charter is premised on precisely this argument. See U.N. CHARTER pmb1.

35. See, e.g., MEARSHEIMER, *supra* note 24, at 30-36.

often cooperate with each other because the costs of doing otherwise are simply too great.

The generic vehicle for such cooperation is the international regime, originally defined by Ruggie as “a set of mutual expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of states.”<sup>36</sup> Regimes serve a number of functions that may make cooperation rational, notwithstanding the structure of the international system. For example, regimes help to organize relationships in mutually beneficial ways,<sup>37</sup> reduce the transaction costs inherent in international bargaining,<sup>38</sup> and alleviate problems caused by asymmetric information.<sup>39</sup>

Institutionalism highlights a number of reasons why states would comply with regimes. First, the state interest in ensuring cooperation over the long run may justify short-term losses from compliance; the repeated nature of state interaction through the regime deters defection from the cooperative norm.<sup>40</sup> Moreover, since the international system is characterized by any number of bilateral and multilateral regimes, covering any number of subjects, noncompliance with the norms of a single regime is amplified through the larger regime network.<sup>41</sup> States have incentives to protect their reputations as honest dealers and good faith negotiators; these reputations can be irreparably harmed by significant violations of regime expectations.<sup>42</sup>

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36. John Gerard Ruggie, *International Responses to Technology: Ideas and Trends*, 29 INT'L ORG. 557, 570 (1975).

37. ROBERT O. KEOHANE, *AFTER HEGEMONY* 89 (1984); see also S. Todd Lowy, *Bargain and Contract Theory in Law and Economics*, in WARREN SAMUELS, *THE ECONOMY AS A SYSTEM OF POWER* 261, 276 (1979).

38. KEOHANE, *supra* note 37, at 89-92. See also Chayes & Chayes, *supra* note 18, at 178-79 (noting efficiency rationales for compliance with institutions).

39. KEOHANE, *supra* note 37, at 92-94.

40. See, e.g., ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 31-32 (1984) (providing evidence that “tit-for-tat” cooperation can emerge as a dominant strategy).

41. KEOHANE, *supra* note 37, at 103-06.

42. *Id.* See also Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1861 (2002); Bernd Lahno, *Trust, Reputation, and Exit in Exchange Relationships*, 39 J. CONFLICT RES. 495, 499-509 (1995). But see George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 95 (2002) (arguing that the role of reputation is more limited than many believe).

International law, generally, can be considered as an amalgamation of numerous regimes, grounded in particular subject matter (e.g., the Law of the Sea), particular institutional sources (e.g., International Court of Justice opinions), or particular bilateral or multilateral agreements (e.g., the North American Free Trade Agreement). Specific sources of international law can also be conceptualized as regimes; Aceves demonstrates that customary international law and treaty law can be viewed as regimes that play several functional roles.<sup>43</sup> As with other regimes, states have incentives for building reputations for compliance with international law; states find long-term value in keeping their commitments, even when short-term compliance is not in their interests.<sup>44</sup>

However, the mere existence of international law does not guarantee its viability. As is the case with other regimes, international law (and the institutions which shape it) may be more or less effective depending on any number of internal or external factors. Importantly, institutionalists view these regimes in functional, rather than normative terms; they have been unwilling to concede that regimes may have intrinsic value apart from their instrumental purposes.<sup>45</sup> Compliance, therefore, depends on the balance of institutional benefits against institutional costs from the perspective of the state. A central project for IR theorists and international lawyers alike is to identify those factors that facilitate the work of international institutions, so that those factors may be leveraged by international practitioners.

#### D. *Liberal Assessments of International Law*

Liberalism, as a theory of international relations, has proceeded through a number of historic stages. Most scholars, however, trace modern liberalism to the philosophy of Immanuel Kant.<sup>46</sup> The chief difference between liberalism, on the

43. William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y 227 (1997).

44. Chayes & Chayes, *supra* note 18, at 179 ("The assertion that states carry out treaty commitments only when it is their interest to do so seems to imply that commitments are somehow unrelated to interests. In fact, the opposite is true.").

45. Kingsbury, *supra* note 20, at 353-54.

46. See, e.g., Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in KANT'S POLITICAL WRITINGS (Hans Reiss ed. 1970).

one hand, and realism and institutionalism, on the other, is that liberalism focuses on normative elements of the international system, and the role that those elements can play in promoting cooperation and peace. Hoffman has noted that, "The essence of liberalism is self-restraint, moderation, compromise, and peace."<sup>47</sup> These norms are grounded in the inherent autonomy of the individual, whose liberty is protected by governments constituted for that purpose. These governments express their internal values externally within the international system, to further protect the liberty of individual constituents.<sup>48</sup>

Liberalism attributes conflict, in large part, to the dominance of illiberal ideas and mistaken theories; the international system "is what states make of it."<sup>49</sup> Thus, liberalism invokes elements of constructivism, another branch of IR theory, albeit one that is presently dominated by rational choice explanations of the international system. Liberals argue that the mere belief that conflict is inevitable gives rise to conflict. Thus, realism and, to a lesser extent, institutionalism create a self-fulfilling prophecy.<sup>50</sup> Constructivism also gives rise to so-called "knowledge-based" theories of international institutions, which stress the role of norms and ideas in shaping the perceptions and actions of states and other international actors.<sup>51</sup> International law and the institutions that shape it, therefore, are the natural outgrowth of the community of liberal nations, which replicate at the international level the notions of liberal justice that are dominant within their own societies.

This replication, however, is plagued with obstacles. Obviously, the structure of the international system is fundamentally different from that of domestic societies; the lack of a central hegemonic sovereign, and the horizontal nature of the creation and enforcement of law, make the dominance of law

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47. STANLEY HOFFMAN, *Liberalism and International Affairs*, in JANUS AND MINERVA: ESSAYS ON THE THEORY AND PRACTICE OF INTERNATIONAL POLITICS 396, 396 (1987).

48. Tim Dunne, *Liberalism*, in THE GLOBALIZATION OF WORLD POLITICS 163, 165-67 (John Baylis & Steve Smith, eds., 2d ed. 2001).

49. See Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 394-95 (1992).

50. *Id.*

51. See generally ANDREAS HASENCLEVER ET AL., THEORIES OF INTERNATIONAL REGIMES 136 (1997).

more difficult to explain. Yet, the fact that nations do seem to obey most of the law most of the time,<sup>52</sup> even in the absence of the coercive factors that characterize domestic legal arrangements, suggests that normative sources of compliance can be identified and isolated.

Franck finds an answer in the notion of legitimacy, defined as “a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”<sup>53</sup> This conception of legitimacy flies in the face of realist arguments about state interests and motivations. To the extent that states act in any way that does not maximize their security interests, realist expectations are violated. Though contemporary realists concede that the state may have identifiable interests in enhancing its trustworthiness, or in encouraging reciprocity from other states,<sup>54</sup> these interests remain grounded in security rather than morality, normativity, or conceptions of procedural or substantive justice.

The notion of legitimacy has a strong intuitive appeal. However, while it may be possible to identify characteristics of a given rule or institution that are likely to contribute to the pull of legitimacy,<sup>55</sup> it is more difficult to identify the micro-foundations of the impulse towards compliance. States, after all, are legal and political fictions, constructed by the societies that they govern. They do not feel, and they do not form opinions or preferences of their own accord, independent of their constituents. It is necessary, therefore, to explore the links between legitimacy and state constituents at a lower level to determine how legitimate institutions “pull,” or influence, those constituents, and create pressures for state-level compliance.

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52. HENKIN, *supra* note 2, at 47.

53. THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990).

54. *See, e.g.*, James A. Caporaso, *International Relations Theory and Multilateralism: The Search for Foundations*, 46 *INT'L ORG.* 599 (1992).

55. FRANCK, *THE POWER OF LEGITIMACY*, *supra* note 53.

### E. *IR Theory and Appraisals of the Security Council*

Given these theoretical constructs, how should one interpret the recent interactions between the United States and the Security Council? Realists might argue that the ease with which the United States has sidestepped Charter requirements demonstrates the impotence of international law, and the Council as the embodiment of that law. They might contend that the Council is growing less effective because of fundamental changes in the international system; the United States no longer needs to contain the Soviet Union, and consequently the Council no longer reflects prevalent power dynamics. In short, they might argue that the Council is weakening because it no longer serves U.S. interests.<sup>56</sup>

Institutionalists might argue that the U.N. security regime is becoming less effective because the costs of noncompliance, and the benefits derived from compliance, are lower than they once were. The Cold War, and the global sigh of relief which followed it, may have reduced the need for the Council, while continuing to impose burdens on Member States that may no longer be justifiable. In the new, multi-polar world, states may care more about building a reputation for the unflinching protection of their national interests than for compliance with security regimes which may have lost most of their utility.<sup>57</sup>

What is the liberal account? Perhaps the simplest explanation is that the Council operated exactly as it was intended to operate; the absence of authorization signaled the U.S. action as illegal and illegitimate. The fact that the United States chose not to obey the law did not eliminate that law or render it moot, in the same way that a criminal's decision to break the law does not render Congress or the courts moot.<sup>58</sup> After the invasion of Iraq, most nations recognized U.S. actions as violative, rather than proto-normative. Frowein adopts this view, arguing that the U.S. action did not reshape the substantive meaning of the law, but rather demonstrated the law's *ex post* rather than *ex ante* functions.<sup>59</sup>

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56. See Glennon, *supra* note 9.

57. See Kingsbury, *supra* note 20, at 352-53.

58. See Stanley Hoffman, *International Law and the Control of Force*, in *THE RELEVANCE OF INTERNATIONAL LAW: ESSAYS IN HONOR OF LEO GROSS* 22, 22 (Karl W. Deutsch & Stanley Hoffman eds., 1968).

59. Frowein, *supra* note 11.

It is unclear what Frowein's analysis means for the Security Council's ability to constrain states in the real world; violation is still violation, even if the system as a whole remains intact. As realist theorists note, the apparent absence of effective punishment in the absence of a world government makes compliance through coercion difficult.<sup>60</sup> Instead, for obvious reasons, liberals have focused on *ex ante* approaches to behavior modification. As Franck hypothesizes:

“What if, instead, rule disobedience, or a rule void, were attributable—in whole or in part—not to the absence of coercive power to enforce the rules, but to the perceived lack of legitimacy of the actual or proposed rules themselves and of the rule-making and rule-applying institutions of the international system?”<sup>61</sup>

Thus, the failure of the Council to constrain behavior might be attributed to the lack of legitimacy evidenced by its operations. Luck adopts this theme in his assessment of the Iraq invasion, arguing that the Council has become a forum for politicking, instead of a forum for good faith deliberation over the optimal way to protect the international community from threats to its collective security.<sup>62</sup> This theory has some intuitive appeal, yet is itself merely a conclusion lacking underlying explanatory logic. Why is the Council perceived as illegitimate? How does this perception translate into non-compliance, or make violation easier? Are state perceptions of illegitimacy fully explanatory, or are there additional, objective explanations for the Council's lack of effectiveness?

### III. TOWARDS A THEORY OF DEMOCRATIC COMPLIANCE WITH INTERNATIONAL LAW

#### A. *Towards a Hybrid Approach*

Each of the theories discussed above offers unique insight into the international system, yet each seems fundamentally incomplete. None, in isolation, offers a complete answer to the

60. See Helen Milner, *The Assumption of Anarchy in International Relations Theory*, 17 REV. INT'L STUD. 67, 71 (1991).

61. Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 710 (1988).

62. Edward C. Luck, *Making the World Safe for Hypocrisy*, N.Y. TIMES, Mar. 22, 2003, at A11.

compliance question. Realism's rational parsimony is compelling, yet it cannot explain why states would constrain themselves through participation in international institutions and adherence to international law. Institutionalism corrects some of these problems by offering a broader definition of state interests, but still fails to explain why states would obey international law in extreme circumstances, or when the nature of a given interaction tends to frustrate rational cooperation.<sup>63</sup> Moreover, institutionalism, like realism, does not offer a compelling theory of how state-level preferences are generated domestically.<sup>64</sup> Indeed, institutionalism is attractive to many international lawyers precisely because it does not require any inquiry into the nature of internal state processes, thus maintaining the fiction of equal sovereignty between all states in the international system.<sup>65</sup> While this neutral stance may ease the conscience, it precludes a full explanation of the compliance phenomenon. One arrives, then, at liberalism, which offers a compelling theoretical account of how state-society relations in liberal states shape relationships on the international level. Liberal attention to themes like legitimacy lends the theory a strong intuitive appeal. Yet, liberal theory often suffers from an absence of well-defined micro-foundations, making it difficult to translate or validate the theory in practice.

