

CLIMATE CHANGE AND PEAK OIL AS THREATS TO INTERNATIONAL PEACE AND SECURITY: IS IT TIME FOR THE SECURITY COUNCIL TO LEGISLATE?

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[The need to take decisive, coordinated, global action on the twin threats of climate change and peak oil is becoming increasingly urgent. There has been plenty of rhetoric and considerable activity on climate change, but if measured in terms of global reductions in greenhouse gas emissions or an improving climate prognosis, international legal governance measures taken to date have failed. Although analysts tend to have dismissed Security Council action as inappropriate to meet environmental security threats, the recent introduction of 'legislative' decision-making on the part of the Council means that fresh consideration of a possible role for the Security Council is warranted. This paper sees no legal impediment to the Security Council becoming the 'peak' body on climate change and calls for fresh thinking as to just what sort of a decision on the part of the Council could be both effective and politically feasible.]

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What is needed is an investment internationally of political imagination ... [T]he window of opportunity is rapidly closing.¹

I INTRODUCTION

It is, at the very least, sobering to read the *Hague Declaration on the Environment*,² a non-legally binding instrument signed by 24 countries on 11

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¹ John Ashton, 'World's Most Wanted: Climate Change', *BBC News* (UK) 8 September 2006 <<http://news.bbc.co.uk/2/hi/science/nature/5323512.stm>> at 23 September 2008.

March 1989. The Declaration, now almost 20 years old, recognised the issue of climate change as ‘vital, urgent and global’ and called for new institutional authority within the United Nations, either by strengthening existing institutions, or by creating new ones with ‘such decision-making procedures as may be effective even if, on occasion, unanimous agreement has not been achieved’.³ Climate change has proved an intractable problem. Although international lawyers tend to think of the *Kyoto Protocol*⁴ as a valuable ‘first step’, and international law as adequate if only the political will were present, if measured in terms of global reductions in greenhouse gas emissions or an improving climate prognosis, it could reasonably be said that the international legal governance measures attempted to date have failed. On 17 April 2007, the Security Council held its first debate on climate change, energy and security.⁵ There has been strong opposition in some quarters to any suggestion that the Council play a role in the international response to climate change.⁶ And yet the ever-increasing urgency of decisive action, combined with the scale and complexity of the problem, suggests that, at this stage, no option should be ruled out. This article considers the legality and scope for Security Council legislative action on climate change along the lines of *Resolution 1373*⁷ on terrorism and *Resolution 1540*⁸ on weapons of mass destruction.

II THE NATURE OF THE CLIMATE CHANGE CRISIS AND ITS ASSOCIATION WITH ENERGY POLICY

The Intergovernmental Panel on Climate Change reported in 2007 that global increases in the average air and ocean temperature, rising average sea level and widespread melting of snow and ice mean that warming of the climate system is unequivocal.⁹ Most of the observed warming is ‘very likely’ due to the observed increase in anthropogenic greenhouse gas concentrations.¹⁰ Global increases in carbon dioxide concentration are due primarily to fossil fuel use and land use change, while increases in methane and nitrous oxide are primarily due to agriculture.¹¹ The language being used in relation to climate change is increasingly alarming. *Climate Cataclysm*, released by the Brookings Institution

² Opened for signature 11 March 1989, 28 ILM 1308 (1989). The Declaration was signed by representatives of the following states: Australia, Brazil, Canada, Côte d’Ivoire, Egypt, France, the Federal Republic of Germany, Hungary, India, Indonesia, Italy, Japan, Jordan, Kenya, Malta, New Zealand, the Netherlands, Norway, Senegal, Spain, Sweden, Tunisia, Venezuela and Zimbabwe.

³ Ibid [10(a)].

⁴ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (1998) (entered into force 16 February 2005) (*‘Kyoto Protocol’*).

⁵ UN SCOR, 62nd sess, 5663rd mtg, UN Doc S/PV.5663 (17 April 2007).

⁶ See, eg, Thalif Deen, ‘Climate Change: Legitimacy of Security Council Meeting Challenged’, *Inter Press Service News Agency* (Italy) 17 April 2007 <<http://ipsnews.net/print.asp?idnews=37382>> at 23 September 2008.

⁷ SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001).

⁸ SC Res 1540, UN SCOR, 59th sess, 4956th mtg, UN Doc S/RES/1540 (28 April 2004).

⁹ Working Group I, Intergovernmental Panel on Climate Change (‘IPCC’), *Climate Change 2007: The Physical Science Basis* (IPCC Fourth Assessment Report, 2007) 5.

¹⁰ Ibid 10.

¹¹ Ibid 2.

earlier this year, for example, examines three possible future climate change scenarios as a basis for planning: the ‘expected’ scenario, the ‘severe’ scenario, and the ‘catastrophic’ scenario.¹² Any of the three scenarios would probably warrant use of the language of crisis. The catastrophic scenario involves a devastating ‘tipping point’ perhaps 50 or 100 years from now, in which land-based polar ice sheets have disappeared, global sea levels have risen dramatically, and the existing natural order has been destroyed beyond repair.¹³ Risbey has recently demonstrated that the disturbing terms used in relation to climate change — including ‘catastrophe’ — are not unduly alarmist but are broadly consistent with the science.¹⁴

The action needed to respond effectively to the threat of climate change requires change that goes to the heart of the functioning of the modern industrialised economy: the burning of fossil fuels for energy.¹⁵ That energy is used to generate hot water for industry and for homes, for heating and cooling, for food production and for transport.¹⁶ No other substitute is as efficient, and changing to alternative energy sources would require rebuilding existing infrastructure.¹⁷ As time has passed, the science has become increasingly certain, but the change needed to make a difference has become greater and the task more and more difficult.¹⁸ The United Kingdom Government has described a shared dilemma surrounding climate, energy and security:

To ensure well-being for a growing population with unfulfilled needs and rising expectations, we must grow our economies. Should we fail, we increase the risk of conflict and insecurity. To grow our economies we must continue to use more energy. Much of that energy will be in the form of fossil fuels. But if we use more fossil fuels ... we will accelerate climate change, which itself presents risks to the very security we are trying to build.¹⁹

The dilemma is further complicated by the confluence of the climate change crisis and peak oil. Peak oil refers to the maximum rate of the world’s extraction of conventional oil. As with climate change, there is a minority of professionals who deny the phenomenon.²⁰ Mainstream debate centres on whether the global peak of oil production has already been reached or is still ahead and, if so, how

¹² Kurt M Campbell (ed), *Climatic Cataclysm: The Foreign Policy and National Security Implications of Climate Change* (2008) 17.

¹³ *Ibid.*

¹⁴ James S Risbey, ‘The New Climate Discourse: Alarmist or Alarming?’ (2008) 18 *Global Environmental Change* 26, 28.

¹⁵ David Shearman and Joseph Wayne Smith, *The Climate Change Challenge and the Failure of Democracy* (2007) 122.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Letter Dated 5 April 2007 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*, UN SCOR, 62nd sess, UN Doc S/2007/186 (5 April 2007) (‘*Letter to the President of the Security Council*’).

