Six senses of the UN Security Council’s interactions with the concept of international responsibility: complicating to contextualise

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This article brings into focus the relationship between United Nations Security Council (UNSC) decision-making under Chapter VII of the UN Charter and the concept of international responsibility. Beginning with the very treaty provision that establishes the UNSC’s position at the apex of the UN Charter collective security regime, Article 24(1), which confers on the UNSC ‘primary responsibility for the maintenance of international peace and security’, but also in many other senses, this fundamental concept of international law is central to almost every aspect of the law and practice of the primary political organ of the United Nations (UN). The senses of the UNSC’s responsibility are varied. Each sense of responsibility carries a subtly different meaning and is context-dependent. I argue that, in traditional accounts, this variety is often overlooked. Either explicitly or more often implicitly, the international legal psyche draws us to a narrower, paradigmatic account of international legal responsibility, one that associates responsibility only with the consequences of a breach of an international obligation. This article aims to complicate and unsettle this approach, to open space for a more context-sensitive perspective on the UNSC’s interactions with the concept of international responsibility.

Keywords: UN Security Council, international responsibility, Chapter VII of the UN Charter, accountability, law of international organisations

1 INTRODUCTION

At the precise moment that President Putin declared war on Ukraine on 23 February 2022, the UNSC was in session conducting, ironically perhaps, a debate on the worsening situation in Ukraine.1 In real time, the tone of the debate shifted significantly. References to the imminent threat of unlawful force were replaced by outrage at the full-scale invasion of Ukraine. Yet, one thing remained constant. On either side of that pivotal moment, delegates in the UNSC Chamber appeared most comfortable when they were framing their interventions with reference to the concept of responsibility.

The Brazilian and Mexican representatives, for example, both reminded the UNSC of its ‘primary responsibility’, under Article 24(1) of the UN Charter, ‘for the maintenance of international peace and security’.2 The Irish representative took this a step further, speaking of a ‘collective responsibility – indeed, our obligation – here at this table to maintain international peace and security’.3 To the Kenyan delegate, this obligation weighed heaviest on permanent members of the UNSC, whose voting privileges ‘bestowed on them a special responsibility’ to act.4 The United States delegate took a slightly different tack, appealing to the concept of responsibility not as a noun but as an adjective: ‘Responsible members of the Security Council will stand together, and we will stand with Ukraine … despite a reckless, irresponsible permanent member of the Security Council abusing its powers to attack its neighbour and subvert the United Nations and our international system’.5 Others invoked a sense of

1 UNSC, Verbatim Record (23 February 2022) UN Doc S/PV.8974.
2 Ibid 8, 11.
3 Ibid 6.
5 Ibid 4.
consequentialist responsibility, arguing that Russia should ‘take full responsibility and pay the price’; 6 or otherwise be ‘held responsible for the consequences of an unprovoked war’.

Clearly, most UNSC members agreed with the Ukrainian delegate that it ‘is the responsibility of this organ to stop the war’. 8 However, it was altogether less clear whether UNSC members agreed on the precise meanings and connotations underpinning their invocations of responsibility and how such connotations differ across contexts. This ambiguity resonates with the treatment of responsibility in international law more generally. Deep, critical thinking about exactly what responsibility requires in different contexts ‘often takes a back seat in modern international legal scholarship’. 9 In place of such critical meditation, when international lawyers contemplate the concept of responsibility, all roads tend to lead to one, narrowly defined, paradigmatic version. Specifically, the doctrinal form of international legal responsibility, associated with the notion of obligation and the consequences that flow from a breach thereof, holds a quasi-monopolistic grip on the international legal imagination. The grip of the responsibility as obligation thesis is so tight that responsibility is treated almost as if it is monosemous. As a result, sometimes explicitly but more often implicitly, other senses of responsibility tend to be missed or at least underplayed, and the context lost.