I attempt a hybrid assessment of international law and institutions by amalgamating the rational choice structure of institutionalism with the normative theory of liberalism. In short, I argue that states rationally assess the costs and benefits of various policy options, and act to maximize their utility in selecting an option. However, in making these calculations, democratic states assess the preferences of their populations, which are fundamentally shaped and affected by liberal, democratic norms. These norms, combined with the democratic characteristics of domestic institutions, combine to create a tendency I label "democratic compliance." In developing the

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63. See Lisa L. Martin, *Interests, Power, and Multilateralism*, 46 INT'L ORG. 765, 772-73 (1992).

64. See Burley, *supra* note 12, at 225.

65. *Id.* at 226; see also Stanley Hoffman, *International Systems and International Law*, reprinted in INTERNATIONAL LAW AND ORGANIZATION 113 (Richard A. Falk & Wolfram F. Hanrieder, eds., 1968) (noting that contemporary law accepts the "formal homogeneity of a legal system whose members are supposedly equal").

concept of democratic compliance, I draw heavily on the IR literature and democratic peace theory.

### B. *The “Democratic Peace”*

An analysis of international conflict demonstrates a startling finding: few, if any, modern democracies have ever gone to war with each other.<sup>66</sup> At the same time, studies have also shown that democracies are no less war-prone in their interactions with non-democratic states.<sup>67</sup> These observations have been collectively referred to as the “democratic peace.” Arguments about the relationship between democracy and peace can be traced back to Kant, who argued that “republican constitutions,” a “commercial spirit” of international trade and a federation of interdependent republics would provide a basis for perpetual peace.<sup>68</sup> While the debate over the empirical validity of the democratic peace continues to this day, more interesting recent work has attempted to explain, rather than validate, the correlation between democracy and peace.<sup>69</sup> IR scholars have attempted to explain the democratic peace with a wide variety of theories, which can be loosely categorized as structural, normative, and hybrid in nature. I briefly outline several variants of democratic peace theory to assist this Note’s subsequent analysis.<sup>70</sup>

#### 1. *Structural Explanations for the Democratic Peace*

Structural explanations for the democratic peace abound. Internally, democracies are more likely to institute structural checks and balances, such that war and aggressive action are

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66. A host of methodological issues arise in the classification of democracies, particularly at the margins. While interesting, these questions are beyond the scope of this Note.

67. Moore explains the continued conflict with non-democratic states as an outgrowth of “government failure” within those states, which permits high-risk and potentially irrational conflict to ensue. See John Norton Moore, *Solving the War Puzzle*, 97 AM. J. INT’L L. 282, 286-87 (2003).

68. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in KANT’S POLITICAL WRITINGS 99, 102-05, 114 (Hans Reiss ed., 1970).

69. Lori Fisler Damrosch, *Use of Force and Constitutionalism*, 36 COLUM. J. TRANSNAT’L L. 449, 456 (1997).

70. It is neither possible nor desirable at this juncture to offer an exhaustive review of the democratic peace literature.

inhibited.<sup>71</sup> Often, these structures are embodied within and required by the state's foundational legal documents. As Damrosch argues, constitutional protections within liberal democracies effectively provide a mechanism for pre-commitment on the part of democratic societies that protects long-term interests in peace by constraining impulsive short-term actions.<sup>72</sup> Thus, democracies are likely to be less rash, and more rational in their decision-making.

In addition, democracies may be better equipped to signal their intentions to other states than non-democracies. The processes of democratic states are more likely to be understood by other democracies, reducing the likelihood of misperception. As Fearon argues, democracies are able to credibly signal their willingness to use force, because domestic populations can impose "audience costs" on leaders who appear weak.<sup>73</sup> Schultz elaborates on this basic theme by demonstrating that the presence of a domestic opposition can reduce the probability of conflict,<sup>74</sup> while Martin argues that legislatures act to increase the costs of violating international commitments, deterring the abrogation of treaties.<sup>75</sup> Bueno de Mesquita further contends that threats from democratic states are more credible because they are better able to shift resources to military operations, increasing the probability of success, and decreasing *ex ante* incentives to engage in conflict with such states.<sup>76</sup>

In addition to these analyses of internal structure, there are also structural elements characterizing the interactions be-

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71. See, e.g., Bruce Russett, *Why Democratic Peace?*, in *DEBATING DEMOCRATIC PEACE* 82, 100 (Michael Brown et al. eds. 1996); see also Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 *PHIL. & PUB. AFF.* 205, 225 n.23 (1983).

72. See Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 *MICH. J. INT'L L.* 1 (1998).

73. See James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 *AM. POL. SCI. REV.* 577, 581-82, 585-86 (Sept. 1994); see also Joe Eyerma & Robert A. Hart, Jr., *An Empirical Test of the Audience Cost Proposition: Democracy Speaks Louder than Words*, 40 *J. CONFLICT RES.* 597 (1996).

74. Kenneth A. Schultz, *Domestic Opposition and Signaling in International Crises*, 92 *AM. POL. SCI. REV.* 829, 840 (1998).

75. MARTIN, *supra* note 17, at 110-11.

76. See Bruce Bueno de Mesquita et al., *An Institutional Explanation of the Democratic Peace*, 93 *AM. POL. SCI. REV.* 791, 794, 804 (1999).

tween democracies that promote peace. Many models have focused on the interdependencies that tend to emerge between democracies, particularly in the area of trade and other forms of economic transactions.<sup>77</sup> Arguably, such relationships create incentives among states to pursue mutual gains and avoid recourse to force in settling disputes.<sup>78</sup> In addition to their functional role, these relationships serve as a powerful conduit of norms and ideas, themselves a powerful explanation for the peaceful coexistence of democracies.

## 2. *Normative Explanations for the Democratic Peace*

Normative explanations for the democratic peace focus on the ideas that are pervasive within liberal democratic states and the role those ideas play in promoting peace and building cooperative trust between democracies. Normative theories pay special attention to the relationship between domestic preferences, and state and system-level behavior. Typically, normative explanations make two basic assumptions: (1) states normally externalize the norms that characterize their domestic political processes and institutions, and (2) the anarchic view of the international system implies that a clash between democratic and non-democratic norms favors the latter at the expense of the former.<sup>79</sup> Democratic norms, replicated on the international stage, maintain that competition can occur within peaceful bounds, within which success does not require the elimination of one's opponent.<sup>80</sup> Thus, democracies can compete with each other without resorting to violence or the use of force. These assumptions also mean that the state's behavior is not only affected by its regime type and consequent normative outlook, but also by the state's appreciation of the character of other states in the international system. The normative explanation for the democratic peace turns on the state's perceptions of other states; once liberals accept a

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77. See, e.g., Harry Bliss & Bruce Russett, *Democratic Trading Partners: The Liberal Connection, 1962-1989*, 60 J. POL. 1126, 1137-38, 1144 (1998).

78. See, e.g., John R. Oneal & Bruce Russett, *The Kantian Peace: The Pacific Benefits of Democracy, Interdependence, and International Organizations, 1885-1992*, 52 WORLD POL. 1, 34 (1999).

79. See, e.g., Zeev Maoz & Bruce Russett, *Normative and Structural Causes of the Democratic Peace, 1946-1986*, 87 AM. POL. SCI. REV. 624, 625 (1993).

80. *Id.*

foreign state as a democracy, they will strenuously oppose war against that state.<sup>81</sup>

### 3. *Hybrid Explanations for the Democratic Peace*

Several explanations of the democratic peace utilize a hybrid framework, assessing the operation of structure and norms in tandem. Owen's analysis is illustrative; his theoretical framework combines normative assumptions about public preferences with an appreciation of the structural elements of liberal democracies. He argues that democratic leaders will be either liberal or illiberal, and that liberal leaders will avoid war with other democracies because of the liberal impulse to cooperate. Illiberal leaders, on the other hand, may be tempted to use force against democracies. In such cases, however, the structure of democratic institutions permits the generally liberal public to protest that decision, and to impose costs on the illiberal leader that can constrain his actions.<sup>82</sup> Owen's theory, then, succeeds in explaining how liberal norms operate within a rationalist framework at the state level.

#### C. *Extending the Democratic Peace*

The startling empirical findings of the democratic peace literature have exciting implications for the prevention of conflict between democracies. An obvious question is whether democratic peace theories can be extended to other contexts. For instance, if democracy seems to promote interstate cooperation over militarized conflict, perhaps it also encourages compliance with international law. Unfortunately, while democratic peace theories are the subject of great debate in the IR literature, they have not had the substantial impact on legal discourse that might be expected.<sup>83</sup> Nonetheless, the democratic peace literature remains a rich source of ideas for international lawyers, and several mechanisms exist for extending its insights to the broader question of democratic compliance.

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81. John M. Owen, *How Liberalism Produces Democratic Peace*, 19 INT'L SEC. 87, 95-97 (1994).

82. *Id.* at 89.

83. See Burley, *supra* note 12, at 225.

### 1. *Methods of Extending Democratic Peace Theory*

There are at least three separate methods for extending democratic peace arguments to explain a more general compliance with use of force norms. These approaches focus on: (1) the monadic (or independent) characteristics of democracies, which impact state-level interactions irrespective of the nature of other strategic actors; (2) the role of institutions as mediators between democratic states; and (3) the role institutions play as actors in their own right and the manner in which legitimate institutions may serve as “quasi-democracies.” Each of these possibilities should be assessed in turn:

#### a. Monadic Characteristics of Democracies

Most empirical studies of the democratic peace have focused on dyadic interactions between two states. In such models, the behavior of the democratic state is assumed to be affected by the regime characteristics of the other state. As noted above, joint democratic dyads are the least likely to resort to violence, while there does not appear to be any significant reduction in conflict within mixed dyads.<sup>84</sup> Evidence suggests, however, that the monadic<sup>85</sup> characteristics of democracies may make them generally more cooperative with all states, although these impulses may dissipate as conflict escalates. For instance, Rousseau et al. find that democracies are less likely to initiate foreign policy crises with other states, and are less likely to escalate these crises.<sup>86</sup>

These same tendencies may contribute to a monadic tendency among democratic publics to adhere to the commitments they have made to other states, making those commitments credible regardless of the regime type of the promisee. Gaubatz adopts this line, arguing that individuals generally prefer that their governments keep their treaty promises, and that these preferences provide incentives for state compliance with the provisions of such treaties.<sup>87</sup> These same forces are

84. See *supra* Part III.B.

85. Here, monadic effects are those that do not depend on the regime type of other states with which the democracy interacts. Thus, monadic effects are distinguished from dyadic effects arising between two democracies.

86. David L. Rousseau et al., *Assessing the Dyadic Nature of the Democratic Peace, 1918-1988*, 90 AM. POL. SCI. REV. 512, 512-13 (1996).

87. See Kurt Taylor Gaubatz, *Democratic States and Commitment in International Relations*, 50 INT'L ORG. 109, 121 (1996).

likely to have broader application, promoting a generalized commitment to international law and international institutions. Henkin, for instance, notes the normative preference for compliance within the United States, which makes it a leading example of a nation with “internal forces impelling observance of international law[.]”<sup>88</sup> Of course, this observation begs the question: What rules do Americans recognize as “law” such that compliance is a normative requirement?

b. Dyadic Cooperation through Institutions

A second approach might begin with the interdependency explanations for the democratic peace. Essentially, these theories argue that the ties between democratic states, be they economic, diplomatic, ideological, etc., tend to frame interactions as positive-sum in nature, and to deter conflict among joint democracies.<sup>89</sup> Leeds and Davis find that democratic states are likely to pursue mutual gains in contexts extending beyond the mere avoidance of war, systematically shaping foreign policy preferences in favor of cooperation.<sup>90</sup> This argument closely tracks institutionalist theory, and similarly relies on “networks” of interstate relationships as a vehicle of enforcement.<sup>91</sup> Interdependency explanations for the democratic peace, however, also account for normative elements of regime type. Institutions provide a conduit for communication, but the democratic nature of participants informs the cooperative nature of these interactions. Moreover, democracies also appear to be more likely to form and maintain regimes, as a result of the liberal norms that are pervasive within liberal societies.<sup>92</sup>

The institutionalist account argues that states have incentives to comply with the decisions of international institutions because the failure to do so may give rise to significant diplomatic, economic, and reputational costs. Interdependency arguments stress the special nature of the connections that arise between democracies. Normative accounts of the democratic peace add a third element: Liberal states may place intrinsic

88. HENKIN, *supra* note 2, at 60-68.

89. *See generally* Russett, *supra* note 71.