²⁰ See, eg, Leonardo Maugeri ‘Oil: Never Cry Wolf — Why the Petroleum Age is Far from Over’ (2004) 304 *Science* 1114; Daniel Yergin, ‘Ensuring Energy Security’ (2006) 85 *Foreign Affairs* 69, 74. But see Q Y Meng and R W Bentley, ‘Global Oil Peaking: Responding to the Case for “Abundant Supplies of Oil”’ (2008) 33 *Energy* 1179.

far away it is.²¹ It is projected that once we are on the downward slope, oil will become increasingly difficult to extract.²² Prices will rise accordingly, a trend likely to be exaggerated by booming demand on the part of China and India.²³ While the prospect of decreasing amounts of increasingly expensive oil could mean that there is a strong incentive for states to work cooperatively on developing new energy sources, it also lends itself to a focus on national energy security, by which is generally meant ensuring the largest possible share of remaining oil at the best possible price. Michael Klare refers to the New International Energy Order in which the basic division is between energy-surplus and energy-deficit states, albeit with many gradations within each category.²⁴ He goes so far as to claim that '[f]inding substitutes for petroleum — and other finite sources of energy — will be essential if the United States and China are to avert a potentially violent global struggle over dwindling reserves'.²⁵ It is not only supplies of affordable oil that could create or exacerbate tensions. The ready availability of cheap energy has increased the rate of extraction of other resources so that a number are rapidly depleting, including natural gas, various metals and fish stocks.²⁶

In a narrow sense, we know exactly what is required to respond to the crisis of climate change: a dramatic reduction in the emission of greenhouse gases in order to slow the process of climate change, combined with wide-reaching measures to adapt to the climate change already in train. There is much less certainty, however, regarding how to do so in a way compatible with the globalised system of expansionary capitalism. Capitalism is a system in which natural resources are used to produce profit and waste.²⁷ The profit is then reinvested to permit further expansion and greater exploitation of natural resources. Even where new and improved technologies produce gains in efficiency, those gains are used to expand operations.²⁸ According to Clark and York, capitalism is ultimately unable to maintain a sustainable relationship with nature: 'There is no natural containment of capitalist operations, short of human extinction'.²⁹ Thus, finding new oil reserves would not 'solve' the problem of peak oil; it could only delay the inevitable exhaustion of this natural resource. Even if some way could be found by which to dramatically reduce the burning of fossil fuels for energy, the optimal atmospheric level of carbon dioxide is only one of a number of natural equilibria under increasing threat from a growing world population.

Climate change challenges the fundamentals of not only our current capitalist system but also democracy as the preferred polity. This is because democracies, by definition, find it difficult to take strong action that is not popular with the

²¹ Shearman and Smith, above n 15, 29–30, 122.

²² Ibid 122.

²³ Ibid.

²⁴ Michael T Klare, *Rising Powers, Shrinking Planet: The New Geopolitics of Energy* (2008) 14.

²⁵ Ibid 252.

²⁶ Richard Heinberg, *Peak Everything: Waking Up to the Century of Declines* (2007) 3–7.

²⁷ Brett Clark and Richard York, 'Carbon Metabolism: Global Capitalism, Climate Change, and the Biospheric Rift' (2005) 34 *Theory and Society* 391, 394.

²⁸ Ibid 412.

²⁹ Ibid 418.

public.³⁰ If a democratically elected government introduces changes, even necessary changes, that are unpopular with the electorate, it risks defeat at the next election. Democratic governments may respond to the will of the people, but it is highly unlikely that people will demand measures that reduce their mobility, their use of technology or their access to electricity. It is even less likely that people will demand change that may mean the end of their own paid employment.³¹ In their recent book, *The Climate Change Challenge and the Failure of Democracy*, Shearman and Smith argue that ‘liberalism has overdosed on freedom and liberty’.³² An ecological philosophy of humanity must place survival and the integrity of ecological systems much higher up the list of important values.³³ According to Shearman and Smith, democracy leads to social and environmental decay because its leaders are short-term caretakers and career seekers; the interests of politicians are at odds with the leadership we need of them.³⁴ The Rudd Government in Australia won the election in part because of its preparedness to take action on climate change and yet the electorate in Australia, as in many other countries, has balked at paying substantially higher prices for petrol.³⁵ A rise in petrol prices is nothing compared to the changes forecast as a result of the confluence of climate change and peak oil.

Added to this, the reliance of today’s major democracies on market forces has extended to climate change mitigation through an emphasis on emissions trading schemes. A recent report on climate change by the US Council on Foreign Relations has pointed to the need for more traditional regulation in places where markets fail to function efficiently.³⁶ Some analysts have suggested that the rapid transition to a low carbon economy is achievable only with government intervention in the economy akin to that experienced during wartime.³⁷ Increased competition to secure a ready supply of affordable oil has already led to an increased role for the state in the acquisition of energy; it is becoming too risky to leave it to private enterprise.³⁸

³⁰ Shearman and Smith, above n 15, xv.

³¹ Ibid 28.

³² Ibid 85.

³³ Ibid.

³⁴ Ibid.

³⁵ Michael Brissenden (Reporter) and Ben Hawk (Executive Producer), ‘Climate Change Swings into Election Focus’, *The 7:30 Report*, Sydney, Australia, 29 October 2007 <<http://www.abc.net.au/7.30/content/2007/s2073595.htm>> at 23 September 2008.

³⁶ US Council on Foreign Relations, *Confronting Climate Change: A Strategy for US Foreign Policy* (Independent Task Force Report No 61, June 2008) 4.

³⁷ See generally Ian Dunlop, ‘Climate Change Is a War that We Must Fight’, *The Age* (Melbourne, Australia) 23 October 2007, 13; Tim Flannery, ‘The Long View’, *The Age* (Melbourne, Australia) 31 October 2007, 6; George Monbiot, ‘Drastic Action on Climate Change Is Needed Now — and Here’s the Plan’, *The Guardian* (London, UK) 31 October 2006, 31; ‘War-Like Plan Needed to Tackle Climate Change, Summit Told’, *ABC News Online* (Australia) 3 April 2007 <<http://www.abc.net.au/news/newsitems/200704/s1888593.htm>> at 23 September 2008.

³⁸ Klare, *Rising Powers, Shrinking Planet*, above n 24, 22.