In this article, I seek to expose the deleterious implications of international law’s responsibility problem by placing a spotlight on the UNSC’s complicated relationship with the concept, which I suggest provides an exemplar of this broader phenomenon. The article proceeds as follows: having outlined an important theoretical distinction between responsibility as authority, responsibility as an obligation and responsibility as prudence (Section 2), I identify six discrete senses that UNSC decision-making under Chapter VII of the UN Charter interacts with our protagonist concept. First, member States confer on the UNSC ‘primary responsibility for the maintenance of international peace and security’ under Article 24(1) of the Charter (Section 3). Second, the UNSC sits at the apex of the operational aspects of the responsibility to protect concept (Section 4). This role has given rise to an important discourse on whether permanent members of the UNSC have a ‘global responsibility not to veto’ in mass atrocity situations (Section 5). The UNSC also plays an important role in the determination of State responsibility in other ways. The binding nature of UNSC decisions triggers in States a legal ‘responsibility to comply’ (Section 6). In certain circumstances, the UNSC also fulfils a quasi-judicial function in assigning international responsibility for unlawful acts (Section 7). Finally, UNSC decisions can trigger the legal responsibilities of the UN under the law of the responsibility of international organisations (Section 8).

To be sure, each sense of the UNSC’s interactions with the concept of international responsibility has been the subject of prior scholarly attention on a micro-level. 10 However, the literature tends to be siloed into distinct scholarly projects, with each closed off from the others. Fragmentation also plays out on a methodological level. The fixation with the doctrinal form of responsibility has meant that the literature has been closed off from comparative-jurisprudential perspectives on the concept of responsibility. 11 This leaves a creeping, ‘stubborn feeling … even after legal responsibility has been decided that there is still a problem … left over’. 12 To remedy this, this article identifies,

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6 Ibid 5 (France).
7 Ibid 14 (Albania).
8 Ibid 13.
systematises and contextualises the various senses of UNSC responsibility as a macro-level legal-theoretical question by scrutinising their relationship a) with each other and b) with paradigmatic responsibility, to open space for a more context-sensitive account.\footnote{The deployment of the rubric of senses borrows from Hart’s influential attempt to taxonomise the relationship between law and responsibility: ‘[a] wide range of different, though connected, ideas is covered by the expressions ‘responsibility’, ‘responsible’, and ‘responsible for’, as these are standardly used in and out of the law. Though connexions [sic] exist between these different ideas, they are often very indirect, and it seems appropriate to speak of different senses of these expressions’, HLA Hart, Punishment and Responsibility: Essays in the Philosophy of Law (2nd edn, OUP, Oxford 2008) 211.}

2 CONCEPTUALISING RESPONSIBILITY: BETWEEN AUTHORITY, OBLIGATION AND PRUDENCE

Although originally published over half a century ago, HLA Hart’s attempt to jurisprudentially taxonomise the various senses of responsibility remains an important touchstone. Hart’s principal contribution was to show that, notwithstanding the great ‘welter of distinguishable senses of the word ‘responsibility’\footnote{Ibid.},\footnote{Ibid.} they could ‘be profitably reduced by division and classification’.\footnote{Ibid.} He offered the hypothetical tale of the drunken sea captain who lost his ship at sea, told in the terminology of responsibility, to illustrate the different senses of responsibility.

As captain of the ship, X was responsible for the safety of his passengers and crew. But on his last voyage he got drunk every night and was responsible for the loss of the ship with all aboard. It was rumoured that he was insane, but the doctors considered that he was responsible for his actions. Throughout the voyage he behaved quite irresponsibly, and various incidents in his career showed that he was not a responsible person. He always maintained that the exceptional winter storms were responsible for the loss of the ship, but in the legal proceedings brought against him he was found criminally responsible for his negligent conduct, and in separate civil proceedings he was held legally responsible for the loss of life and property. He is still alive and he is morally responsible for the deaths of many women and children.\footnote{On the association between this sense of responsibility and ‘authority’, see Mark Bovens, The Quest for Responsibility: Accountability and Citizenship in Complex Organisations (CUP, Cambridge 1998) 25-31.}

Hart’s typology demonstrates that there is an intrinsic link between the concept of responsibility and an expectation that an actor will pursue a certain course of conduct. The actor can pursue a course of conduct in that they have the authority to do so (role-capacity responsibility);\footnote{Eg Hart (n 13) 212–222; Peter Cane, Responsibility in Law and Morality (Hart, Oxford 2002) 29-31.} they must pursue a course of conduct because they have a special obligation to do so and the failure to do so involves the imposition of sanctions (consequential responsibility); or, between these two poles, they should pursue a course of conduct (responsibility as prudence). In other words, the term can legitimately be used to describe an authority to act in a certain way, an obligation to act in a certain way or a normative evaluation of conduct. Let us approach each sense of responsibility in turn.