90. Brett Ashley Leeds & David R. Davis, *Beneath the Surface: Regime Type and International Interaction, 1953-78*, 36 J. PEACE RES. 5, 17 (1999).

91. *See* KEOHANE, *supra* note 37, at 103-06.

92. *Id.*; *see also* Bliss & Russett, *supra* note 77.

value in the institution itself apart from the instrumental function that institution serves. Further, democratic states may have both intrinsic and instrumental incentives to ensure that the institutional members comply with norms of substantive and procedural fairness, whether those members are democracies or non-democracies. Thus, democracies may have incentives to avoid violating institutional expectations in their conflicts with non-democracies, because of the intermediation of other democratic members of the international institution.

### c. Legitimate Institutions as Quasi-Democracies

A third possibility for extending the democratic peace might treat institutions as international actors in and of themselves, and question the circumstances under which interactions between democracies and institutions are likely to constrain the activities of the former. In other words, instead of analyzing state-state dyads, one might examine state-institution dyads. In this analysis, the institution takes on a fuller international personality, independent of that of its constituent states. Extrapolating from democratic peace theory, one might hypothesize that the dyads most likely to minimize conflict are those in which the state is a democracy, and the institution is quasi-democratic in character.

This notion of quasi-democracy has both normative and structural components, as does democracy in its more familiar, state-centered form. Since liberal theory equates democratic structures with legitimate governance, the mere presence of quasi-democratic structures should exert some normative pull toward compliance. Furthermore, quasi-democratic institutions normally embody structural elements that increase the likelihood that an institution's actions will be objectively legitimate.

## 2. *Legitimate Institutions as Reliable Information Providers*

First, I assess several structural characteristics of legitimate institutions which may tend to improve the decision-making abilities of such institutions, but also increase their trustworthiness and reliability in the view of state actors.

a. Enhanced Fact-Finding and Deliberation

One of the functional roles of institutions is to correct problems caused by information asymmetries among participants by collecting and disseminating data, thereby decreasing uncertainty in the international system.<sup>93</sup> However, that information is of limited use if it is unreliable to states. This notion of reliability can be thought to have two distinct components: one grounded in technical accuracy, and the other grounded in trust, or the belief that the institution is acting in good faith as an agent of its constituents, rather than in pursuit of any private agenda. Both of these components of reliability are enhanced when the information in question is provided by legitimate institutions.

The technical accuracy of institutional information is the product of the quality of the institution's fact-finding apparatus. Such accuracy reflects a number of factors: available resources, access levels, the state of technology, and the nature of fact-finding procedures themselves. The last factor is most likely to be affected by legitimacy in two principle ways. First, legitimate institutions are more likely to incorporate some system of procedural checks and balances, whether within a single institution or among several. This structural feature encourages reasoned deliberation and orderly process, increasing the quality of information analysis, and preventing rash or immature judgment.<sup>94</sup> Second, legitimate institutions are more likely to capture a variety of substantive views and substantive biases. The representative nature of legitimate institutions informs vibrant intellectual exchange and an outcome that is more likely to approach the truth.<sup>95</sup>

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93. See KEOHANE, *supra* note 37, at 92-94.

94. See, e.g., THE FEDERALIST No. 70 (Alexander Hamilton) ("In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.").

95. Here, one can import much of the analysis underlying the "marketplace of ideas" rationale for the First Amendment. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

## b. Increased Transparency and Trustworthiness

The trustworthiness of institutional information is heavily affected by the interests that inform institutional fact-finding operations. Information can be trusted if fact-finding agents do not have incentives to skew data in pursuit of their own private agendas. Legitimate institutions reduce these incentives through their transparency; when self-dealing can be easily be detected, it can more easily be punished.<sup>96</sup> Legitimate institutions clearly separate legal functions from political functions in a manner conducive to public expectations and normative intuitions. While political behavior is not always inappropriate, it is important that such behavior be identifiable so that institutional actors may be held accountable for their actions.

The institution's role as a mediator and arbitrator of disputes is closely related to its ability to gather and communicate unbiased information. When disagreements emerge between states, regarding either bilateral disputes or differences of opinion about the treatment of a third-party, institutions can provide a neutral forum for the settlement of the factual differences underlying those disagreements. However, parties will only accept a determination that would restrain their actions if there are reasons to trust the institution.<sup>97</sup> Trustworthiness, in turn, stems from the parties' belief that the mediating institution is not providing information in a biased fashion, in order to encourage one outcome over another. Thus, the institution must be willing to provide information that might increase the likelihood of conflict in addition to information that would prevent it.<sup>98</sup> If institutions cannot be trusted in this way (i.e., if they are viewed as illegitimate providers of information), they cannot serve as effective mediators.

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96. See generally Marvin Berhold, *A Theory of Linear Profit-Sharing Incentives*, 85 Q. J. ECON. 460, 460-482 (1971); Steven A. Ross, *The Economic Theory of Agency: The Principal's Problems*, 62 AM. ECON. REV. 134, 134-38 (1973).

97. Andrew Kydd, *Which Side Are You On?: Bias, Credibility, and Mediation* (Jan. 2, 2002) (unpublished manuscript), available at [http://www.wcfia.harvard.edu/papers/468\\_janmed.pdf](http://www.wcfia.harvard.edu/papers/468_janmed.pdf).

98. *Id.* at 32.

c. “Quasi-Democratic” Structures as Costly Signals

The adoption of structures and procedures that make an institution legitimate also serves as a form of costly signaling. Legitimacy often entails the added expenditure of time, money and other resources, and submission to burdensome procedures.<sup>99</sup> Consequently, when states submit to participate in legitimate institutions, they have made a costly commitment to restrict their future options, making their commitment to eventual compliance more reliable. Just as democratic institutions within the state signal adherence to norms that cannot be violated easily,<sup>100</sup> quasi-democratic institutions signal that they will have difficulty departing from norms.

3. *Normative and Structural Forces within Democracies*

Next, I assess the ways in which legitimate institutions can leverage domestic pressures to encourage state-level compliance with their decisions.

a. Domestic Preferences and Audience Costs

Democratic states cannot take actions within the international system without answering to their domestic populations. As Putnam notes:

The politics of many international negotiations can usefully be conceived as a two-level game. At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments. Neither of the two games can be ignored by central decision-makers[.]<sup>101</sup>

Putnam's insight is a valuable one and it is most applicable when the state in question is a democracy. Democratic

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99. Consider, for example, domestic courts, which have complicated rules of evidence.

100. See HENKIN, *supra* note 2, at 60-62.

101. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434 (1988).

structures are most likely to give voice to domestic opposition, and to ensure that leaders remain accountable to public opinion.<sup>102</sup> Democratic norms are most likely to encourage this opposition. In the United States, for example, government officials derive “their just powers from the consent of the governed.”<sup>103</sup> This notion is basic to the American conception of legitimate democratic governance.

One consequence of the two-level game in democratic states is the government’s enhanced ability to signal resolve to other international actors. Since the electorate can impose costs on leaders who fail to fulfill their promises, such promises are not mere cheap talk, but are credible indicators of intent. Fearon utilizes this concept of “audience costs” to demonstrate that democratic leaders are more likely to issue credible threats, and thus less likely to have to resort to force to prove their resolve.<sup>104</sup>

Fearon’s model suffers from at least two flaws. First, there is little reason to assume that the domestic population will always, or even often, punish a leader who makes a threat and then backs down from that threat. If such behavior is in the best interests of the state, or comports with the preferences of the domestic population, the leader might actually be rewarded for his responsiveness (or at least not punished as severely). For example, if the President threatened to massacre small children in a Canadian orphanage, he would incur audience costs from his decision to make the threat in the first place, but he would incur significantly greater costs domestically if he decided to follow through on his promise. In other words, executive actions that contradict basic democratic norms, including the general preference for cooperation, are likely to be punished.

Second, Fearon’s model ignores other types of promises which may carry equal, or even greater, importance for the domestic population. Notably, compliance with bilateral and multilateral agreements may be important to the public, and the failure to fulfill such commitments may be viewed as a sign of weakness, inability, or bad character on the part of the

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102. See generally Thomas Risse-Kappen, *Public Opinion, Domestic Structure, and Foreign Policy in Liberal Democracies*, 43 *WORLD POL.* 479 (1991).

103. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

104. See Fearon, *supra* note 73, 585-86.

noncompliant leader.<sup>105</sup> More generally, the population may view compliance with international law as critical; the implicit or explicit state consent to be bound by that law serves as another type of promise by the state and its leadership.

In other words, Fearon's substantive assumptions about when such costs are likely to arise are imperfect and incomplete. After all, democracies are more than the sum of their institutional structures. They also embody specific sets of values that not only shape the manner in which their institutions are structured, but also the values and goals that they pursue.

#### b. Invocation of the Rule of Law

One principle democratic value is manifested in the concept of rule of law—the notion that common rules of behavior should bind all members of society, and that these rules should be enforced fairly and consistently. Brownlie argues that the rule of law consists of six main elements: officials acting upon authority conferred by law, the law conforming to substantial and procedural standards, separation of powers, a judiciary not subject to the control of the executive, all legal persons subject to the law on a basis of equality, and an absence of wide discretionary powers in the government.<sup>106</sup> The rule of law is a fundamental precept of democratic governance; codified rules replace arbitrary government determinations or moral intuitions. Moreover, the process of lawmaking provides a vehicle for democratic participation and functions as a manifestation of popular sovereignty.<sup>107</sup>

The norm that elevates law within domestic societies, though, is likely to have wider application. “Increasingly we are understanding that the achievement of the rule of law in both primary senses, that is both among and within nations, is

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105. These preferences might stem from both the intrinsic and instrumental value of the treaty. Free trade agreements, for instance, confer tangible benefits on certain social groups that are independent of the preference for compliance in and of itself.

106. IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS* 213-14 (1999).

107. *See generally* ROBERT A. DAHL, *ON DEMOCRACY* (1998); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop eds. and trans., U. Chicago Press, 2000).

mutually reinforcing [sic].”<sup>108</sup> In other words, democracies that fundamentally accept the rule of law within their domestic systems are more likely to apply the same rule of law concept to the international setting. As Simmons puts it:

It seems clear that governments that provide for a stable framework of law and system of property rights domestically are more likely to do the same for the purposes of facilitating international economic transactions. One interpretation is that a credible commitment to a stable system of law is not divisible in the eye of the investor. A rule-of-law government may have even more to lose from non-compliance with an international legal obligation than a more capricious regime.<sup>109</sup>

The question, of course, is which international decisions are likely to be attributed legal character by domestic populations, and which processes are likely to be viewed as conforming to the rule of law. Brownlie’s definition, which focuses on standardization and equality, constrained discretion, and principles of procedural and substantive legality,<sup>110</sup> closely approximates the notions of legitimacy and quasi-democracy I have outlined in the above sections. Therefore, a finding that a given decision is “law” is roughly synonymous with a finding that the decision-making process is legitimate. Legitimate institutions not only exert their influence directly on states as in Franck’s account, but also act indirectly through democratic populations and democratic institutions.

### c. Norm Internalization

Apart from the preference of democratic populations for compliance with the decisions of legitimate institutions, the decisions of international institutions may play a more subtle role in shaping the first-order preferences of such populations. Koh draws a careful distinction between *compliance* and *obedience*. In his conception, *compliance* occurs when an actor is both aware of a rule and consciously accepts its influence, but

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108. John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT’L L. 881, 882-83 (1999).

109. Beth A. Simmons, *Why Comply with the Public International Law of Money?*, 25 YALE J. INT’L L. 323, 360 (2000).

110. BROWNLIE, *supra* note 106, at 213-14.

does so in order to gain specific rewards or avoid specific punishments.<sup>111</sup> *Obedience*, on the other hand, occurs when an actor adopts rule-induced behavior because the norm underlying that rule has been internalized and incorporated into that actor's value system.<sup>112</sup> Although similar to Franck's analysis of legitimacy, this inquiry focuses on the formation of internalized preferences, rather than the normative pull exerted by external forces.