III THE FAILURE OF INTERNATIONAL LAW TO TAKE EFFECTIVE ACTION TO MITIGATE CLIMATE CHANGE

Oran Young has proposed that an effective governance system is ‘one that channels behaviour in such a way as to eliminate or substantially to ameliorate the problem that led to its creation’.³⁹ Judged against this standard, the international legal governance of climate change has to date been a failure. There has been plenty of rhetoric and considerable activity but it is simply not on the scale required to meet the crisis with which we are faced. The first major international conference on climate change, *The Changing Atmosphere: Implications for Global Security*, was held in Toronto, Canada, from 27–30 June 1988. The 1988 Toronto Conference accepted the estimate that a 50 per cent reduction of the then current emissions of carbon dioxide was required to stabilise concentrations in the atmosphere, but set an initial target of a 20 per cent reduction of 1988 levels by the year 2000.⁴⁰ This began a trend of agreeing to modest targets, inadequate to solve the problem.⁴¹

By international legal standards, the move from non-legally binding statements or declarations to the development of a binding legal instrument was relatively rapid. The 1992 *United Nations Framework Convention on Climate Change*⁴² committed developed nations to the aim of returning individually or jointly to their 1990 levels of greenhouse gas emissions.⁴³ At the first Conference of the Parties to the *UNFCCC*, it was recognised that the target was inadequate and parties agreed to develop a protocol with binding emission limits for developed states.⁴⁴ In art 3 of the *Kyoto Protocol*, the states included in Annex I agreed to reduce their overall emissions by at least 5 per cent below 1990 levels in the period 2008–12.⁴⁵ However, even if all signatories of the *UNFCCC* had ratified and complied with the *Kyoto Protocol*, the targets set would still have been inadequate.⁴⁶

The focus of the international legal response to climate change continues to be on multilateral treaty-making and the need for a post-2012 agreement. This is despite the inadequacies of the multilateral treaty-making process, including that of the ‘lowest common denominator effect’.⁴⁷ A treaty is adopted at an international conference by a vote of two-thirds of the states present and voting,

³⁹ Oran R Young, *International Governance: Protecting the Environment in a Stateless Society* (1994) 30.

⁴⁰ ‘The Changing Atmosphere: Implications for Global Security’ (Conference statement from 1988 Toronto Conference) [21], [22], reproduced in ‘Selected International Legal Materials for Global Warming’ (1990) 5 *American University Journal of International Law and Policy* 515, 521.

⁴¹ Working Group III, IPCC, *Climate Change 2007: Mitigation of Climate Change* (IPCC Fourth Assessment Report, 2007) 97.

⁴² Opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) (*‘UNFCCC’*).

⁴³ *Ibid* art 4(2)(b).

⁴⁴ *Report of the Conference of the Parties on Its First Session, Held at Berlin from 28 March to 7 April 1995*, UN Doc FCCC/CP/1995/7/Add.1 (6 June 1995).

⁴⁵ *Kyoto Protocol*, above n 4, art 3(1).

⁴⁶ Working Group III, above n 41, 32.

⁴⁷ Cary Coglianese, ‘Globalization and the Design of International Institutions’ in Joseph S Nye, Joseph S Nye Jr and John D Donahue (eds), *Governance in a Globalizing World* (2000) 297, 306.

unless by the same majority it is decided that a different rule applies.⁴⁸ This means that groups of states, or influential states, may force a lower collective outcome than is optimal to tackle the issue. And if a state does not like the negotiated agreement, modest as it may be in terms of ameliorating the problem, it can simply choose not to ratify it, as the US has done in relation to the *Kyoto Protocol*. The multilateral treaty-making process may work over time, but a characteristic feature of the climate change issue is the urgency of the required response.⁴⁹

The current international legal governance approach to climate change also suffers from a lack of coordination and integration. Some industry bodies, organisations and relevant UN agencies are taking actions to mitigate or adapt to climate change. Thus, for example, the International Maritime Organization aims to adopt a regime to control greenhouse gas emissions from ships by mid-2009,⁵⁰ and the International Air Transport Association is promoting enormous investment in the development of future aviation fuels.⁵¹ But if changes are to be made on the scale needed to really make a difference, climate change will need to move higher up the priority list and the policies of intergovernmental organisations will need to be much better integrated. There is, for example, little point in having the World Trade Organization dedicated to increasing levels of world trade if climate change demands that we source our food locally.⁵² There is a huge task of prioritising, economic restructuring and coordinating required and this is simply not possible, or at least will evolve too slowly, through the current disaggregated governance approach.⁵³

As a system, international law has not traditionally claimed democratic credentials,⁵⁴ but some of the identified deficiencies of treaty-making resonate with alleged weaknesses in the approach of Western democracies to climate change. An effective response to climate change at both the national and international level requires strong leadership and direction if economic and political change is to be achieved within the timeframe available to avoid the worst-case scenarios.

IV CLIMATE CHANGE, ENERGY AND THE CHAPTER VII MANDATE OF THE SECURITY COUNCIL

There is at present only one international body with the legal authority to make decisions binding on all states and with the power to enforce its decisions

⁴⁸ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 9(2) (entered into force 27 January 1980).

⁴⁹ Ban Ki-moon, UN Secretary-General, 'Slowing — and Reversing — Climate Change Threat "Defining Challenge of Our Age"' (Press Release, 19 November 2007) <<http://www.un.org/News/Press/docs/2007/sgsm11283.doc.htm>> at 23 September 2008.

⁵⁰ International Maritime Organization, 'Oslo Meeting Prepares Ground on GHG Reduction Mechanisms' (Press Release, 1 July 2008) <http://www.imo.org/newsroom/mainframe.asp?topic_id=1709&doc_id=9753> at 23 September 2008.

⁵¹ Justin Wastnage, 'New Jets Aim for a Green Sky Future', *The Sydney Morning Herald* (Sydney, Australia) 28 May 2008, 12.

⁵² Tara Garnett, *Wise Moves: Exploring the Relationship between Food, Transport and CO₂* (Transport 2000 Trust Report, London, UK, 2000).

⁵³ Shearman, above n 15, 8–9.

⁵⁴ See 'Symposium: International Law and Democratic Theory' (2007) 38 *Victoria University of Wellington Law Review* 157.

with coercion. This is the UN Security Council. Given the inadequacies of the multilateral treaty-making process as a means of collectively agreeing to urgent, far-reaching decisions that are likely to be domestically unpopular, it is time to at least consider alternative institutional approaches to tackling climate change mitigation and adaptation. By art 24(1) of the *Charter of the United Nations*, Member States confer on the Security Council ‘primary responsibility for the maintenance of international security’ and, by art 25, Member States agree to ‘accept and carry out the decisions of the Council’. Not every decision taken by the Council is of a coercive nature: Chapter VI of the *UN Charter* sets out a number of ways in which the Security Council can contribute to the peaceful resolution of disputes without compelling UN Members to pursue any of its recommendations.⁵⁵ Under Chapter VII of the *UN Charter*, however, the Security Council has the authority to order states to take or refrain from taking certain actions, impose economic sanctions and even to authorise the use of force. Let us consider whether the Security Council would have the legal capacity to make decisions on climate change legally binding on states before considering whether it would be politically feasible for it to do so.

In order for the Security Council to take action binding on states under Chapter VII of the *UN Charter*, it must first identify a ‘threat to the peace, breach of the peace, or act of aggression’.⁵⁶ In practice, the Security Council has identified a ‘threat to the peace’ much more often than a ‘breach of the peace’, and has proven reluctant to ever identify an ‘act of aggression’.⁵⁷ A ‘threat to the peace’ does not necessarily mean a threat to use force.⁵⁸ The Security Council has adopted a wide interpretation of ‘threat to the peace’, including internal conflict and the refusal to act against terrorism.⁵⁹ Only a small minority of writers believe that there are any legal limits to the discretion of the Security Council in identifying a threat to the peace.⁶⁰ Most writers share the view that the Council’s determination under art 39 is essentially political and that the principal limitation is the voting procedure of the Security Council.⁶¹

In the early years of the post-Cold War era, the removal of East–West tensions seemed to make room to place non-military issues on the agenda of international peace and security. The final declaration of a Heads of State and Government Summit of the 15 Member States of the UN Security Council held in January 1992 announced that:

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and *ecological* fields have become threats to

⁵⁵ See, eg, *UN Charter* art 33.