2.1 Role-capacity responsibility; or responsibility as authority

Role-capacity responsibility is an amalgamation of two senses of responsibility that are kept separate in traditional taxonomies.\footnote{On the association between this sense of responsibility and ‘authority’, see Mark Bovens, The Quest for Responsibility: Accountability and Citizenship in Complex Organisations (CUP, Cambridge 1998) 25-31.} However, it is productive to treat roles and capacities under the same heading, for they are intimately connected. On the one hand, to say, for example, that the teacher is responsible for discipline in the classroom, the accountant is responsible for ensuring that the books add up, or that the captain is responsible for picking a winning team is to adopt the terminology of role responsibility. According to Hart’s nomenclature, role responsibility occurs ‘whenever a person...
occupies a distinctive place or office in a social organization’. Role responsibility tends not to be allocated at random; the relevant actor is consciously selected based on some sort of special characteristic. Role responsibility assumes that, because of the existence of that characteristic, the actor is uniquely qualified to ‘provide for the welfare of others or to advance in some specific way the aims or purposes of the organization’. Considering the functional premise undergirding this selection process, role responsibility tends to be delegated by the wider members of a group collectively or from an external source.

Capacity responsibility, on the other hand, refers to the minimum mental and physical capacities that an actor should possess if they are to be made the subject of consequential forms of responsibility. For example, we might refer to minimum age and mental capacity requirements to be eligible for criminal prosecution. If a legal person lacks the required attributes, skills and experiences, we say that they cannot be ‘responsible’ for their conduct in this sense. In Hart’s example, the fact that the captain was not insane meant that he had capacity responsibility.

In line with the distinction between authority and obligation, role-capacity responsibility responds to the ex-ante jurisdictional question of who has been formally assigned the role of acting on behalf of the community. It is an objective question: the actor either has been allocated the role, or it has not; it has the capacity to fulfil it, or it does not. Responsibility is also ‘digital’ in the sense that once authority is allocated, there is no middle ground whereby an actor is a little bit responsible or somewhat responsible. In other words, to the extent that ‘responsible’ is associated with ‘answerable’, it signifies who is answerable but not for what they are answerable. In this sense, role-capacity responsibility is value-neutral. Once the responsible actor is identified, we ask no further questions at this stage as to whether they have fulfilled this role effectively. This separate sub-set of questions is left for a more subjective, analytical, evaluative sense of responsibility.

2.2 Consequential responsibility; or responsibility as obligation

The ex ante element distinguishes role-capacity responsibility from other consequential senses of responsibility. Role-capacity responsibility provides a ‘presumption of liability’, but it is only a ‘failure to satisfy an obligatory social requirement’ that ‘raises a presumption of liability’. Ex-post responsibility, or consequential responsibility, aligns closely with the concept of obligation. To one commentator, ‘the distinctive purpose of responsibility assignments … is to identify one or more agents who are under some special obligation … and who therefore can properly be put under pressure to act’.

Consequential responsibility relates to the notion of blame or culpability. Something has gone wrong, and it is their fault. If capacity-role responsibility relates to the potential condition of being bound to answer or respond in case a wrong should occur, responsibility as obligation speaks to the actual condition of being bound to respond because a wrong has occurred. As a corollary, it also encompasses the imposition of consequences if the response given (in the form, for example, of excuses or justifications) is unsatisfactory. As a logical corollary of being singled out to bear a special obligation to act in a certain way, so too are we singled out to bear the adverse normative consequences of wrongful (or otherwise deficient) action. Their behaviour departed from accepted legal, political or moral conventions; they must ‘take responsibility’ and face the consequences.

19 Hart (n 13) 212.
20 Ibid.
21 Bovens (n 17) 25-31.
22 ‘[R]esponsibility in the basic sense is an ability to offer justifications and excuses – or alternatively the ability to explain oneself, to answer an account of oneself, to answer for oneself’, see John Gardner, ‘The Mark of Responsibility’ (2003) 23 Oxford Journal of Legal Studies 157, 162. This etymological link has been well-established in philosophical literature, see eg John Lucas, Responsibility (OUP, Oxford 1995) 5; J Angelo Corlett, Responsibility and Punishment (4th edition, Springer, San Diego 2013) 9; Antonio Y Vázquez-Arroyo, Political Responsibility: Responding to Predicaments of Power (Columbia University Press, New York 2016) 69. The association with ‘obligation’ is stronger in international legal literature, and the association with ‘answerability’ is less embedded, but the latter has at least been acknowledged, eg Nollkaemper (n 9) 760.
23 Cane (n 18) 30.
Consequential responsibility is imposed by a norm; that is, by the moral, legal or other norms that attach to the normative consequence in question. Responsible actors are ‘answerable’ to the norm in this sense. Therefore, the conditions of consequential responsibility may vary. This relates to the material as opposed to the conceptual conditions of consequential responsibility. In legal terminology, this is typically captured by the term ‘liability’. Moral responsibility is analogous to legal liability responsibility, the only difference being the base conditions (morality or law) and repercussions (moral or legal sanction) for incurring each respectively. For present purposes, the key signifier is the degree of obligation that the imposition of ‘responsibility’ imposes. When legal rules require an actor to act or abstain from action, one who breaks the law is usually liable to punishment for their recalcitrant behaviour.