Koh identifies three distinct methods of norm internalization: (1) social internalization, which occurs when a norm acquires so much public legitimacy that there is widespread adherence to it; (2) political internalization, which occurs when political elites accept an international norm and advocate its adoption as a matter of government policy; and (3) legal internalization, which occurs when an international norm is incorporated into the domestic legal system and becomes domestic law.<sup>113</sup> Koh attempts to downplay the importance of regime type in his analysis, and is critical of the view that internalization may be easier in liberal democracies than in non-democratic states.<sup>114</sup>

Koh argues that, "whether the process of vertical [norm] internalization will be equally effective worldwide depends far less on the particular domestic legal system in question, than on the particular rule for which internalization is sought."<sup>115</sup> The question is which types of rules are most likely to be internalized. On balance, it seems likely that the more legitimate a rule is perceived to be, the more likely it is to be internalized. For the reasons discussed above, rules that emerge from legitimate processes are more reliable as approximations of objective truth or universal principles, and more likely to influence liberal populations. In other words, such populations are more likely to view the decisions of legitimate institutions as objectively correct. Consequently, legitimate rules not only

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111. Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 628 (1998).

112. *Id.*

113. *Id.* at 642.

114. *Id.* at 676 (noting that the lack of effective mechanisms of vertical integration may prevent norm internalization); see also Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1910 (1992).

115. Koh, *supra* note 111, at 674.

constrain behavior because members of the public have a preference for abiding by procedurally legitimate outcomes, but also because such outcomes are likely to conform to their interests in the first instance.

#### IV. APPLYING THE THEORY TO THE SECURITY COUNCIL

##### A. *The Security Council as an Institution*

In order to ensure prompt and effective action by the United Nations, its Members not only confer on the Security Council primary responsibility for the maintenance of international peace and security, but also agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.<sup>116</sup>

The United Nations represents a particularly extensive form of international institution, encompassing myriad subsidiary organs. Of particular importance in the context of use of force is the Security Council, established by Chapter V of the U.N. Charter.<sup>117</sup> The Council carries the “primary responsibility for the maintenance of international peace and security.”<sup>118</sup> Despite Article 2(4)’s general prohibition on the use of force by Member States,<sup>119</sup> Article 39 empowers the Council to take appropriate steps, including the use of force,<sup>120</sup> to prevent threats to international peace and security.<sup>121</sup> While the Charter originally envisioned that Council military actions would be executed by a standing U.N. force, in practice the Council now authorizes “coalitions of the willing”—groups of national states with independent military authority—to act on the Council’s behalf.<sup>122</sup>

The Council is composed of fifteen members,<sup>123</sup> and the consent of at least nine is necessary for the Council to authorize the use of force.<sup>124</sup> The majority of the Council’s membership is elected to two-year terms from the U.N.’s general mem-

116. U.N. CHARTER art. 24, para. 1.

117. *Id.* at ch. V.

118. *Id.* at art. 24, para. 1.

119. *Id.* at art. 2, para. 4.

120. *See id.* at art. 42.

121. *Id.* at art. 39.

122. *See* THOMAS FRANCK, RECOURSE TO FORCE 21-31 (2003).

123. U.N. CHARTER, art. 23, para. 1.

124. *Id.* at art. 27, para. 2.

bership.<sup>125</sup> However, five of the Council's seats are reserved for the Permanent Members or P5—the United States, the United Kingdom, France, China, and Russia.<sup>126</sup> In addition to their permanent status, these members have the power to veto all substantive decisions of the Council.<sup>127</sup> This arrangement reflected the power dynamics of the Cold War, and continues to favor powerful states today.<sup>128</sup>

Yet, this structure's careful attention to power dynamics is in tension with the rhetoric underlying the Council and its mission. Article 24 provides that Member States are legally bound by the decisions of the Council,<sup>129</sup> and that the Council acts as a proxy for Member States' own internal deliberations.<sup>130</sup> Thus, the Charter seems to envision a Council with distinct responsibilities for safeguarding international peace and security that should transcend national interests. In practice, however, the Council cannot act unless the interests of the permanent members are served. As former U.S. Ambassador John Negroponte posits, "It's axiomatic that the solid achievements of the Security Council have tended to be when the P5 can act in harmony or consensus."<sup>131</sup>

#### B. *Sources of Perceived Illegitimacy*

If the theory of democratic compliance is valid, then the extent to which the United States is constrained by Security Council determinations should be shaped by the perceived legitimacy of the Security Council. Here, one might distinguish two different types of legitimacy. In one conception, the Council is legitimate as long as it operates within the limitations of the Charter.<sup>132</sup> In assessing the legitimacy of a given act, the principle question is whether the Council has formal,

125. *Id.* at art. 23, para. 2.

126. *Id.* at art. 23, para. 1.

127. *Id.* at art. 27, para. 3.

128. *See, e.g.*, FRANCK, *RECOURSE TO FORCE*, *supra* note 122, at 46.

129. U.N. CHARTER art. 25.

130. *See id.* at art. 24 (Members "agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.").

131. LINDA FASULO, *AN INSIDER'S GUIDE TO THE U.N.* 43 (2003) (quoting Ambassador Negroponte).

132. *See* THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW* 219-21 (1995) ("[T]he legitimacy of the exercise of power by the Security Council depends upon the public perception that it is being exercised in accordance with the Charter's applicable defining rules and standards.").

treaty-based authority to reach the decisions it has reached. A second conception of legitimacy, however, might be more skeptical about the source of that authority. Under this latter conception, the question is not merely whether the rules have been followed, but rather whether those rules are themselves legitimate in the first instance.<sup>133</sup> Along this line of inquiry, several obvious questions arise: Does the composition of the Council fairly represent the community of states, or does it favor certain states (and their citizens) at the expense of others? Does the Charter require (or is it interpreted through practice to require) the Council to treat parties fairly, according to some set of principled standards? Do these standards take precedence over the private interests of Council members?

Both of these conceptions of legitimacy are dependent upon public perception in addition to objective reality. Thus, an objectively legitimate Council may be viewed as illegitimate if it fails to communicate its actions effectively to the public at large. On the other hand, an objectively illegitimate Council may be able to escape public accountability if it sufficiently masks its actions from public scrutiny. Thus, a host of perception-oriented questions arise, such as: Are Council decision-making processes transparent to the public? Are the Council's decisions well-explained? Are the specific actions taken by the Council clearly separated, and referenced to specific sources of legal authority or legal mandate?

Unfortunately, the Council fails to meet expectations in several of these areas. In the following sections, I briefly outline some of the Council's failures.

#### 1. *Lack of Representation and the Veto Power*

By design, the Council is something of a "distorted miniature executive council of the U.N. membership."<sup>134</sup> Council participation is ordinarily limited to a small minority of U.N. Member States, while one-third of its seats are given to permanent members who maintain additional veto powers. Kirgis puts it succinctly:

The Security Council's enforcement powers are troublesome to many UN member states because the

133. See FRANCK, *THE POWER OF LEGITIMACY*, *supra* note 53.

134. FRANCK, *FAIRNESS*, *supra* note 132, at 218.

Council is not regarded as an adequately representative body. Its five permanent, unelected members—China, France, Russia, the United Kingdom and the United States—can veto any substantive measure. One of them—the United States—has dominated the Council in recent years. To the extent that law enforcement finds its legitimacy in democratic institutions, the Security Council is vulnerable to criticism. This, of course, is not so much a question of the effectiveness of international sanctions as it is a question of the legitimacy of the institutions that administer them. Yet the two questions are interrelated.<sup>135</sup>

Kirgis' argument is compelling: States cannot trust that the Council's actions are correct or just because the Council is not structured in a manner that those states consider to be legitimate. This perception, in turn, undercuts incentives to comply with Council decisions.

A great deal has been written about modifications to membership or to the veto power that would increase Council legitimacy.<sup>136</sup> While these changes would address international perceptions of illegitimacy, such changes would be unlikely to increase perceptions of legitimacy within the United States to nearly the same degree. After all, the status quo favors U.S. interests, and thus the illegitimacy of the privileged U.S. position is less likely to be viewed as illegitimate by the United States. As such, reform in these areas is unlikely to significantly increase compliance by the United States.

## 2. *Political Decision-Making*

Americans are, however, likely to view the political nature of Council operations with skepticism, particularly when Council politics work against U.S. interests. The U.N. Charter was specifically framed to permit political calculations to influence Security Council decision-making, particularly with respect to the authorization of the use of force.<sup>137</sup> Notwithstand-

135. Kirgis, *supra* note 33.

136. See, e.g., *Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council*, U.N. GAOR, 57th Sess., U.N. Doc. A/57/47 (2003).

137. See FRANCK, *RECOURSE TO FORCE*, *supra* note 122, at 46.

ing this fact, the political nature of the Council seems at odds with both its adjudicative functions under the Charter,<sup>138</sup> and the Council's implicit mandate to respect the sovereignty and peaceful coexistence of all nations on an equal basis without favor or discrimination.

Certainly, the Council's model of force authorization conflicts with familiar conceptions of force authorization within democratic societies. One analogy is to the warrant process in the United States; as in the Charter system, police officers normally cannot invade the sanctity of a citizen's home without either exigency or *ex ante* authorization.<sup>139</sup> The general acquiescence to this system, in no small part, is grounded in the fundamental assumption of unbiased adjudication by an impartial magistrate.<sup>140</sup> One can only imagine how the warrant system might break down if the judge had vested interests in allowing citizens to be robbed or killed. Americans typically expect such adjudication to be carried out in an unbiased fashion, based on the good faith interpretation of the law in the interests of the entire community.

If the political nature of the Council does depart from these expectations, the question is, why? An explanation may lie in the historical context in which the Charter was developed. During the Cold War, the international system was characterized not only by a high degree of imminent danger to peace and security, but also by fundamental ideological differences between the Eastern and Western blocs.<sup>141</sup> Under such conditions, a Council that reflected the realities of power politics may have been a necessity, not only because of the potential for global destruction, but also because of the absence of truly communal norms on which to base a more legitimate institution to serve the community of increasingly liberal states.

Since the end of the Cold War, however, the United States has emerged as the sole remaining superpower. As Cold War

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138. U.N. CHARTER art. 24.

139. See generally *Katz v. US*, 389 US 347 (1967).

140. See Richard Van Duizend et al. *The Search Warrant Process: Preconceptions, Perceptions, and Practices* 31, 56 (National Center for State Courts, undated) (reported in FRANK W. MILLER, ET AL., *THE POLICE FUNCTION* 121-23 (4th ed. 1986)) (noting that the beneficial effects of the search warrant requirement include review before a magistrate).

141. See, e.g., John Lewis Gaddis, *The Tragedy of Cold War History: Reflections on Revisionism*, 73 FOREIGN AFF. 142, 146-48 (1994).

tensions have eased and the international community has begun to critically analyze foundational institutions like the Council, the inconsistent, politicized manner of Council deliberations has been increasingly perceived as a source of illegitimacy.<sup>142</sup> Notwithstanding newly emerging threats posed by terrorism and non-state actors, nothing like the potentially world-ending dangers of the Cold War has emerged. At the same time, the end of the Cold War and the triumph of capitalism and democracy have permitted an ideological convergence that has facilitated the rise and spread of liberal values.<sup>143</sup> In short, the barriers to a legalistic Council—high threat levels and ideological divergence—have lessened significantly. Consequently, legalist adjudication should now be an effective tool for recognizing and dealing with threats in an appropriate and mutually acceptable manner.

### 3. *Lack of Clear Standards and Duties*

The Council's method of political decision-making tends to amplify its frequent failure to act according to clear standards. This problem is most evident when the Council addresses so-called hard cases, in which the Council must reach a Chapter VII decision in the absence of any clear-cut international military conflict.<sup>144</sup> The inherent difficulty of the substantive inquiry in such cases is exacerbated by the injection of politically-motivated arguments. Consequently, the legitimacy of all Council actions may be discounted. Many nations, for example, take issue with the Council's authorization of humanitarian interventions, as these decisions do not appear to conform to any clear, consistent, or transparent criteria.<sup>145</sup>

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142. See, e.g., Mark Turner, *New Challenges Mean Time for Change at UN*, FIN. TIMES, Sep. 6, 2003, at 7; Betsy Pisik, *Envoys Voice Doubt In Security Council*, WASH. TIMES, Oct. 17, 2001, at A13.

143. For the general argument, see THOMAS FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (2000).

144. FRANCK, FAIRNESS, *supra* note 132, at 222.

145. See Marrack Goulding, *The Evolution of United Nations Peacekeeping*, 69 INT'L AFF. 451, 461 (1993) ("There may be sound reasons why it is right to use force against Iraq . . . , but not against other member states which continue to occupy their neighbours' territory contrary to the Security Council's wishes. . . . But if the Security Council is to escape the charge of double standards . . . [the Council] and especially its Western members . . . need to be more careful in defining those reasons and getting them accepted.").

Thus, it may be difficult to see the Council's decisions as embodying or executing a consistent underlying law.