⁵⁶ *UN Charter* art 39.

⁵⁷ Christine Gray, ‘The Use of Force and the International Legal Order’ in Malcolm D Evans (ed), *International Law* (2nd ed, 2006) 589, 606.

⁵⁸ Yoram Dinstein, *War, Aggression and Self-Defence* (4th ed, 2005) 284.

⁵⁹ Gray, above n 57, 606.

⁶⁰ Erika de Wet is one of the few. See, eg, Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004) 176.

⁶¹ Sir Michael Wood, ‘The UN Security Council and International Law’ (Lecture delivered at Hersch Lauterpacht Memorial Lectures, Cambridge, UK, 8 November 2006) [55], available from <http://www.lcil.cam.ac.uk/lectures/sir_hersch_lauterpacht_memorial_lectures.php> at 23 September 2008.

peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.⁶²

The Security Council has not to date shown any great alacrity in identifying environmental threats to the peace. Climate change does, however, come much closer to the more usual type of threat addressed by the Council than many other environmental issues, due to the imminence of the threat and the scale of the anticipated disaster to be avoided. The Council is a 'pre-eminent organ for handling international crises'.⁶³ An environmental security threat of the nature of a 'crisis' comes much closer to the traditional role of the Council than a situation where the effects are not widespread or far-reaching.⁶⁴

The 1988 Toronto Conference issued a statement entitled 'The Changing Atmosphere: Implications for Global Security'. Paragraph two of the statement reads:

Far-reaching impacts will be caused by global warming and sea level rise, which are becoming increasingly evident as a result of continued growth in atmospheric concentrations of carbon dioxide and other greenhouse gases ... The best predictions available indicate potentially severe economic and social dislocation for present and future generations, which will worsen international tensions and increase risk of conflicts among and within nations. It is imperative to act now.⁶⁵

As the climate change crisis has intensified, the security implications have been investigated with much greater intensity. In the last two to three years there has been a plethora of reports and books coming out of think tanks, non-governmental organisations and universities identifying climate change as a threat to individual, national and/or international security.⁶⁶

⁶² Note by the President of the Security Council, UN SCOR, 47th sess, UN Doc S/23500 (31 January 1992) (emphasis added).

⁶³ Peter Wallensteen and Patrik Johansson, 'Security Council Decisions in Perspective' in David M Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (2004) 17, 29.

⁶⁴ See UN SCOR, 62nd sess, 5663rd mtg, UN Doc S/PV.5663 (17 April 2007) 2.

⁶⁵ 'The Changing Atmosphere: Implications for Global Security', above n 40, 515.

⁶⁶ See, eg, Oli Brown, Anne Hammill and Robert McLeman, 'Climate Change as the "New" Security Threat: Implications for Africa' (2007) 83 *International Affairs* 1141; Joshua W Busby, *Climate Change and National Security: An Agenda for Action* (US Council on Foreign Relations, Council Special Report No 32, November 2007); Nils Petter Gleditsch, Ragnhild Nordås and Idean Salehyan, 'Climate Change and Conflict: The Migration Link' (International Peace Academy, Coping with Crisis Working Paper Series, May 2007) <http://www.ipacademy.org/asset/file/169/CWC_Working_Paper_Climate_Change.pdf> at 23 September 2008; Cleo Paskal, *How Climate Change is Pushing the Boundaries of Security and Foreign Policy* (Chatham House Energy, Environment and Development Programme Briefing Paper, June 2007) <http://www.chathamhouse.org.uk/files/9250_bp0607climatecp.pdf> at 23 September 2008; Renate Schubert et al, German Advisory Council on Global Change, *Climate Change as a Security Risk* (German Advisory Council on Global Change Flagship Report, 2007) <http://www.wbgu.de/wbgu_jg2007_engl.pdf> at 23 September 2008; Dan Smith and Janani Vivekananda, *A Climate of Conflict: The Links Between Climate Change, Peace and War* (International Alert Report, November 2007); Chris Abbott, Oxford Research Group, *An Uncertain Future: Law Enforcement, National Security and Climate Change* (Oxford Research Group Briefing Paper, January 2008) <http://www.oxfordresearchgroup.org.uk/publications/briefing_papers/pdf/uncertainfuture.pdf> at 23 September 2008.

There are two basic senses in which climate change is considered a threat to security. First, the environment itself may threaten the security of individuals, societies or state territories through, for example, extreme weather events or rising sea levels.⁶⁷ Second, the less radical understanding of the security threat posed by climate change is that of it acting as a threat multiplier. Consequences of climate change, including water shortages and a reduction in arable land, may result in or exacerbate existing tensions, leading to violence.⁶⁸ A future conflict sparked by climate change stresses may take the form of a traditional state-to-state or civil war, or may consist of scattered pockets of fighting and unrest within and across borders.⁶⁹ The likely association of climate-induced environmental degradation and resource shortages leading to conflict was given credibility by a report released by the UN Environment Programme in June 2007 that pointed to a strong link between land degradation, desertification and the conflict in Darfur,⁷⁰ where a shift in rainfall had led to conflict between the nomadic herders and settled pastoralists.⁷¹

There is also an overlap between the security threat posed by climate-induced resource shortages and resource shortages caused by the depletion of fossil fuels. In June 2008, NATO Secretary-General Jaap de Hoop Scheffer warned of looming scarcity of fossil fuels, rising energy prices and a scramble for energy resources producing a new strategic horizon for which NATO must prepare.⁷² Since 2006, the US Department of Defense has considered competition over resources as on par with conflict over Taiwan in terms of being a potential trigger for war with China.⁷³ Klare emphasises that while no key state involved in the global struggle for energy is likely to make a deliberate decision to provoke a conflict, the danger is that Russia, the US and China are engaging in behaviour that make inadvertent escalation ever more likely.⁷⁴ Major powers seek to secure their supplies of oil and mineral resources in unstable regions, meaning that there is a potential for the great powers to become sucked into conflicts in resource-rich areas, such as in the Niger Delta region of Nigeria, in the Cabinda province of Angola, or in Georgia.⁷⁵

⁶⁷ See, eg, *Letter to the President of the Security Council*, above n 19, 4; UN Environment Programme, *Sudan: Post-Conflict Environmental Assessment* (2007) 8; UN SCOR, 62nd sess, 5663rd mtg, UN Doc S/PV.5663 (17 April 2007) 26–9.

⁶⁸ See, eg, *Letter to the President of the Security Council*, above n 19, 3; UN Environment Programme, above n 67, 8; UN SCOR, 62nd sess, 5663rd mtg, UN Doc S/PV.5663(Resumption 1) (17 April 2007) 15, 19, 27, 28.

⁶⁹ See, eg, UN Environment Programme, above n 67, 79–88.

⁷⁰ *Ibid* 6.

⁷¹ *Ibid* 86–7. See also Brown, Hammill and McLeman, above n 66, 1143.