2.3 Evaluative responsibility; or responsibility as prudence

Between responsibility as authority and responsibility as obligation lies responsibility as prudence. Returning to Hart’s example, we are told that, throughout the voyage, the sea captain ‘behaved quite irresponsibly’. We know that we should react disapprovingly to this statement, but Hart himself does not elaborate further on where this sense of responsibility fits within his taxonomy. Therefore, Hart fails to adequately capture an alternative, positive evaluative sense of responsibility, sometimes referred to as ‘responsibility as virtue’. Depending on the context, evaluative responsibility can also invoke ideas of, inter alia, dignity, maturity, trustworthiness, efficiency, effectiveness or, as a general rubric, prudence. If somebody is a responsible person in this final sense, it is generally met with praise. At its core, the relevant distinction is between ‘passive’ and ‘active’ responsibility. Passive responsibility involves being given responsibility or being held responsible for failing to live up to it, whereas active responsibility involves taking responsibility.

It is important to distinguish responsibility as prudence from the above-mentioned senses of responsibility. Some see this evaluative form of responsibility as a sub-set of role responsibility, ie ‘they are a responsible manager’, in the sense that ‘they take their responsibilities seriously’. To Hart, ‘a responsible person’, behaving responsibly (not ‘irresponsibly’) . . . is, ‘one who is disposed to take his duties seriously; to think about them, and to make serious efforts to fulfil them’. However, while responsibility in this more analytical sense might require for its elucidation a reference to role responsibility, it does not lead from that that the evaluative sense is part of role responsibility. This is so for at least three reasons.

First, there is no reason of principle to suggest that only those who find themselves in a formal position of (role-capacity) responsibility can be evaluated and commended as a ‘responsible’ actor all the same. This reasoning fails to capture the occasion when an actor actively and purposefully takes on responsibility in the absence of any special obligation. That is, where several different members of the group simultaneously enjoy both the right and the capacity to perform a task, but in this specific context and moment one member has ‘taken responsibility’ and performed the task in a particularly noteworthy way. Secondly, compared to the perceived objectivity of role-capacity responsibility, the evaluative sense of responsibility is more subjective: responsible behaviour is perceived through the eye of the beholder. Finally, responsibility as prudence is subjective in an additional sense. Because it necessitates the weighing up of potentially conflicting norms and interests, there is no objectively identifiable blueprint on how it can be achieved. The responsible actor needs to use their subjective discretion. Therefore, to be able to act responsibly, one needs to be in a position with a degree of autonomy and independence from the group or the external source. A defining feature of role-capacity responsibility is that it is delegated from a principal to an agent, so responsibility as prudence is conceptually distinct.

26 Bovens (n 17) 26; Graham Haydon, ‘On Being Responsible’ (1978) 28 The Philosophical Quarterly 46.
27 Bovens (n 17) 28–38.
28 Hart (n 13) 213.
We might also point to two important lines of demarcation between responsibility as prudence and responsibility as an obligation. First, responsible conduct in the sense of prudence is aspirational; it goes beyond mere legal compliance. The law’s logic of responsibility is a logic of obligation. The relevant obligation is not aspirational in the sense that it encourages conduct that ‘goes the extra mile’. It is a logic of acceptable behaviour, ‘not virtuous or supererogatory behaviour’. Secondly, the consequences dealt to the ‘responsible’ actor in the sense of responsibility as obligation are negative. They take the form of sanctions. The consequences awarded to responsible actors in the sense of responsibility as prudence, on the contrary, are positive. They take the form of a reward. For example, a promotion in the workplace or being asked to captain the team in the next game after having scored the winning goal.