Despite the problems encountered by the Council, many systems of governance are able to manage uncertainty while maintaining their legitimacy. Democratic judicial systems, for instance, routinely encounter novel questions of law, and are able to address those questions while maintaining their institutional legitimacy. One explanation lies in the courts' adoption of *stare decisis* as the foundation of jurisprudence. No such rule governs Council decision-making,<sup>146</sup> perhaps because the Council is an uneasy hybrid of legislative, executive, and adjudicatory powers. In stark contrast to many domestic systems, the Council essentially makes its own law, enforces that law, and reviews that enforcement, all at the same time. Democracies like the United States normally separate these powers, while incorporating checks and balances into their institutional decision-making processes. Notably, the legislative and executive branches are accountable not only to the electoral process, but also to the judicial branch, which measures their actions against the authority vested in them by the Constitution and statutory law.<sup>147</sup> The Council's failure to follow suit by separating its various functions further undermines the legal character of its decisions, along with any associated "pull toward compliance."<sup>148</sup>

#### 4. *Transparency*

What might one expect from a non-political, or legal, Council? In addition to a lack of bias and adherence to clear standards, the public might also expect a degree of transparency in Council operations. In other words, the public might wish to know that the Council is actually doing its job, and doing it in the manner in which the Charter directs. However, the current structure of Council operations makes it difficult for the domestic and international communities to properly assess whether the Council has fulfilled its obligations.

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146. See Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 29 (2002).

147. See THE FEDERALIST NO. 51 (James Madison).

148. Abbott et al., *supra* note 19, at 415 (identifying the delegation of enforcement to disinterested third-parties as a fundamental prerequisite of legal institutions).

The Council often fails to distinguish between its recognition (or non-recognition) of a threat, in the first instance, and its authorization (or non-authorization) of force to deal with that threat in the second.<sup>149</sup> Moreover, because Council members are themselves biased, self-interested political actors, they have incentives to cloud fact-finding efforts in order to mask the true motivations behind their decisions. In the absence of adequate evaluation of the factual claims by unbiased third-parties, through either *ex ante* fact-finding or *ex post* judicial review, legitimate and illegitimate Council operations tend to pool and become indistinguishable. Consequently, the legitimacy of all operations is discounted.

### C. Modeling the Compliance Decision

#### 1. A Rational Choice Approach to Modeling

It may be useful to explore the implications of the perceived inadequacies in Security Council operations by constructing a model of a typical interaction between the Council and a powerful democratic state like the United States. The dynamics of the model might then be observed to gain a greater understanding of how legitimacy influences the compliance decisions of democratic states. Of course, this understanding will be imperfect; models, by nature, imply a trade-off between a comprehensive examination of all relative factors and the practical need for parsimony in order to gain theoretical leverage on the problem being studied.<sup>150</sup> However, by capturing the salient characteristics of the interaction, the problems caused by legitimacy deficits can be better appreciated. Towards this end, it is also essential to remember that legitimacy is only one of many variables affecting the ultimate compliance decision. States consider a number of factors—threat level, diplomacy, economic costs, etc.—in making their determinations. The aim of the modeling exercise, therefore, is to demonstrate, to the extent possible, that greater legiti-

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149. Much of this is the result of the voting structure itself. First, a state like the United States will rarely introduce a resolution if it is unsure that the resolution will pass. Consequently, there are few examples of formal “no” votes by the Council. Moreover, when a resolution is voted down, the two Chapter VII questions are not presented separately, but rather together in the form of the resolution.

150. JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* 6 (1994).

macy in Council operations, *ceteris paribus*, is likely to increase the likelihood of compliance. However, the model will not, and cannot, show that even perfectly legitimate institutions will always be successful in ensuring compliance.

I construct a simplified model of the compliance decision using concepts derived from game theory. Game theory attempts to ascertain the prudent actions of an actor given the probable actions of other actors, and vice versa. Thus, the theory focuses on strategic interactions between parties. These interactions take place under the assumption of rationality: actors analyze various choices presented to them with a view towards maximizing their well-being (or “expected utility”).<sup>151</sup> Of course, this assumption does not perfectly mirror reality; many factors affect actors’ perceptions of reality, and impact the manner in which those perceptions are analyzed and translated into policy prescriptions.<sup>152</sup> Moreover, normative effects may be impossible to fully capture using rational modeling; as Elster argues, “social norms provide an important kind of motivation for action that is irreducible to rationality or indeed to any other form of optimizing mechanism[.]”<sup>153</sup> The predictions of rational theory, however, are not intended to be perfect. Rather, they are meant to approximate the outcomes of given strategic interactions, to identify variables that merit closer scrutiny, and to isolate potential leverage points for reform. Thus, while rational modeling is not the end of the inquiry, it is useful as an initial methodological approach. In this respect, rational modeling seems to offer the best first cut at a more complete analysis.

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151. *Id.* at 7.

152. See DANIEL KAHNEMAN, PAUL SLOVIC, AND AMOS TVERSKY, EDs., *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (1982); see also Ngaire Woods, *Economic Ideas and International Relations: Beyond Rational Neglect*, 39 *INT’L STUD. Q.* 161 (June 1995); Jürg Steiner, *Rational Choice Theories and Politics: A Research Agenda and a Moral Question*, 23 *PS: POL. SCI. & POL.* 46 (1990); George A. Quattrone & Amos Tversky, *Contrasting Rational and Psychological Analyses of Political Choice*, 82 *AM. POL. SCI. REV.* 719 (1988); Allan W. Lerner et al., *The Effect of Misperception on Strategic Behavior in Legislative Settings: Social Psychology Meets Rational Choice*, 6 *POL. BEHAV.* 111 (1984).

153. JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 15 (1989).

## 2. *The Compliance Game*

### a. The Basic Hypothetical

In order to place the compliance game in fuller context, it is useful to develop a brief narrative of the simplified interaction between the United States and the Council. Here, I assume that the United States has perceived a threat from some international actor, and wishes to act to combat that threat. Before doing so, however, it has approached the Security Council seeking authorization for its actions.<sup>154</sup> At this point, the Security Council is required to make two decisions: (1) whether that threat is sufficient to justify recourse to force under international law, and (2) whether it wishes to authorize the use of force by the United States.

I assume that a legitimate Council would authorize force when an actual threat to international peace and security exists, and would not authorize force when no threat is recognized. This assumption extends from underlying notions of self-defense (i.e., force is only justified to counter an existing threat) and equality and the rule of law (i.e., authorization should be given when fixed standards are met). I further assume that, in addition to the appropriate (and legitimate) outcomes, the Council might (1) fail to authorize the use of force even though it has found the existence of a threat, or (2) authorize the use of force even though it has failed to find the existence of a threat.<sup>155</sup>

The initial determination as to whether or not a sufficient threat exists to justify force, however, is hidden from the international community. The only public outcome of the Council's decision-making process is whether or not to authorize the use of force. In other words, the United States receives an affirmative or negative response from the Council, but is not provided with an explanation as to the Council's internal reasoning. Ultimately, the United States must make a decision as to whether or not it should comply, weighing the costs and

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154. The game could be complicated by considering the U.S. decision as to whether consultation is desirable in the first place, or whether it should resort to unilateral "self defense," with the potential for *ex post* ratification by the Council. However, such a model would be overly complicated for present purposes.

155. This is not to imply that such a decision would be legal according to the U.N. Charter.

benefits of compliance. This determination will be influenced by the probable reactions of the international community, as well as domestic constituents.

b. Deriving Preferences and Payoffs

In order to identify the rational strategies of both the United States and the Council, it is necessary to specify (albeit in somewhat indeterminate fashion) the payoffs received by each actor under every possible outcome. These payoffs are determined, in large part, by the actors' preferences:

U.S. Preferences

I assume that the United States has five specific sources of state interest:

**Security Interests:** The primary interest of the United States is to protect its territorial integrity and the security of its citizens. Thus, the United States has a definite interest in avoiding or minimizing threats to its security. Further, an ongoing threat will decrease the expected utility of the United States in proportion to the degree of the threat.

**Other International Interests:** The United States also has an interest in maximizing the benefits it derives from its relations with other nations. These include the benefits of international trade, and the provision of public international goods. The United States also has an interest in facilitating good diplomatic relations with the international community, and avoiding punishment in the form of economic sanctions, damaged diplomatic relations, legal prosecution, or military attack.

**Economic and Budgetary Interests:** The United States is also concerned with the strength of its economy, the ability of the government to provide economic goods to its citizens, and the ongoing costs of operations. Thus, the government has an interest in maximizing positive economic returns. Since government actions, particularly military actions, are costly, economic considerations should play a part in the evaluation of potential strategies.

**Political Interests:** The United States, controlled by the Bush administration, also has powerful political interests which inform and motivate its policy decisions. Generally speaking, the administration has an interest in maximizing

public support for its policies. The political benefits or costs derived from a given policy choice are an aggregation of positive and negative opinion. For any given attack, the administration must weigh the political costs of violating international law against the political costs of permitting a potential threat to national security to continue unabated.

**Private Policy Interests:** The Bush administration also has private interests in securing policies that it believes to be correct, or that maximize the administration's self-interest.

#### Security Council Preferences

I assume that the Security Council has three sources of interests:

**Interests in the Maintenance of International Peace and Security:** The primary institutional interest of the Security Council is the fulfillment of its mandate under the U.N. Charter, namely the identification and resolution of existing and potential threats to international peace and security.<sup>156</sup> This interest suffers whenever an illegitimate use of force occurs or persists unabated, whether that force emanates from a threatening international actor, or from the United States.

**Legitimacy Interests:** The Security Council also has a strong interest in maintaining its institutional legitimacy. The Council is a creature of international law, and as such its authority rests on its adherence to its mandate and its legitimate interpretation and exercise of its powers within the confines of international law. Apart from this intrinsic interest in legitimacy, the perception that the Council is illegitimate will likely impact its ability to fulfill its designated functions in the long-run.

**Private Interests of Member States:** Security Council Member States also have any number of private interests that influence the eventual outcome of any Council vote. These interests may coincide with the interests of the Council, but they also may diverge.

#### c. The Game Diagram

The compliance game is constructed based on these interests and the strategic options available to each actor. Here,

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156. See U.N. CHARTER ch. VII.

the game is presented in strategic (or condensed, tabular) form. Some explanation of the variables included in the diagram is warranted.

I assume that the Security Council realizes payoffs involved in its interests in maintaining its own legitimacy, in maintaining international peace and security, and in realizing the private interests of Member States. I assume that peace and security are hampered when a significant threat is left unanswered, and that the degree of harm to the Council is a function of the threat posed to the United States (represented as *S*). I further assume that the international community imposes retrospective costs on the Council if it acts outside of what are perceived to be reasonable bounds of discretion. Thus, if the Council authorizes force even though the perceived threat is below some lower threshold ( $k_l$ ), or fails to authorize force even though the perceived threat is above some upper threshold ( $k_h$ ), the Council will be punished proportionately. Moreover, I posit that these boundaries will afford the Council greater of lesser discretion based on the level of *ex ante* legitimacy attributed to Council processes (*L*). Finally, I factor in the private interests of the Member States (*P*), assumed to be positive if the United States complies with the Council's decision, and negative if it does not.

With respect to the United States, I assume that if the United States does not attack, it suffers costs equal to the level of threat it perceives from the threatening entity. However, the United States updates its initial perception of threat based on the prior determination of the Security Council,<sup>157</sup> factoring in the perceived legitimacy of the Council's decision-making process ( $T_1$ ); the more legitimate the Council is perceived to be, the more the United States will rely on its determination in reaching its own. If, on the other hand, the United States attacks, I assume that the threat is eliminated,<sup>158</sup> but that the

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157. Baye's Law provides a method of updating ones beliefs based on *ex ante* assessments of the probabilities that an event *B* will occur if an event *A* occurs first. The formula is written as:  $P(A \text{ — } B) = P(A) P(B \text{ — } A) / (P(A) P(B \text{ — } A) + P(\sim A) P(B \text{ — } \sim A))$ .

158. Obviously, it is unlikely that such a threat would be completely eliminated. However, instead of complicating the model by resorting to probabilistic determinations based on military strength, I make this simplifying assumption, noting that the costs and risks of war can be incorporated elsewhere.

United States incurs costs as a result of its military operations. These costs vary depending on whether the attack was authorized, and are assumed to be higher if the United States acts unilaterally.<sup>159</sup> In the case of unauthorized attack, in addition to the actual costs of the operation itself, the United States bears both international and domestic costs stemming from the political and diplomatic consequences of its actions.