⁷² Bruno Waterfield, 'Climate Change and Energy Crisis Threaten Global Security, NATO Secretary General Warns', *Telegraph Online* (UK) 3 June 2008 <<http://www.telegraph.co.uk/news/worldnews/2070551/Climate-change-and-energy-crisis-threaten-global-security,-Nato-secretary-general-warns.html>> at 23 September 2008.

⁷³ US Office of the Secretary of Defense, *Military Power of the People's Republic of China 2006* (Annual Report to Congress, 2006) 1 <<http://www.defenselink.mil/pubs/pdfs/China%20Report%202006.pdf>> at 23 September 2008.

⁷⁴ Michael T Klare, 'The New Geopolitics of Energy', *The Nation* (New York, US) 19 May 2008, 18.

⁷⁵ *Ibid* 24.

Despite the fact that not everyone has been convinced of a strong link between resource shortages, climate change and conflict,⁷⁶ widespread acceptance of the link has been boosted by diplomatic efforts on the part of the UK. In a significant foreign policy speech on 24 October 2006, the then UK Foreign Secretary Margaret Beckett told her audience at the British Embassy in Berlin that achieving climate security was a strategic priority for the UK.⁷⁷ Beckett appointed John Ashton as the UK Foreign Secretary's Special Representative for Climate Change, to spread the message that climate change constitutes a serious risk to international security.⁷⁸ The stated motivation of the UK diplomatic campaign has been to instil a sense of urgency into discussions on climate change and energy through the message that global warming should be recast as a security issue.⁷⁹ On 28 March 2007, the UK released a concept paper proposing that the Security Council hold an open debate exploring the relationship between energy, security and climate, and the debate was held on 17 April that year.⁸⁰ More than 50 delegations participated in the daylong meeting. A number of participants agreed with the premise that climate change threatens international security.⁸¹ The representative of the Pacific Island Forum told the Security Council that the 'impact of climate change on small islands was "no less threatening than the dangers guns and bombs posed to large nations"'.⁸²

Climate change as either a direct or indirect security threat would thus appear to warrant a determination of a 'threat to the peace', the threshold for a Security Council decision under Chapter VII. Once the Council has determined such a threat, it has the mandate to take a decision that is legally binding on states.⁸³ Such a course of action must aim to maintain or restore international peace and security.⁸⁴ The term 'maintain' serves to emphasise the fact that the Council does

⁷⁶ See, eg, Nils Petter Gleditsch, 'Armed Conflict and the Environment: A Critique of the Literature' (1998) 35 *Journal of Peace Research* 381; Thomas F Homer-Dixon, 'On the Threshold: Environmental Changes as Causes of Acute Conflict' (1991) 16(2) *International Security* 76; Thomas F Homer-Dixon, 'Environmental Scarcities and Violent Conflict: Evidence from Cases' (1994) 19(1) *International Security* 5; Ragnhild Nordås and Nils Petter Gleditsch, 'Climate Change and Conflict' (2007) 26 *Political Geography* 627; Clionadh Raleigh and Henrik Urdal, 'Climate Change, Environmental Degradation and Armed Conflict' (2007) 26 *Political Geography* 674.

⁷⁷ Margaret Beckett, 'Berlin Speech on Climate and Security' (Speech delivered at the British Embassy, Berlin, Germany, 24 October 2006), available from <<http://ukingermany.fco.gov.uk/en/newsroom/?view=Speech&id=4616005>> at 23 September 2008.

⁷⁸ Daniel Howden, 'Diplomats Warned that Climate Change Is Security Issue, Not a Green Dilemma', *The Independent* (London, UK) 6 December 2007, 1.

⁷⁹ See, eg, Alister Doyle, 'Climate Change Called Security Issue Like Cold War', *Reuters Newsfeed* (UK) 21 August 2007 <<http://www.reuters.com/article/worldNews/idUSL213921720070821>> 23 September 2008.

⁸⁰ UK Mission to the UN, *Energy, Security and Climate* (UK Concept Paper, 2007) <http://unfccc.int/files/application/pdf/ukpaper_securitycouncil.pdf> 23 September 2008; *Letter to the President of the Security Council*, above n 19.

⁸¹ UN Security Council, 'Security Council Holds First-Ever Debate on Impact of Climate Change on Peace, Security, Hearing Over 50 Speakers' (Press Release, 17 April 2007) <<http://www.un.org/News/Press/docs/2007/sc9000.doc.htm>> 23 September 2008 ('UN Climate Change Debate').

⁸² UN SCOR, 62nd sess, 5663rd mtg, UN Doc S/PV.5663 (Resumption 1) (17 April 2007) 28.

⁸³ See *ibid* 4, 11, 27. See also Hikaru Yamashita, 'Reading "Threats to International Peace and Security," 1946–2005' (2007) 18 *Diplomacy and Statecraft* 551.

⁸⁴ *UN Charter* art 39.

not need to wait for the peace to be disturbed before taking action; in *Resolution 1625*, the Council has recently expressed its determination to enhance the effectiveness of the UN in preventing, as opposed to responding to, conflict.⁸⁵ If, then, the Security Council would have the legal mandate to take a Chapter VII decision on climate change and peak oil, what would be the most effective action for the Council to take and would it be politically feasible for the Council to act? Let us consider each question in turn.

V THE SECURITY COUNCIL AS THE PEAK BODY ON CLIMATE CHANGE

Where the Security Council identifies a threat to the peace, it has a virtual *carte blanche* in terms of possible responses.⁸⁶ The best-known options under Chapter VII of the *UN Charter* are probably the imposition of sanctions in accordance with art 41 and the authorisation to use force as provided for in art 42. Scholars and environmental activists have given some attention to the appropriateness of Chapter VII measures in the environmental context. Writing in the early post-Cold War years, Catherine Tinker found that environmental matters could readily be accommodated by art 39, but rejected both economic sanctions and interventions authorised by the Security Council as inappropriate responses likely to do more harm than good.⁸⁷ She considered this to be particularly the case if the environmental harm had already occurred:

sending in military troops under United Nations auspices to prevent trees being cut down or to stop the building of a factory using polluting technology is clearly inappropriate and may itself be a threat to international peace and security ... Use of force to stop one nation's development activities — even for the goal of preserving natural resources — is not a use of the United Nations police power contemplated by the drafters of the United Nations Charter.⁸⁸

Writing in the mid-1990s, Alexandra Knight also accepted the potential for the use of art 41 measures but argued against the appropriateness of using force under art 42.⁸⁹ More recently, Lorraine Elliott has emphasised that it would be inappropriate for environmental policy to be militarised.⁹⁰ It is indeed difficult to imagine a circumstance relating to climate change for which the use of force authorised by the Security Council would be the most effective response. The other danger in moving towards collective security against environmental threats is the danger of misuse. The environment may become an excuse for intervention motivated by other factors. An individual state might use force and claim self-defence against environmental harm. There may come a day when state practice has evolved to a point at which the scope for the international law of self-defence to expand to encompass environmental threats is worth revisiting,

⁸⁵ SC Res 1625, UN SCOR, 60th sess, 5261st mtg, UN Doc S/RES/1625 (14 September 2005).

⁸⁶ Dinstein, above n 58, 283.