Reflecting on the different senses of responsibility, Hart’s view was that consequential responsibility, in the sense of ‘answering or rebutting accusations or charges, which, if established, carry liability to punishment or blame or other adverse treatment’, is the ‘primary sense’ of responsibility. Interestingly, a very similar sentiment mirroring the association between responsibility and obligation was expressed in one of the very first conceptualisations of international legal responsibility. Pufendorf defined responsibility as the ‘operative moral quality by which some one [sic] is bound to furnish, allow, or endure something’. To this day, the association between responsibility and obligation has endured. It is central, for example, to the International Law Commission’s (ILC) authoritative framing of international legal responsibility as a tripartite notion that responds to conduct that i) is attributable to an actor with legal personality; ii) constitutes a breach of a legal obligation incumbent upon that actor; and iii) cannot be justified or excused, releases a residual right to impose sanctions against the recalcitrant actor.

This framing can also be rather pervasive and can have methodological implications. Belying the status of responsibility in general jurisprudence as a context-specific concept that can relate to, inter alia, an authority, an obligation or an evaluation, there is a tendency in international legal scholarship to see paradigmatic responsibility (responsibility as an obligation) at every turn. The following sections identify six senses of the UNSC’s interactions with the concept of international responsibility and highlight some of the deleterious consequences of this methodological tendency.

3 THE SECURITY COUNCIL’S ‘PRIMARY RESPONSIBILITY FOR THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY’

The foundational legal provision through which the UNSC derives its competence is Article 24(1) of the UN Charter: ‘In order to ensure prompt and effective action by the United Nations, its Members confer on the UNSC primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the UNSC acts on their behalf’. The nature of the UNSC’s ‘primary responsibility’ is best understood as a type of role-capacity responsibility.

Taking each dimension of role-capacity responsibility in turn, Article 24(1) satisfies the requirements of role responsibility. The UN Charter has been described as a “constitution” of delegated powers. Like all power allocated under the Charter, therefore, the UNSC’s ‘primary responsibility’ has been assigned to it by Member States. The nature of a ‘conferral’ of power from Member States under Article 24(1) supports this reading, as does the final stanza of the same provision, whereby States

29 Cane (n 18) 33–34.
30 Hart (n 13) 265.
‘agree that in carrying out its duties under this responsibility the Security Council acts on their behalf’. The UNSC essentially acts as a proxy for Member States.\textsuperscript{34}

Under the UN Charter regime, the UNSC has not only been formally allocated a role in the maintenance of international peace and security, but it has also been given the capacity to fulfil this role in the form of enforcement powers provided in Chapter VII. Under Article 39, if the UNSC determines that a situation is either a ‘threat to the peace’, a ‘breach of the peace’, or ‘an act of aggression’, then the door is open for the UNSC to resort to non-forcible enforcement measures under Article 41 or, if these measures provide insufficient or is there evidence that they would prove insufficient, forcible measures under Article 42.\textsuperscript{35} The UNSC’s capacity to authorise force reflects the general teleology of the UN collective security regime. In the absence of an armed attack and thus a claim to be acting in self-defence, Member States have relinquished the power to resort to such force unilaterally,\textsuperscript{36} which gives the UNSC a quasi-monopoly over the authorisation of military force as the embodiment of the collective security telos.

3.1 Primary but not exclusive responsibility?

In categorising Article 24(1) as a form of role-capacity responsibility it is important to contend with the International Court of Justice’s (ICJ) (in)famous finding in its Certain Expenses Advisory Opinion that the UNSC’s responsibility is “‘primary’ not exclusive”.\textsuperscript{37} As a matter of theory, a plurality of actors can be conferred role-capacity responsibility simultaneously. Teachers can jointly teach a course, teams can elect joint captains; teaching assistants and vice-captains may not be allocated responsibility \textit{en tout} but might be allocated a mandate to fulfil a specific task therein. Following the same reasoning, there is nothing in the text of Article 24(1) to rule out the possibility that other organs of the UN, principally the UN General Assembly (UNGA), might simultaneously exercise role-capacity responsibility in the realm of peace and security.