DIAGRAM 1: BASIC COMPLIANCE GAME

		Security Council	
		Authorize	Do Not Authorize
U.S.	Attack	$P_s + k_l - T_i$ $P_u - C_m$	$- P_s + T_i - k_h$ $P_u - C_u - I - D$
	Do Not Attack	$P_s + k_l - T_i - S$ $P_u - I$ <sup>160</sup>	$P_s + T_i - k_h - S$ $P_u - T_1$ <sup>161</sup>

Legend

$P_u$  = Private Interests of the U.S.

$k_l$  = Lower limit of "legitimate" Council discretion (Council suffers legitimacy costs if it authorizes an attack when threat is lower than  $k_l$ )

$C_u$  = Costs of unilateral attack

$T_i$  = Threat perceived by the international community

$I$  = International costs of unauthorized attack

$S$  = Costs of instability and threats to security

$P_s$  = Private Interests of Security Council Members

$k_h$  = Upper limit of "legitimate" Council discretion (Council suffers legitimacy costs if it authorizes an attack when threat is higher than  $k_h$ )

$C_m$  = Costs of multilateral attack

$T_1$  = Threat perceived by the U.S. (as updated after Council action)

$D$  = Domestic costs of unauthorized attack

159. Here, I assume that in addition to dividing costs among potential allies, multilateralism will generally ease operations and boost morale.

160. Here,  $P(A)$  is the U.S.'s *ex ante* approximation of threat,  $T_u$ , which can be expressed as a probability that the threat is substantial.  $P(B|A)$ , then, is the probability that the Council fails to authorize force if there actually is a threat, which can be expressed as a function of legitimacy,  $L$ . If one assumes a conservative council, which will almost certainly fail to authorize force in the absence of a threat, then  $P(A|B)$ , the updated belief that there is a substantial threat, reduces to  $(T_u * L) / (T_u * L)$ , or 1.

161. Here,  $P(A)$  is the U.S.'s *ex ante* approximation of threat,  $T_u$ , which can be expressed as a probability that the threat is substantial.  $P(B|A)$ , then, is the probability that the Council fails to authorize force if there actually is a threat, which can be expressed as a function of legitimacy,  $L$ . If one assumes a conservative council, which will almost certainly fail to authorize force in the absence of a threat, then  $P(A|B)$ , the updated belief that there is a substantial threat, reduces to  $(T_u * (1 - L)) / (T_u * (1 - L) + (1 - T_u))$ , or  $(T_u * (1 - L)) / (1 - T_u * L)$ .

#### d. Observations from the Compliance Game

After constructing the game diagram, it may be possible to identify a strategic equilibrium between the two actors—a set of mutually reinforcing strategies that maximize each actor's payoff given the likely actions of the other actor. Since the compliance model uses multiple variables, the equilibrium outcome will be highly dependent on the exact value of those variables. As such, a complete solution would be complex, unclear, and probably unnecessary for present purposes. However, even a cursory review of the diagram reveals several interesting observations:

- *The greater the threat ( $T_u$ ) perceived by the United States, the more likely it is to attack, irrespective of the Security Council's authorization decision.* This finding demonstrates the realist and institutionalist assumption that when the costs of institutional compliance rise, the incentives for compliance tend to diminish.
- *The greater the threat ( $T_i$ ) perceived by the Security Council, the more likely the Council is to authorize the use of force.* This is true for several reasons. First, the threat perceived by the Council is likely to track that perceived by the international community. Consequently, the Council's interest in promoting peace and security by authorizing the use of force is increased. Further, the increase in threat level also increases the legitimacy costs incurred by the Council if it fails to authorize attack. Finally, the higher the threat to the international community, the more likely it is that the private interests of Member States would be served by the use of force.
- *However, the greater the private interests of Council Members ( $P_s$ ) in opposing the use of force, the less likely the Council will be to authorize the use of force.* If Member States have strong individual incentives not to authorize the use of force, they are unlikely to do so.
- *The greater the ex ante private preference of the administration to utilize force ( $P_u$ ), the more likely the administration is to attack.* This follows from the fact that domestic and international forces combine with the existing policy preferences of the administration in the formation of payoffs, but do not supplant those initial preferences. Thus, *ceteris paribus*, an administration with a strong

preference for the use of force, will be more difficult to constrain than a more liberal administration. In addition, the United States may generally be more difficult to constrain than a less powerful, but liberal, state.

- *But, the more legitimate the Council is perceived to be by the domestic population of the United States ( $L_d$ ), the more likely the United States will be to comply with the decision of the Council, whatever it may be.* This effect also has several sources. First, the more legitimate the Security Council is perceived to be, the more reliable its decision is as a basis for U.S. policy; U.S. leaders are more likely to update their prior beliefs based on the Council's decision. In addition, the higher the degree of perceived legitimacy, the more likely the domestic population is to impose costs on the government for failing to comply with institutional decisions. Finally, greater legitimacy in Council operations is likely to increase the probability that the population will internalize the Council's views in assessing the level of threat, and in linking that threat to its internal definition of security.
- *The more legitimate the Council is perceived to be by the international community generally ( $L_i$ ), the less constrained the Council will be by the need to maintain its legitimacy in any given instance.* Here, I posit a distinct relationship between the threshold measures  $k_l$  and  $k_h$ , and the level of legitimacy perceived by the international community. It is reasonable to assume that as perceived legitimacy increases the international community will afford the Council more leeway in making its decisions.

### 3. *Some Empirical Evidence: Public Opinion and the Iraqi Invasion*

#### a. American Support for Compliance

As the above analysis demonstrates, public opinion can theoretically encourage a government to comply with the decisions of international institutions and perhaps even force them to do so, given the right circumstances. Of course, a great deal turns on the particular interests of the public, and its opinions about the relative worth of compliance with international law. Unfortunately, there is a general lack of empirical evidence isolating the public preference for compliance in

the face of strong countervailing interests, such as the arguable preservation of national security. Further, the relative novelty of the post-Cold War era and the infrequency of unauthorized democratic use of force limit available data.

Notwithstanding this fact, recent polling data suggests that legitimacy does matter to Americans. In the Fall of 2002, Americans overwhelmingly believed that U.N. authorization was necessary before any invasion of Iraq was commenced, by over a 2-to-1 margin.<sup>162</sup> An even larger percentage conceded that U.N. authorization was an important factor in assessing the propriety of invasion; an October *Newsweek* poll shows that 84 percent of Americans believed formal U.N. support to be “very” or “somewhat” important.<sup>163</sup> Even after the adoption of Security Council Resolution 1441 on November 8, 2002, public opinion still opposed unilateral action against Iraq. Moreover, polling data shows that most Americans explicitly rejected the Bush Administration’s interpretation of the scope of Resolution 1441’s authority to use force; the public believed that there should be no attack without further U.N. authorization by a 2-to-1 margin, even though they continued to support invasion if such authorization could be obtained.<sup>164</sup>

These trends continued through late February, 2003, when a Gallup poll showed 66 percent of Americans still opposed to the invasion, with 40 percent opposed because the United Nations had not authorized action.<sup>165</sup> Generally,

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162. All polling data referred to in this Note was obtained from The Polling Report, an online compilation of historical polling statistics. See The Polling Report, *Iraq*, page 8, at <http://www.pollingreport.com/iraq8.htm> [hereinafter *Iraq 8*] (citing the following polls: CNN/USA Today/Gallup Poll, Sept. 2-4, 2002; CNN/USA Today/Gallup Poll, Sept. 13-16, 2002; CNN/USA Today/Gallup Poll, Sept. 20-22, 2002); see also The Polling Report, *Iraq*, page 7, at <http://www.pollingreport.com/iraq7.htm> [hereinafter *Iraq 7*] (citing NBC News/Wall Street Journal Poll, Dec. 7-9, 2002).

163. See *Iraq 8*, *supra* note 162 (citing *Newsweek* Poll, Oct. 24-25, 2002).

164. *Id.* (citing Los Angeles Times Poll, Aug. 22-25, 2002); see also *Iraq 7*, *supra* note 162 (citing the following polls: CNN/USA Today/Gallup Poll, Nov. 8-10, 2002; CNN/Time Poll, Nov. 13-14, 2002; Fox News/Opinion Dynamics Poll, Nov. 19-20, 2002).

165. *Iraq 7*, *supra* note 162 (citing the following polls: The Gallup Poll, Feb. 17-19, 2003; CNN/USA Today/Gallup Poll, Feb. 24-26, 2003; CNN/USA Today/Gallup Poll, Jan. 23-25, 2003 (56 percent to 39 percent support invasion only if United Nations authorizes military action); The L.A. Times Poll, Jan. 31-Feb. 2, 2003 (65 percent to 30 percent opposed to invasion without approval of Security Council)); *Iraq 8*, *supra* note 162 (citing CBS

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Americans continued to favor diplomacy over the use of force,<sup>166</sup> and felt that more time should be spent on inspections and peaceful avenues of conflict resolution.<sup>167</sup> Opinion shifted, however, after U.S. Secretary of State Colin Powell spoke before the United Nations on February 5.<sup>168</sup> While some polls continued to show that Americans favored waiting for U.N. support before invasion,<sup>169</sup> others showed that the majority of Americans favored attacking with or without U.N. approval.<sup>170</sup> Notably, support for an invasion without authorization was still significantly less than support for the authorized use of force.<sup>171</sup> However, one still must explain the apparent shift in at least a portion of public opinion.

While a complete explanation is difficult, some obvious trends are worth noting. First, towards the end of February, the party split on the question of authorization widened significantly.<sup>172</sup> This trend could have any number of explanations, but two possibilities are particularly interesting. One explanation lies in the nature of Democratic and Republican ideolo-

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News Poll, Sep. 22-23, 2002 (52 percent to 37 percent in favor of following U.N. recommendations regarding military action)).

166. *Iraq 7, supra* note 162 (citing CBS News Poll, Jan. 4-6, 2003 (63 percent in favor of diplomacy)).

167. *Id.* (citing the following polls: Knight Ridder Poll, Jan. 3-6, 2003 (68 percent favor taking time to achieve goals without war); CNN/USA Today/Gallup Poll Jan. 23-25, 2003 (56 percent say more time is needed for inspections); ABC News Poll, Jan. 28, 2003 (59 percent to 36 percent in favor of giving inspectors more time); ABC News/Wash. Post Poll, Jan. 30-Feb. 1, 2003 (majority more concerned with moving too quickly than with not moving quickly enough); ABC News/Washington Post Poll, Feb. 6-9, 2003 (59 percent say wait for more international support)).

168. See Colin Powell, *Remarks to the United Nations Security Council* (Feb. 5, 2003), available at <http://www.state.gov/secretary/rm/2003/17300.htm>.

169. The Polling Report, *Iraq*, page 6, at <http://www.pollingreport.com/iraq6.htm> [hereinafter *Iraq 6*] (citing the following polls: Newsweek Poll, Mar. 13-14, 2003 (53 percent say the United States should take more time, and 54 percent oppose invasion without U.N. or major ally support); Zogby International Poll, Mar. 14-15, 2003 (finding that a slim majority of people oppose a war against Iraq if the United States wages it without significant U.N. or international support)).

170. See *Iraq 7, supra* note 162 (citing CBS News/New York Times Poll, March 7-9, 2003 (55 percent support attack even without U.N. authorization)); see also *Iraq 6, supra* note 169 (citing CBS News Poll, March 15-16, 2003 (54 percent support unauthorized invasion)).

171. *Iraq 6, supra* note 169 (citing Newsweek Poll, Mar. 13-14, 2003).

172. See *Iraq 7, supra* note 162 (citing ABC News/Washington Post Poll, Feb. 26-Mar. 2, 2003).

gies. Democrats, perhaps unsurprisingly, may be more susceptible to the liberal ideology of constraint as a consequence of their generally liberal political philosophies in domestic politics. Thus, Republicans may be more inclined to lose confidence in institutions than Democrats, and to do so at a faster rate. An alternate explanation may lie in the connection between Republicans and President Bush, the leading representative of the Republican party. For whatever reason, be it ideological agreement, character, or perception of leadership ability, Republicans may be more inclined to trust President Bush than the Security Council, for many of the same reasons they trust Bush on Election Day. Of course, these arguments are speculative, and would require further empirical data to substantiate.