⁸⁷ Catherine Tinker, “Environmental Security” in the United Nations: Not a Matter for the Security Council? (1991) 59 *Tennessee Law Review* 787, 794.

⁸⁸ *Ibid.*

⁸⁹ Alexandra Knight, ‘Global Environmental Threats: Can the Security Council Protect Our Earth?’ (1995) 80 *New York University Law Review* 1549.

⁹⁰ Lorraine Elliott, ‘Expanding the Mandate of the United Nations Security Council’ in W Bradnee Chambers and Jessica F Green (eds), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (2005) 204, 220.

but at present the danger of misuse would seem to outweigh any likely utility. Of course, if climate change had led to a state using force, as prohibited by art 2(4) of the *UN Charter*, and the Council were to respond, the origins of the action in climate change would not be relevant. In prohibiting the use of force in art 2(4), the *UN Charter* does not delve into the underlying causes of a state using force. It simply prohibits states from doing so.

During the post-Cold War era, the Security Council has increased its repertoire of Chapter VII actions and in recent years has turned its attention to meeting security threats not confined to a particular time and geographical location. *Resolution 1373* on terrorism and *Resolution 1540* on weapons of mass destruction identified threats and required all states to take, or refrain from taking, certain actions. Both Resolutions established committees to receive reports from states on their implementation of the resolutions.⁹¹ Actions that are binding on all relevant actors, backed by the possibility of real coercive sanction and capable of repeated application across time comes the closest we have in international institutional law to real law-making.⁹² *Resolution 1373* and *Resolution 1540* have been widely dubbed ‘legislative’ or ‘quasi-legislative’ resolutions.⁹³ This so-called new legislative behaviour on the part of the Council has been controversial. Critics are concerned that the Security Council may overuse this approach, upsetting the balance of power between the Security Council and the General Assembly and weakening the fundamental principles of sovereign equality and consent in international law.⁹⁴ Some argue that in passing legislative resolutions, the Council is acting *ultra vires*.⁹⁵

This new legislative method of the Security Council does, however, suggest a potential role for the Council to play in climate change and energy. The jump from quasi-legislative decisions on terrorism to decisions on climate change is not nearly so great as the jump from a collective military response to an illegal use of force to a military intervention against a state failing to adopt appropriate economic and environmental policies. The Security Council could become the peak body dealing with climate change and energy. The term ‘peak body’ is used here to emphasise that this would not necessarily be a case of the Council displacing other UN organs and agencies where those other bodies are better able

⁹¹ *Resolution 1373*, above n 7, [6]; *Resolution 1540*, above n 8, [4]. *Resolution 1673* extended the mandate of the Committee established under *Resolution 1540* for two years: SC Res 1673, UN SCOR, 61st sess, 5429th mtg, UN Doc S/RES/1673 (27 April 2006) [4]. *Resolution 1810* extended this for a further three years: SC Res 1810, UN SCOR, 63rd sess, 5877th mtg, UN Doc S/RES/1810 (25 April 2008) [6].

⁹² José E Alvarez, *International Organizations as Law-Makers* (2005) 196–7.

⁹³ See, eg, Stefan Talmon, ‘The Security Council as World Legislature’ (2005) 99 *American Journal of International Law* 175; Paul C Szasz, ‘The Security Council Starts Legislating’ (2002) 96 *American Journal of International Law* 901; Mirko Sossai, ‘UN SC Res 1373 (2001) and International Law-making: A Transformation in the Nature of the Legal Obligations for the Fight against Terrorism?’ (Paper presented at Florence Founding Conference of the European Society of International Law, Florence, Italy, 13–15 May 2004), available from <http://www.esil-sedi.eu/english/florence_agora_papers.html> at 23 September 2008.

⁹⁴ Eric Rosand, ‘The Security Council as “Global Legislator”: *Ultra Vires* or *Ultra Innovative*?’ (2004) 28 *Fordham International Law Journal* 542, 544.

⁹⁵ See, eg, Daniel H Joyner, ‘Non-proliferation Law and the United Nations System: *Resolution 1540* and the Limits of the Power of the Security Council’ (2007) 20 *Leiden Journal of International Law* 489.

to address the issues in question, but of the Council taking a leadership role in coordinating the global response. It is an approach in relation to which there is now practice from which to learn some lessons, and one that has been trialled in regulating non-state actors. While the Council lacks the necessary expertise on environmental matters, it is arguable that the Council could readily access the relevant information or — as would seem more likely — it could work in conjunction with other bodies to set standards and establish an Environment Security Committee to monitor compliance with those standards.⁹⁶ Twenty years of international diplomacy on climate change has not produced a treaty adequate to the mitigation task. In some issue areas, slow progress may be adequate, but time is of the essence in relation to climate change. If strong action had been taken 20 years ago the situation would not be as critical as it is today: the longer the delay, the more extreme the response that will be needed. A global response directed and coordinated by the Security Council would not require the consent of all participating states; hence, it is possible that greenhouse gas emission targets could at last be set at the level advocated by scientists rather than be dictated by the lowest common denominator pressures to which multilateral treaty negotiations tend to be subject. A legislative decision of the Council on emission cuts could be backed with real coercive sanctions.

VI WOULD SECURITY COUNCIL LEGISLATIVE ACTION ON CLIMATE CHANGE BE POLITICALLY FEASIBLE?

Even if it is legally possible for the Security Council to legislate on climate change and energy, this does not mean that doing so is politically feasible. The Security Council could not legislate on climate change and energy without the acquiescence, if not leadership, of the US. The US did not take a prominent role in the open debate of the Security Council on 17 April 2007.⁹⁷ Its representative did not speak against the Council assuming a climate change role, but nor did he express any support for the idea. Examining US behaviour in relation to international law in other issue areas offers some indication of possible US attitudes in the future. While the US has on numerous occasions drawn on international law to disseminate its policy preferences around the world, it guards carefully against other states or actors using it in the same way.⁹⁸ Acting through the Security Council has in fact been a preferred approach of the US in relation to the referral of situations to the International Criminal Court and verification of compliance with the *Biological Weapons Convention*:⁹⁹ Security Council involvement enables the US to be in a position to push for enforcement action against others while being able to block any such action against itself.

⁹⁶ Christopher K Penny, 'Greening the Security Council: Climate Change as an Emerging "Threat to International Peace and Security"' (2007) 7 *International Environmental Agreements: Politics, Law and Economics* 35, 61.

⁹⁷ UN SCOR, 62nd sess, 5663rd mtg, UN Doc S/PV.5663 (17 April 2007).

⁹⁸ Shirley V Scott, 'The Nature of US Engagement with International Law: Making Sense of Apparent Inconsistencies' in David Armstrong (ed), *Handbook of International Law* (2008) (forthcoming).

⁹⁹ *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, opened for signature 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975).