Under Article 14 of the Charter, the UNGA may ‘recommend measures for the peaceful adjustment of any situation’. In Certain Expenses, the ICJ hinted at the possibility that ‘the word “measures” implies some kind of action’.\textsuperscript{38} This could be taken to mean enforcement action, even the type of action envisaged under Chapter VII. This would be uncontroversial if the power were restricted to the making of recommendations, as the wording of Article 14 suggests. However, in a second statement, the ICJ also suggested that ‘the functions and powers’ of the UNGA ‘are not confined . . . to the making of recommendations; they are not merely hortatory and can have dispositive force’, thus implying that the responsibility of the UNSC in this domain is not absolute.\textsuperscript{39}

However, it is important not to conflate the ICJ’s two conclusions in Certain Expenses to reach another conclusion that the ICJ itself did not make. The ICJ suggested that the UNGA can recommend any measures including enforcement measures and, in some circumstances, the UNGA’s power extends beyond mere recommendation.\textsuperscript{40} However, it does not have the power to offer a stand-alone authorisation of enforcement measures under Chapter VII. It cannot side-track the UNSC. To suggest otherwise would be to succumb to a post hoc fallacy. Indeed, in the very same passage, the ICJ affirmed that ‘it is only the Security Council which can require enforcement by coercive action’.\textsuperscript{41} The key distinction is between enforcement power and ‘dispositive effect’. Any action by any actor can have a

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\textsuperscript{34} See eg the statement by the representative of Gabon in 2011 that the situation in Libya ‘required an answer and a clear and strong message from the Security Council, in accordance with the responsibility entrusted to it by the Charter’, UNSC, Verbatim Record (26 February 2011) UN Doc S/PV 6491 6 (emphasis added).

\textsuperscript{35} The image of Article 39 as a ‘gateway provision’ is attributable to Nigel D White, \textit{Keeping the Peace: The United Nations and the Maintenance of International Peace and Security} (2nd ed, Manchester University Press, Manchester 1997) 173.

\textsuperscript{36} Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) arts 1(1), 2(4), 51 (‘UN Charter’).


\textsuperscript{38} Ibid.

\textsuperscript{39} Ibid.

\textsuperscript{40} This is undoubtedly true in certain situations. For example, the UNGA may suspend the rights and privileges or even expel members. In an interesting about-face, here it is the Security Council that is limited to a recommendatory role, UN Charter arts 5, 6, 18(2).

\textsuperscript{41} Certain Expenses (n 37) 163.
dispositive effect, i.e. the power to decide a matter with finality. Yet, when it comes to enforcement measures, the UNSC enjoys a clear hierarchical superiority.

Interestingly, in Certain Expenses, the ICJ did not discuss the implications of findings for the purposes of the UNGA’s Uniting for Peace Resolution. However, it has subsequently confirmed the legality of the procedure, which allows for the referral of any matter pertaining to international peace and security from the UNSC to the UNGA if the UNSC is unable to exercise its primary responsibility due to a ‘lack of unanimity of the permanent members’. Following such a referral, the UNGA can issue recommendations for collective measures, including for the use of force where there is a ‘breach of the peace or act of aggression’, through a two-thirds majority vote. It is important to caution, though, that in its core sense, the Resolution has been implemented only once. In response to the Korean crisis, the UNGA determined that the People’s Republic of China had engaged in aggression in Korea, and ‘call[ed] upon all States and authorities to continue to lend every assistance to the United Nations action’, which by implication meant military assistance. Indeed, the twelve subsequent Uniting for Peace resolutions have stopped short of recommending force, let alone attempting to provide a stand-alone authorisation for the same, hinting that even the UNGA is hesitant to usurp the UNSC in this way.

3.2 From exclusive authority to an obligation to act?

There is a significant body of scholarly opinion that equates the UNSC’s primary responsibility with an obligation to resort to enforcement measures under Chapter VII if certain bona fide conditions are met; that is, if an objectively identifiable threat to the peace, breach of the peace or act of aggression exists. The argument draws specific attention to the final stanza of Article 24(1), which refers to ‘duties under this responsibility’. To understand what these ‘duties’ entail, some have sought to identify an explicit structural connection between Articles 24(1) and 39, arguing that the latter represents the ‘embodiment of the UNSC’s primary responsibility for the maintenance of international peace’. Article 39 provides that the UNSC ‘shall determine the existence of any threat to the peace, breach of the peace or act of aggression’. Prompted by the affirmative language of the provision, the argument is built upon three successive moves. If a situation moves beyond the threshold of being ‘likely to endanger international peace’ under Chapter VI this triggers ‘an obligation to investigate a situation’. The failure to make a determination in the face of evidence that such a situation exists would constitute a breach of a ‘duty to decide’. Finally, if the UNSC does determine that at least a threat to the peace exists then it must, as a matter of legal obligation, either make the recommendations it deems appropriate or decide upon enforcement measures to take under Articles 41 and 42.