Public opinion may also have been linked to the erosion of public confidence in the Security Council's procedures, coupled with a sharp increase in confidence in the Bush administration following Powell's February 5 presentation to the United Nations. As early as November of 2002, at least half of the American public expressed doubts over whether U.N. inspectors would accurately report their findings, perhaps out of fear that doing so could spur a war.<sup>173</sup> An even greater percentage believed the inspectors were simply incapable of detecting Weapons of Mass Destruction (WMDs) even if they were present.<sup>174</sup> Even by the beginning of February, however, most Americans still believed that President Bush had not produced sufficient evidence of Iraq's culpability to justify invasion.<sup>175</sup> If anything, it appears that public confidence in Bush's trustworthiness was slipping; more Americans believed he was deliberately misrepresenting information, and fewer Americans believed he was accurate.<sup>176</sup> The turning point, to the extent that one can be identified, appears to be Powell's speech before the United Nations on February 5. After the speech, Americans believed, by almost a 2-to-1 margin, that the administration had met its evidentiary threshold.<sup>177</sup> Consequently, the burden of persuading public opinion shifted to

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173. *Id.* (citing Fox News/Opinion Dynamics Poll, Nov. 19-20, 2002).

174. *Id.* (citing CNN/USA Today/Gallup Poll, Dec. 9-10, 2002 (73 percent)).

175. *Id.* (citing ABC/Washington Post Poll, Jan. 30-Feb. 1, 2003).

176. *Id.* (citing ABC News Poll, Jan. 27, 2003).

177. *Id.* (citing ABC News/Washington Post Poll, Feb. 6-9, 2003).

the Council, already plagued by legitimacy concerns and doubts about its treatment of the Iraq situation.<sup>178</sup> Ultimately, it seems the Council failed to reverse these impressions.

#### b. Impact of Public Opinion

Regardless of the explanation one gives for the erosion of public support for compliance, the fact remains that a sizable portion of the American population—a majority for many months—believed that compliance was the preferable and required U.S. policy. This suggests that the public prefers compliance, and that compliance considerations play a considerable role in shaping public opinion. Moreover, the eventual shift in public opinion seems to be linked to ideology and perceptions of legitimacy, suggesting that the nature of the institutional actor does influence the strength of the preference for compliance with that institution's decisions.

Finally, the fact that public opinion failed, in this case, to constrain Bush's behavior does not mean that public opinion lacks the power to impact the eventual compliance decision, or to shape the manner in which that decision is made. Bush was compelled to justify his actions to the American people, and to take numerous intermediate steps that he likely would have avoided in the absence of public pressure.<sup>179</sup> Ultimately, the fact that public opinion did not prevent Bush's decision to invade Iraq *ex ante* does not mean that his actions will not have *ex post* costs, nor do they signal that public opinion cannot be more effectively leveraged as a constraining device in the future.

### V. REMEDIAL MEASURES

Based on the foregoing analysis, a number of potential modifications to the Security Council's operations suggest themselves.

#### A. Structural Modifications

The first set of potential modifications would involve structural changes to the current configuration of the Council,

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178. *Id.* (citing ABC News/Washington Post Poll, Feb. 19-23, 2003).

179. *See, e.g.*, Elizabeth Bumiller, *Threats and Responses: White House Memo; War Public Relations Machine Is Put on Full Throttle*, N.Y. TIMES Feb. 9, 2003, at 17.

and its current allocation of voting rights and the veto. These are the types of reforms that have been hotly debated in recent years.<sup>180</sup> Rather than rehearse these proposals, I simply recognize that their implementation might enhance the objective legitimacy of the Council. However, Security Council enlargement and veto reallocation face two large obstacles.

First, enlargement is a difficult proposition for political reasons. The P5 enjoy a privileged position in the U.N. hierarchy by virtue of their veto power. They are unlikely to simply sacrifice this advantage, or to see it watered down through the addition of other veto powers. Moreover, the provisions for amendment under the Charter make structural modifications to the Council particularly difficult. Consequently, enlargement is unlikely to succeed unless the P5 have incentives to acquiesce.

Second, enlargement poses significant practical difficulties for Council operations.<sup>181</sup> With fifteen members, the Council already faces significant obstacles in ordering its debates and ensuring reasoned deliberation. Additional members will compound these difficulties. Further, the addition of new members will decrease the transparency of Council operations, and make it more difficult to hold members accountable to a legalist model of Council operations. Consequently, there is not only a trade-off between overall legitimacy and effectiveness, but also between the legitimacy gained through more balanced representation and the legitimacy lost from increased fragmentation and politicization of Council operations.

Given these difficulties, I focus on an alternative mechanism for increasing Council legitimacy: enhancing transparency and accountability, and encouraging legalist decision-making processes. Far from detracting from Council effectiveness, I believe that a shift to such principles would enhance the Council's ability to fulfill its mission under the Charter. Moreover, if the Council is viewed as a legal rather than political organ, future reforms like enlargement become less problematic. The minimization of private interests and political intrigue permit enlargement in a viewpoint-neutral fashion, in a

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180. See, e.g., BARDO FASSBENDER, U.N. SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE (1998).

181. See FASULO, *supra* note 131, at 47-50.

manner that is less likely to offend the interests and expectations of Member States, while being more difficult for such states to credibly and legitimately oppose.

B. *Increasing Transparency in Use of Force Appraisals:  
Towards a Two-Step Process*

1. *Chapter VII and the Two-Step Process*

One of the difficulties identified in the compliance game is the inability of the public and the international community to assess whether the Council has made a legal decision based on an objective assessment of the threat posed or a political decision that has been heavily influenced by the private interests of Member States. I have argued that the more legal a decision appears to be, the more binding it will be on democratic states. One mechanism for enhancing compliance, then, is to enhance the perception of legalism in Council deliberations.

It is crucial, therefore, that Council procedures allow states to clearly separate the objective and political types of decision-making; currently there is a pooling problem which precludes such separation based on observations of the decision-making process. There are several methods by which such separation might be attempted, but all should have the effect of distinguishing the two questions addressed to the Council under Chapter VII. As noted above, Article 39 dictates that:<sup>182</sup>

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 Articles 41 and 42, to maintain or restore international peace and security.

The first question is essentially adjudicative in nature; the Council must assess the facts and determine whether they constitute a threat to international peace and security. The resolution of the second question, on the other hand, is an act of political discretion. Yet, within that discretion, some actions will be perceived as legitimate, and some as illegitimate, depending on the previous fact-finding step. Thus, if the Council identifies a threat, it will find it difficult to ignore that

182. U.N. CHARTER art. 39 (emphasis added).

threat. Similarly, if the Council finds no threat, any authorization to use force will be immediately suspect. Thus, the separation of the two questions has the effect of legalizing the Chapter VII inquiry.

One obvious objection is that a Council that wants to act politically will always be able to find a way to act politically. For example, instead of simply failing to authorize force, the Council would simply not find a threat under the new system. As I argue in the following sections, however, the altered structure of the compliance game makes such deception more difficult than in the status quo, and more costly. Further, there are devices which might be adopted to constrain the influence of political factors in the first part of the two-step process.

## 2. *Modeling Separation*

To illustrate the benefits of visible separation between the two steps of the Council's Chapter VII inquiry, I present a modified version of the compliance game presented in Part IV. Here, the Council makes two separate decisions: whether to find a threat, and whether to authorize the use of force. Since these are both binary questions, the Council has four strategic options. As before, the United States has two options: it can attack or refrain from doing so.

Notably, here the United States updates its beliefs about the presence of a threat based on an assessment of the accuracy of the Council's fact-finding mechanism, rather than its assessment of the legitimacy of those operations. The effective separation of the factual determination from the question of political authorization permits the United States to rely on the Council's assessment to a greater extent. Since facts are more objective than opinions, it should be easier for external observers to detect erroneous or biased interpretations of those facts when those interpretations are explicit. Thus, the Council is likely to be more constrained than it is in the status quo, in which the two steps are not visibly separated. Further, there are a number of procedural mechanisms, discussed below, which might be adopted to limit Council discretion and increase the transparency of the fact-finding process. These should minimize the intrusion of political factors into fact-finding operations.

Consequently, both the domestic population and the international community have a much clearer mechanism for judging the Council's legitimacy when the two steps are separated. The explicit nature of the threat determination compels the Council to make a costly commitment that cannot be escaped without substantial legitimacy costs. If the Council identifies a threat, it cannot later fail to authorize the use of force without sending a clear signal of its illegitimate actions to the public. Similarly, if the Council fails to identify a threat, any later authorization will be viewed as illegitimate *per se*. In short, instead of basing legitimacy on a notion of bounded discretion, the international community simply examines whether the threat and authorization determinations agree. If they do not, legitimacy costs are certain (H). If, however, the determinations do agree, the international community can still make the more difficult assessment based on the discretion it is willing to afford the Council.

Further, if the Council acts in a blatantly illegitimate fashion, the domestic and international costs faced by the United States as a result of non-compliance are likely to decrease substantially (here, I assume they become negligible). At the same time, if the United States requests Council authorization and the Council responds to both questions in the negative, the United States will continue to suffer domestic and international costs based on more ambiguous determinations of Council legitimacy. However, because the Council has adopted a quasi-democratic division between its legal and political functions, the public assessment of legitimacy is likely to be higher in cases in which the Council's two determinations are not in direct conflict.

As a direct consequence of these alterations in the structure of the Council, and the structure of the game, the Council has far greater incentives to authorize the use of force when threats do exist, and to deny its authorization when no sufficient threat is identified. At the same time, states like the U.S. have greater freedom to act to defend themselves when an actual threat exists (either because they will receive authorization, or because the costs of non-compliance will be substantially reduced), but greater incentives to comply when the Council makes a decision to deny the use of force that appears legitimate.

DIAGRAM 2: REVISED COMPLIANCE GAME

		Security Council			
		Finds Threat		Does Not Find Threat	
		Authorize	Do Not Authorize	Authorize	Do Not Authorize
U.S.	Attack	$P_s + k_i - T_i$ $P_u - C_m$	$P_s - H$ $P_u - C_u$	$P_s - H$ $P_u - C_m$	$P_s + T_i + k_h$ $P_u - C_u - I - D$
	Do Not Attack	$P_s - S$ $P_u - 1$	$P_s - S - H$ $P_u - 1$	$P_s - S - H$ $P_u - T_a^{183}$	$P_s - S$ $P_u - T_a$

3. *Methods of Separation*

Separating the two steps of the Council’s use of force determination is easier said than done. The clean separation modeled above represents an ideal that is unlikely to be achieved in practice, due to the political difficulties of Council transformation and the incentives that Council members might have to subvert whatever separating devices are implemented. However, several mechanisms might move the Council along the path to separation, reinforcing legitimate norms and practices in the process.

a. Procedural Separation within the Council

First, and most obviously, the Security Council could simply adopt a rule requiring all Chapter VII authorizations to first make an explicit finding as to the existence of a threat, and then (and only then) to make a separate finding with respect to authorization for the use of force. Thus, the process required by Article 39, and arguably implicit in all Chapter VII decisions, would be more clearly embodied in Council procedures. The fact-finding step might further require specific findings to be made, with reference to specific, verifiable sources. The authorization step might entail detailed legal justification for the Council’s decision, with reference to past Council actions and existing international law.

183. I use  $T_a$  to refer to threat modified by perceptions of fact-finding accuracy, as opposed to legitimacy.

While these procedures might be helpful, if only for the sake of formality, there is still reason to believe that the decision-making process would remain politicized. Council members might simply adjust their findings of fact to suit their later authorization preferences. While fact-finding may never be entirely objective, however, determinations of fact are more concrete and easier to objectively verify than loose findings of law or political discretion. Moreover, procedural separation might be coupled with any number of additional mechanisms that would constrain the Council's ability to politicize its fact-finding operations.

b. Advisory Opinions

Pursuant to Article 65 of the Statute of the International Court of Justice, the Court may provide an advisory opinion on any legal question submitted by any body authorized to do so by the U.N. Charter.<sup>184</sup> Article 96 of the U.N. Charter, in turn, authorizes the Security Council to seek such opinions. The Security Council has not made widespread use of the advisory opinion procedure, yet the Council could nevertheless seek the Court's opinion on the legality of the use of force in a given context. Notably, these decisions would not be formally binding on the Council. Nevertheless, the advisory opinion would provide an objective interpretation of standing law, which might be referenced by the international community in judging the subsequent actions of the Council. Thus, the Council would have incentives to constrain its potentially politicized authorization decision appropriately.

The main objection to the advisory opinion procedure lies in the inability of the International Court of Justice (ICJ) to decide legal questions expediently. As such, effective recourse to advisory opinions by the Council would require an overhaul of ICJ procedures, particularly with respect to ICJ-Council interactions. Fortunately, the Council and its members have the ability to pursue these changes through political channels. As such, if the process could be accelerated, the

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<sup>184</sup> Statute of the International Court of Justice, June 26, 1945, art. 65(1), 59 Stat. 1055, T.S. No. 993.