Perhaps the most obvious stumbling block to US-led Security Council legislation on climate change is that the US has hitherto been a laggard on climate change cooperation.¹⁰⁰ The 2008 US presidential election offers one grounds for hope of change.¹⁰¹ Furthermore, since Hurricane Katrina, there has been an increasing acceptance of the association of climate with security in the US.¹⁰² As in other countries, innovative policies are being adopted by some states and cities¹⁰³ and US industry is now working hard to develop new technologies.¹⁰⁴ Perhaps most hopeful are the signs of change within the Pentagon. Militaries have tended to resist taking on environmental responsibilities, regarding them as peripheral to their primary role.¹⁰⁵ But, if the US military were to become fully committed to a vastly greater use of renewable energy sources and to reducing US dependence on imported oil, this may well generate much-needed momentum in the US as a whole.¹⁰⁶ CNA Corporation, a non-profit national security analysis organisation, recently convened a 'Military Advisory Board' made up of a dozen high-ranking retired US admirals and generals from all four services to consider the national security implications of climate change.¹⁰⁷ The report of their investigation, released in April 2007, recommended that the national security consequences of climate change be fully integrated into national security and national defence strategies and that the US should commit to a stronger national and international role to help stabilise climate change at levels that will avoid significant disruption to global security and stability.¹⁰⁸

Not only would the US need to dramatically shift its position on climate change as a whole, it would also need to come to some political accommodation with China on both climate and energy. At present, not only do China and the US hold divergent views of the nature of the action needed on climate change, but they are engaged in competition for access to the world's remaining untapped supplies of crude oil.¹⁰⁹ China is now a major force in both world energy markets

¹⁰⁰ Associated Press, 'Next US President Tipped to Lead on Climate Change', *International Herald Tribune* (US) 1 September 2008 <<http://www.iht.com/articles/ap/2008/09/01/asia/AS-Australia-Climate-Change.php>> at 23 September 2008.

¹⁰¹ Ibid.

¹⁰² Busby, above n 66, 1.

¹⁰³ See, eg, Michele M Betsill and Harriet Bulkeley, 'Cities and the Multilevel Governance of Global Climate Change' (2006) 12 *Global Governance* 141; Harriet Bulkeley et al, 'Environmental Governance and Transnational Municipal Networks in Europe' (2003) 5 *Journal of Environmental Policy and Planning* 235; Paul Wapner, 'Horizontal Politics: Transnational Environmental Activism and Global Cultural Change' (2002) 2(2) *Global Environmental Politics* 37.

¹⁰⁴ Laurie J Flynn, 'Silicon Valley Rebounds, Led by Green Technology', *The New York Times* (New York, US) 29 January 2007 <<http://www.nytimes.com/2007/01/29/technology/29valley.html>> at 23 September 2008.

¹⁰⁵ Robert F Durant, *The Greening of the US Military: Environmental Policy, National Security, and Organizational Change* (2007).

¹⁰⁶ Eva Sohlman, 'Flight of the Green Hawks: Why the Pentagon Is on a Green Mission' *Washington Life Magazine* (Washington, US) April 2008, 64.

¹⁰⁷ See CNA Corporation, *National Security and the Threat of Climate Change* (2007), available from <<http://securityandclimate.cna.org/report>> at 23 September 2008.

¹⁰⁸ Ibid 7.

¹⁰⁹ See, eg, Flynt Leverett and Jeffrey Bader, 'Managing China-US Energy Competition in the Middle East' (2006) 29(1) *The Washington Quarterly* 187; David Zweig and Bi Jianhai, 'China's Global Hunt for Energy' (2005) 84(5) *Foreign Affairs* 25.

and global energy geopolitics; its rapidly rising energy impact and diplomatic reach is a facet of China's economic and geopolitical rise.¹¹⁰ If the US and China are to be in a position to lead Security Council action they will need to find ways of reducing their mutual distrust and dampening their heated competition for oil, while finding ways of working cooperatively to achieve common objectives. One possible way forward would be for them to vastly increase collaboration on the development of oil alternatives and energy-saving technologies.¹¹¹

VII WOULD SECURITY COUNCIL LEGISLATIVE ACTION ON CLIMATE CHANGE MITIGATION BE EFFECTIVE?

When considering the collective unwillingness of national governments to take the far-reaching measures required to prevent the worsening effects of climate change, the prospect of a process of law-making not dependent on the consent of participating states and enforceable through coercive sanctions offers hope. There are, however, limits to what the Security Council could do in practice. Perhaps the most fundamental limitation is that the Council was not designed to take enforcement action against its permanent members. What if it turns out to be these very states that lack the political appetite for action? In addition, the committees established by *Resolution 1373* and *Resolution 1540* both use a reporting system to monitor compliance. The initial reporting response to the Counter-Terrorism Committee was high but there has been a drop-off in response rates. The response to the *Resolution 1540* Committee's reporting request has been described as 'slow and uneven'.¹¹² The reporting system can readily become subject to reporting fatigue and impose a burden on small states and those with limited resources to devote to the task.¹¹³ Of course, the submission of a report is not the same as complying with the substantive provisions of a resolution.¹¹⁴

The Counter-Terrorism Committee under UK Ambassador to the UN Jeremy Greenstock has focused on facilitating compliance through capacity building, as opposed to singling out and judging individual states.¹¹⁵ This approach is undoubtedly in recognition of the futility of the Security Council pursuing coercive action against states unable to comply with its legislative decisions. It may well be just as futile to attempt coercive enforcement action against states *unwilling* to comply, particularly if there were to be a considerable number of such states. The effectiveness of legislative action on the part of the Council must, therefore, ultimately rest on acceptance of the legitimacy of the Council

¹¹⁰ Kenneth Lieberthal and Mikal Herberg, 'China's Search for Energy Security: Implications for US Policy' (2006) 17(1) *NBR Analysis* 5, 8.

¹¹¹ Michael T Klare, 'The US and China Are Over a Barrel: In the Costly Competition for Oil, Cooperation is the Wisest Course', *Los Angeles Times* (Los Angeles, US) 28 April 2008, 17.

¹¹² Edward C Luck, *UN Security Council: Practice and Promise* (2006) 106.

¹¹³ C S R Murthy and Friedrich Ebert Stiftung, *The UN Counter-Terrorism Committee: An Institutional Analysis* (Friedrich Ebert Stiftung Briefing Paper 15, September 2007) 9 <<http://library.fes.de/pdf-files/iez/04876.pdf>> at 23 September 2008.

¹¹⁴ Talmon, above n 93, 193.