Further support for this thesis may be sought from Article 51 of the Charter, according to which defensive uses of force ‘shall not in any way affect the authority and responsibility of the Security Council’. The fact that authority, associated with role-capacity responsibility above, is distinguished from responsibility here is potentially noteworthy. The principle of effet utile and the interpretive presumption against redundancy work together to dictate that, where possible, all treaty terms should

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44 UNGA, Res 498 (1951) para 1.


46 Including the most recent invocation in response to Russia’s invasion of Ukraine, see UNGA, Res ES-11/1 (2022).


48 Butchard (n 10) 55.

49 Ibid 54.

be interpreted so as to have an effective meaning and no individual term should be read as irrelevant or superfluous. Giving due weight to these principles might imply that the UNSC has not only a right (authority) to enact enforcement measures under Chapter VII if a State suffers an armed attack per Article 51, but a positive obligation (responsibility) to do the same. If we accept this argument, we could apply it by analogy to all threats to the peace.

However, upon closer scrutiny, the ‘responsibility as obligation’ thesis runs into several impediments. Specifically, it relies upon a presumption that the terms ‘threat to the peace’, ‘breach of the peace’, or ‘act of aggression’ can be subjected to legal interpretation and threshold definitions authoritatively sought. However, the terms are defined nowhere in the Charter or any other legal instrument. It would also be difficult to seek guidance from the UNSC’s ad hoc, sporadic practice since its creation. Although ‘[p]revious Council decisions in similar situations create precedent pressure and give rise to a permissive Council practice that shapes actors’ expectations about possible enforcement action’, this takes place informally. The UNSC is not strictly bound by anything resembling the doctrine of precedent, much less one that could be enforced judicially. This resonates with a widespread scholarly consensus in 1945. The very first treatises that considered these issues agreed that the UNSC is the ‘master of its own agenda’. This interpretation has also been borne out in the UNSC’s subsequent practice. Its record is a model of consistent inconsistency, going as far ‘upstream’ in its determination of a threat to the peace as it pleases. The UNSC can seemingly also go as far ‘downstream’ as it pleases. For every occasion where the UNSC has stretched its mandate, there is a Rwanda, Bosnia, Syria or Ukraine, where it has been paralysed by the permanent member veto. In both cases, UNSC members do not feel any obligation to revert to enforcement measures if a threat to the peace exists, the relevant factor being political expedience rather than adherence to any established legal criteria.

All things considered, the reference to ‘duties’ in Article 24(1) may be a misnomer. Understood in the context of the UNSC’s broader structure, it is surely relevant that Article 24(1) falls under the heading ‘Functions and Powers’ as opposed to, say, ‘Duties’. We can conclude that the provision confers on the UNSC a ‘competence’, in other words, the ‘authority’ to act in the sense of role-capacity responsibility. The scholarly inclination ‘to concoct all sorts of supposedly mandatory criteria which are intended to limit the discretion of the UNSC’ is itself a product of the international legal psyche drawing us towards a conceptualisation of responsibility that entails an element of obligation.

4 THE SECURITY COUNCIL’S RESPONSIBILITY TO PROTECT

The UNSC plays an important role in the operationalisation of the responsibility to protect concept, giving rise to a second sense of responsibility. The responsibility to protect concept emerged against

52 Tellingly, the attempt to provide the Council with objective criteria in the UNGA’s Definition of Aggression is expressly delimited so as not to prejudice or hamper the wide discretion which the Council has in the matter, see UNGA, Res 3314 (1974) arts 4, 6.
56 ‘If the keys that unlock the collective security procedures and machinery are simply political ones then law will struggle to play a profound role in this area’, Nigel D White, ‘On the Brink of Lawlessness: The State of Collective Security Law’ (2002) 13 Indiana International and Comparative Law Review 237, 238.
57 On the distinction between a ‘competence’ and a ‘duty’ in this context, see Kelsen (n 54) 285.
58 Dinstein (n 55) 334.
the backdrop of successive humanitarian disasters throughout the 1990s. The inquiries into the failure to prevent genocides in Rwanda and Srebrenica placed the fault squarely at the UNSC’s door. They did this by using the language of responsibility explicitly. The independent report on Rwanda found that the UNSC ‘bears the responsibility for the hesitance to support new peacekeeping operations’60, and for ‘its lack of political will to stop the killing’.61 The report on the events in Srebrenica cast a wider net, suggesting that the ‘international community as a whole must accept its share of responsibility for allowing this tragic course of events by its prolonged refusal to use force in the early stages of the war’, but, importantly, noted that the ‘responsibility is shared by the Security Council’.62