Council might find the advisory opinion to be a useful tool in bolstering the Council's apparent legitimacy.<sup>185</sup>

c. Delegation

Instead of seeking a non-binding advisory opinion, the Council might choose to delegate actual authority to make the initial threat determination to a different body.<sup>186</sup> Here, I identify three possible forms of delegation:

Self-Delegation

The Council might delegate initial fact-finding to a subset of the Council members, or to a subordinate body of the Council. If these members were sufficiently independent, they could exercise their delegated authority in a manner substantially free from political influence. Moreover, these bodies could be specially structured as legal, rather than political, further adding to the appearance and reality of legitimate fact-finding. Alternately, self-delegation could take the form of a re-designation of the fact-finding stage as a procedural question, invoking the more permissive supermajority-rules provisions of the Charter.<sup>187</sup> Here, the appearance of politicization is countered by the voluntary removal of the veto power, and the submission of the use of force question to a more representative and balanced decision-making structure. In such instances, use of force is more likely to be authorized given the absence of a procedural hurdle, which makes the decision *not* to use force more compelling.

Self-delegation initiatives face two major hurdles. The first is political. Council members, the P5 in particular, have incentives to retain their powers under the Charter, and are unlikely to sacrifice those powers without a compelling reason. Notwithstanding this fact, self-delegation may be politically expedient in limited instances. However, a second problem arises in the questionable legality of self-delegation. Many of

185. See Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 8 (1996).

186. Given space constraints, I am unable to fully address the legal obstacles to delegation. Although there may be some difficulties with delegation under the Charter, the practical obstacles are minimal given the absence of functional judicial review.

187. See U.N. CHARTER art. 27, para. 2; see also Thomas Franck, *Inspections and Their Enforcement: A Modest Proposal*, 96 AM. J. INT'L L. 899 (2002).

the Council's procedural rules are dictated by the Charter. Thus, any action by the Council which unilaterally reinterprets those provisions may be outside the bounds of Council authority and formal legality, and may throw the Council's legitimacy into question. As such, any act of self-delegation should be accompanied by a rigorous legal argument not only justifying the delegation, but propounding the specific source of the authority to make the delegation.

#### External Fact-Finders

Another method of delegation would entail the wholesale export of the fact-finding function to an outside body that would gather facts and render an opinion as to the meaning of those facts. Appropriately selected external bodies would be able to leverage their expertise during the fact-finding process, reaching decisions that are more technically accurate than the Council itself. Moreover, such bodies would be buffered from the direct influence of Council politics, making their findings more objective than those of the Council.

While the Council already relies on fact-finders operating through the Secretariat or bodies such as the IAEA, the Council normally accepts their findings as one input into its decision-making process, and in practice exerts significant control over these fact-finding efforts, and politicizes their activities using methods that are difficult to detect.<sup>188</sup> Thus, the traditional use of fact-finders by the Council is problematic. These problems might be ameliorated through the delegation of fact-finding authority to a body outside of the Council's immediate control. That body would have the power to designate its own personnel, define the scope of its mission, and publish its own findings without the intervention of the Council or the Secretary-General. Once known to the international community, the Council would be pressured by both the international community and the force of its initial delegation, to accept those findings as its own.

Several objections might be raised to the use of external fact-finders. First, while fact-finding operations themselves might be shielded from Council politics, the selection of exter-

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188. See M. Cherif Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, 5 WASH. U. J.L. & POL'Y 35, 39 (2001) (lamenting the politicization of the fact-finding process).

nal operations probably will be impacted by political considerations. Further, there might be the perception that external actors are themselves politicized, which would merely shift the focus of the legitimacy problem. These concerns are significant, but are cabined by the international community's ability to judge the legitimacy of the Council's delegation decision. Thus, the Council should have incentives to choose external bodies which the public believes to be legitimate themselves.

### Third-Party Triggers

A third method of delegation would bypass the need for Council deliberation on the authorization question altogether. Instead of delegating the authority to gather facts to an external party, the Council could delegate the right to trigger the authorization to use force itself. In other words, the Council could specify a set of *ex ante* conditions which, if met, would justify the use of force, and then designate a body which would determine when, if ever, those conditions are met. This process could follow one of two models that are familiar in domestic legislation.

In the first model, the Council would determine applicable conditions for the use of force, and a disinterested external body (like the IAEA) would determine whether those conditions had been met. If that body answered in the affirmative, the use of force would be authorized absent further Council intervention. This process would parallel the domestic warrant process, in which the legislature defines a crime, and an independent magistrate determines whether those conditions have been reasonably met.

In the second model, the Council would again specify *ex ante* conditions for force authorization, but would delegate the decision to use force in accordance to those conditions to states themselves. In other words, states could judge whether the conditions for the use of force had been met and act accordingly without further authorization from any international body. Individual states would act as executives, enforcing Council-made law. Notably, the United States argued that Security Council Resolution 1441 was premised on precisely this model.<sup>189</sup>

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189. See Blackwill, *supra* note 6.

The first of these models is more tenable than the second, for several reasons. The magisterial model more effectively encourages reasoned deliberation as to whether the conditions precedent to authorized attack have been met. Disinterested bodies can assess the state of the world more objectively, without submitting to passions of the moment. Moreover, an appropriately chosen external body can serve as a proxy for the Council itself, embodying the interests of the international community in reaching proper and accurate factual determinations. On the other hand, permitting self-interested, biased states to determine for themselves whether the use of force was authorized would effectively destroy the Council's role as a deliberative intermediary. Permitting the state actor to interpret the scope of the rules applicable to it would also deprive that law of much of its force and practical constraining effect, making the authorization decision largely superfluous.

The first model avoids the problem of the fox guarding the henhouse, but would still constitute a delegation of core Council authority. Apart from the legitimacy concerns discussed with respect to external fact-finders generally, such delegation raises questions of legality under the Charter. It is unclear whether some variant of the non-delegation doctrine exists under the law of the United Nations.<sup>190</sup> While the resolution of these issues is beyond the scope of this Note, the international community must grapple with such complex issues as the administrative nature of international institutions, like the United Nations, continues to grow.

#### d. *Ex Post* Review

One source of the Council's illegitimacy is the perception that it does not operate according to fixed standards or within clear boundaries. While some have argued that the U.N. Charter is, essentially, a constitutional document,<sup>191</sup> it is clear that the Charter has not embodied the type of robust checks

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190. See, e.g., Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 125 (1999) (arguing that Council delegations of the authority to use force should be clear and narrowly construed).

191. See Thomas Franck, *Is the U.N. Charter a Constitution?*, in VERHANDEN FÜR DEN FRIEDEN [NEGOTIATING FOR PEACE] 95 (Max Planck Inst. for Comp. Pub. Law & Int'l Law ed., 2003), available at [http://edoc.mpil.de/fs/2003/eitel/95\\_franck.pdf](http://edoc.mpil.de/fs/2003/eitel/95_franck.pdf).

and balances that are familiar in many domestic constitutions.<sup>192</sup> Consequently, it is unclear whether the Council's duties under Chapter VII have any real weight; the Council has little incentive to constrain itself absent external pressure, particularly as the paralyzing effects of the Cold War have dissipated.<sup>193</sup>

While the Charter does not specifically grant any institutional body the power to overturn or limit the Council's decisions, many have argued that the Charter implicitly delegates this role to the ICJ.<sup>194</sup> However, the ICJ has resisted this role, perhaps in recognition of the practical arguments in favor of forbearance.<sup>195</sup> Further, it is unclear what the effects of an unfavorable ICJ opinion would be. Would the Council accept the decision or ignore it? Notwithstanding these difficulties, an effective process of *ex post* judicial review would provide some check to the Council's unilateral authority, while increasing the legitimacy of those Council decisions approved by the Court.<sup>196</sup>

## VI. CONCLUSIONS AND RECOMMENDATIONS

In this Note, I have attempted to answer two interconnected questions: why might democracies have special incentives to comply with international law, and what types of decisions, rules, and institutions are likely to leverage those incentives? I have offered a broad theory of democratic compliance which argues that, on balance, democratic states are more likely to comply with the decisions of international institutions

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192. See Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 N.W. J. INT'L L. & BUS. 398, 468-69 (1996-97).

193. See W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 85 (1993).

194. See, e.g., *id.* at 92-94; Thomas Franck, *The "Power of Appreciation": Who is the Ultimate Guardian of U.N. Legality?*, 86 AM. J. INT'L L. 519 (1992); Alvarez, *supra* note 185.

195. While the ICJ has never struck down a decision of the Council, it has suggested implicitly that it retains the power to judge the Council's actions against the authority granted by the Charter and the rules of international law generally. See *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libyan Arba Jamahiriya v. United Kingdom)*, 1992 I.C.J. 3 (Order of Apr. 14); see also Franck, *The "Powers of Appreciation"*, *supra* note 194.

196. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 29-30 (1962).

if those institutions are perceived to be legitimate. I have further identified several structural and normative mechanisms through which this impulse is realized, extending previous research into the democratic peace.

In sketching the theory, I have consciously tried to cross two divides which often preclude novel approaches to the study of the compliance problem. The first is methodological: international lawyers and IR theorists often deal with the same subject matter, but rarely attempt to use each other's foundational theories and methodologies. I have attempted to situate my analysis of international law within the larger context of the general international system, avoiding disciplinary pigeonholes in the process. More specifically, I have drawn on democratic peace theory in an attempt to predict the potential implications of democracy for compliance with international law. Whether or not I have succeeded, it is essential that the hybrid approach to the study of compliance, and other fundamental questions of the international system, be pursued further. This approach offers the best possibility of adapting legal reasoning to the realities of the international system, and to the changes that periodically affect its dynamics, whether those changes are the product of objective or subjective forces.

The second divide I have aimed to cross is that between the theoretical paradigms of institutionalism and liberalism. In doing so, I have argued that the structural arguments of institutionalism are of little value without some normative theory about the generation and alteration of state-level preferences, while the normative content of liberalism is of limited use without the structural framework of institutionalism. In synthesizing elements of the two theories, I have attempted to combine what I view as the best elements of each approach to create a hybrid theory of state-level compliance. The theory of democratic compliance outlined in this paper is necessarily broad; clearly it must be refined further. My goal has not been to provide complete answers, but rather to raise important questions and suggest some creative methods for answering those questions. Time and space considerations preclude a fuller analysis of these issues at this point, but it is worth noting several areas that might be pursued profitably.

First, and most obviously, greater empirical study is necessary to validate the broad claims of this article, and to further refine and detail the theory of democratic compliance. While

I believe that the data I have presented are suggestive, they are by no means conclusive. Second, greater attention should be paid to the specific institutional characteristics of quasi-democracies. In particular, the specific nature of decision-making should be incorporated into any model of state-level rational behavior.<sup>197</sup> Third, a comparative analysis of differences in compliance behavior between democracies might prove instructive. Finally, while this paper has focused on the particular characteristics of democracies in relation to compliance, some of the concepts might also be extended to non-democratic states, many of which incorporate some element of public pressure on the government's behavior.

These inquiries should begin as soon as possible. There is no time like the present to press the case for Council reform, and that case would benefit immensely from a greater understanding of the connection between Council structure and Council effectiveness at the micro level. Recent events have also opened a window of opportunity for change. However else U.S. actions in Iraq may be interpreted, they signal a fundamental dissatisfaction with Council operations. Bush himself has publicly criticized the Council for its failure to fulfill its duties and obligations under the Charter. The international community should call upon Bush, and American leadership, to advance reform efforts within the Council. At the very least, the administration and the Council should publicly recognize the ministerial nature of Chapter VII duties, and the manner in which discretion should be constrained within their decision-making.

The push for greater representation within the Council is important, but should be pursued in light of the overwhelming need to depoliticize the Council's operations and increase the consistency and uniformity of its decision-making. States should seek membership, not to voice their own opinions or pursue their own interests, but to ensure that the Council's legal determinations benefit from robust debate and deliberation, which accounts for the differing observational standpoints, worldviews, and legal traditions of the international community.

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197. For a comparison of three models of institutional decision-making, see GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971).

In the end, for reform to be feasible, it must deliver benefits to those states who might be constrained. While a more legalistic and legitimate Council might constrain U.S. operations in some instances, it would also empower the United States in others by eliminating Council opposition in instances in which U.S. interests are significantly threatened. Such authorization would lower the implicit and explicit costs of military operations, but more importantly it would permit the United States to reestablish its connections to the international legal system, and to once again demonstrate that perpetual peace can be pursued, if not perfectly achieved, within a structure of liberal norms.