¹¹⁵ Jane E Stromseth, 'An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390 — The Security Council's Counter-Terrorism Role: Continuity and Innovation' (2003) *American Society of International Law: Proceedings of the 97th Annual Meeting* 41, 43.

action. The very efficiency of Council legislative behaviour in comparison with the multilateral law-making approach gives rise to complaints regarding the Council's lack of democratic credentials. The Council tried to address this issue in relation to *Resolution 1540* through engaging in five months of informal negotiations and holding two open meetings of the Security Council.¹¹⁶ It is possible that the perceived lack of democratic credentials of the Council could be ameliorated to some extent if there was a procedure that gave states confidence that their contributions were being given full consideration.¹¹⁷ Such a process would still err on the side of efficiency, but would give non-Council states greater input than they have enjoyed when the Council has authorised use of force.¹¹⁸

In order for legislative behaviour on the part of the Security Council to be perceived as legitimate by states outside the Council, it must be seen to be a necessary course of action in the interests of all members of the international community, not just of key players on the Council.¹¹⁹ Important to the legitimacy of a Security Council decision on climate change and energy would be the attitude of developing countries. During the April 2007 Security Council debate on climate change, energy and security, developing countries expressed a range of positions on Security Council involvement on climate change. As small Pacific states vulnerable to the effects of rising sea levels, Tuvalu and the Federated States of Micronesia were strongly supportive of possible Council involvement.¹²⁰ Singapore and Papua New Guinea did not rule out some degree of Council involvement, while members of the Group of 77 developing countries were adamantly opposed to Council involvement on the issue.¹²¹ The Group of 77 submitted a letter of protest prior to the debate, strongly rejecting a climate change role for the Security Council.¹²²

The UK has made no suggestion that the Security Council should pass a resolution on climate change; it claimed to encourage discussion of the security implications of climate change in an open debate of the Council so as to raise awareness.¹²³ Merely holding this debate could, however, be interpreted as an implicit suggestion that the Council take a decision on climate change. In the case of AIDS, the Security Council passed *Resolution 1308* six months after the first meeting to discuss the impact of AIDS on peace and security and it paved the way for an ongoing role of the Council in respect of AIDS.¹²⁴ Developing

¹¹⁶ Roberto Lavalle, 'A Novel, if Awkward, Exercise in International Law-Making: Security Council Resolution 1540 (2004)' (2004) 51 *Netherlands International Law Review* 411, 425–6.

¹¹⁷ Axel Marschik, 'The Security Council as World Legislator? Theory, Practice and Consequences of an Expansion of Power' in Ronald Macdonald and Douglas Johnson (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005) 457, 484.

¹¹⁸ Talmon, above n 93, 175.

¹¹⁹ Shirley V Scott, 'UN Security Council Resolution 1540 and Political Legitimacy' in Agata Fijalkowski (ed), *International Institutional Reform: 2005 Hague Joint Conference on Contemporary Issues of International Law* (2007) 63–8.

¹²⁰ UN Climate Change Debate, above n 81.

¹²¹ *Ibid.*

¹²² Deen, above n 6.

¹²³ *Letter to the President of the Security Council*, above n 19.

¹²⁴ Colin McInnes, 'HIV/Aids and Security' (2006) 82 *International Affairs* 315, 315.

countries regarded the implicit suggestion that the Council take a role on climate change as reflecting a weakening of developed country acceptance of their own moral and legal responsibility to take the lead, as embodied in art 3(1) of the *UNFCCC*.¹²⁵ From the perspective of these developing countries, the reason for the failure of the *UNFCCC*-based process is that developed countries have failed to live up to their initial promises.

There is a wide gulf between the expectations of developed and developing countries regarding how climate change should be addressed.¹²⁶ The Group of 77 believes that climate change is a sustainable development issue to be dealt with by the UN General Assembly, the UN Economic and Social Council, and the UN Commission on Sustainable Development.¹²⁷ It is the developed world that needs to act on climate change; according to Ambassador Nirupam Sen of India, threats to international peace and security would be minimised through developed countries reducing their greenhouse gas emissions and energy consumption.¹²⁸ The gulf between developed and developing countries' perceptions of climate change is evident from the comparisons that developing countries draw between greenhouse gas emissions and weapons of mass destruction. According to Kaire Munionganda Mbuende of Namibia, humanity 'and the developing countries in particular have been subjected to what could be described as low intensity biological or chemical warfare' from developed countries.¹²⁹ Mbuende referred to developed countries waging unprovoked war on developing countries:

Mr President, we cannot talk about climate change in a casual manner and it cannot be business as usual. The cause of the problem is known. Those who are responsible for the problem are also known. Now is the time to hold them accountable for their action. They should not be allowed to get away with impunity.¹³⁰

It may be difficult to imagine what the contents of a Security Council resolution on climate change acceptable to both developing and developed countries might look like, yet that political accommodation is going to have to happen somewhere. And if the terms of a Security Council resolution were 'fair' as that term is understood by developing countries, opposition to a Council resolution would likely be overcome.

¹²⁵ Above n 42. Article 3(1) states:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

¹²⁶ *Letter to the President of the Security Council*, above n 19.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ Kaire Munionganda Mbuende, 'Statement to the United Nations' (Address delivered at Open Debate on the Relationship between Energy, Security and Climate Security Council, New York, US, 17 April 2007) [6] <<http://www.un.int/namibia/scstate17-04-07.html>> at 23 September 2008.

¹³⁰ *Ibid* [8].

VIII CONCLUSIONS

The issue of climate change, particularly when viewed in association with peak oil and resource shortages, is fundamental, multifaceted, complex, and the quintessential global issue. The *Hague Declaration on the Environment* recognised in 1989 that '[b]ecause the problem is planet-wide in scope, solutions can only be devised on a global level'.¹³¹ Although an individual state could have energy security independently if, for example, it had its own supplies of oil, climate security cannot be achieved on an individual basis but only collectively. It is thus an indictment of international law-making processes that some of the most promising Western responses to climate change so far have occurred at a sub-state level.

This article has considered the legality and political feasibility of the Security Council 'legislating' on climate change and energy as it has on terrorism and weapons of mass destruction. Legislative action on the part of the Council could be viewed as a natural progression in the evolution of processes of making international law. We have moved from a system in which customary international law predominated to one in which global issues are tackled via multilateral treaty-making, and it is possible that we are now witnessing a development by which issues of greatest moment are addressed through a legislative response on the part of the Security Council. Climate change and the associated issue of peak oil would fit comfortably within the art 39 reference to a 'threat to the peace' in the *UN Charter* and such a course of action would be in line with recent Council emphasis on preventive action. More than 50 delegations contributed to an open discussion in the Security Council on climate change and energy in April 2007, a first step towards possible Council involvement.

While there are few legal impediments to the Security Council legislating on climate change and energy, the political hurdles at first glance appear insurmountable. The challenge of designing, debating and finalising a resolution on climate change acceptable to all the permanent members of the Security Council is, in the present context, difficult to imagine. And it would be extremely difficult to craft a legislative resolution on climate change mitigation and/or adaptation that would be perceived as legitimate from the developing country perspective. The approach that involves every state being required to take certain legislative measures and to report their actions to a committee is far from perfect, and there is scope for new and creative approaches by which the Council could lead on this issue. Any resolution that might be interpreted as the US and the EU avoiding taking tough action themselves by shifting the burden to others with less historical responsibility for the problem would certainly be met with tough resistance and would be unlikely to be effective even if passed. Developed countries are not yet sufficiently desperate to think in terms of the far-reaching economic concessions that developing countries would likely hope to extract from developed countries in return for willing support for a Council initiative.

The political obstacles to be overcome may at present seem overwhelming, and yet a case can nevertheless be made that Security Council legislative action on climate change and energy is at least worthy of serious consideration solely

¹³¹ *Hague Declaration on the Environment*, above n 2, [5].

on the grounds of the failure to date of alternatives. If the permanent members of the Council were to be able to mediate their own differences and adopt a leadership role responsive to the concerns of historical and economic injustices, it is just possible that the Council could play a valuable role as the peak body on climate change, thereby facilitating the far-reaching global changes needed to mitigate and adapt to what is looming as the greatest global threat of the 21st century.