The above-mentioned context directly impacted the ultimate multi-level framing of the responsibility to protect concept. According to the Report of the International Commission on Intervention and State Sovereignty (ICISS), each State has a primary ‘responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity’.63 If a State is unable or unwilling to fulfil its primary responsibility, the ‘responsibility to respond’ entails the responsibility of the international community ‘to take collective action in a timely and decisive manner, through the Security Council’ to protect populations from mass atrocities.64 When it comes to the all-important operational element of the responsibility to protect, therefore, the UNSC is ‘the principal player’.65

The very decision to use the term ‘responsibility’ might be seen as an implicit nod to the UNSC’s primary responsibility under Article 24(1). If this is the case and the responsibility to protect is to be understood as a new lens through which the UNSC is to fulfil its ‘primary responsibility’ under the Charter, it should come as no surprise that in the subsequent debates the authority/obligation dichotomy has reappeared, but in a new form. To the extent that mass atrocities situations constitute a ‘threat to the peace’ under the responsibility to protect framework, the UNSC clearly has the authority to respond.66 But whether the nature of the responsibility also amounts to a ‘hard and fast legal obligation, only a political concept, soft law or an emerging legal norm’ is much more contested.67

The drafters of the original ICISS Report doubted that there was a ‘sufficiently strong basis to claim the emergence of a new principle of customary law’ that the UNSC should intervene in all cases, describing the concept instead in softer terms as an ‘emerging guiding principle’.68 Drawing on the idea that the responsibility to protect constitutes a principle, not an obligation, we might say that it is not so much an emerging norm as much as a consolidation of existing norms. If the concept merely ‘pulls pre-existing norms together and places them in a novel framework’, then “[t]he innovation is mainly conceptual”69 as opposed to doctrinal and juridical.

However, this has not stopped some scholars from reading in positive obligations incumbent upon the UNSC as part of an ‘ongoing process of legalization’70 whereby legalisation is understood as a process of ‘dutification’. The Libya example plays an important role in this line of argument. To one commentator, it represented a ‘leap’ towards a ‘collective obligation of States to help and repair in...
situations of urgency’, with Resolution 1973 making an ‘ardent obligation appear real’. To another, it manifested an opinio juris or at least an opinio necessitatis which might be the first step towards a legal opinion.

It is worth pausing for a moment, though, to consider an important difference between opinio juris and opinio necessitatis. While the full Latin maxim opinio juris sive necessitatis encompasses both terms, when it comes to the identification of a customary rule, contemporary doctrine refers almost exclusively to the underlying concept of opinio juris; the objective belief that one is acting because one has a legal obligation to do so. Opinio necessitatis is more subjective in comparison, it brings the matter closer to what should be done in the interests of social necessity, political prudence and expediency, rather than what the law holds must be done.

The separation of law and morality at the stage of law ascertainment or, in other words, the insistence that an alleged rule is not law just because it is alleged to be socially necessary, is a foundational pillar of legal positivism. It is particularly telling, therefore, that the opinio necessitatis/opinio juris conflation is prevalent in accounts that otherwise purport to adopt orthodox positivist methods. Taking legal positivists on the terms of their own ‘sources thesis’, then, to ascertain the extent to which the responsibility to protect amounts to a legal obligation to act, it is important to zoom in on the official views of States. In this regard, echoing the words of the ICJ in a different context:

[There is] so much uncertainly and contradiction, so much fluctuation and discrepancy . . . in the official views expressed on various occasions . . . and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

In sum, while there is some evidence, in certain situations, of an opinio necessitatis, there is no corresponding opinio juris to suggest that States, when representing the international community for the purposes of the operational element of the responsibility to protect concept, feel that there is a positive obligation incumbent on the UNSC to intervene. Alvarez’s bold criticism that the auto-obligation argument is ‘absurdly premature and not likely to be affirmed by state practice’ is, therefore, as correct today as it was fifteen years ago, not least considering the dearth of clear and relevant State and institutional practice post-Libya. The UNSC continues to refer to the responsibility to protect, but

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72 Peters (n 65) 26.
73 ‘The requirement, as a constituent element of customary international law, that the general practice be accepted as law (opinio juris) means that the practice in question must be undertaken with a sense of legal right or obligation’, ILC, ‘Draft Conclusions on Identification of Customary International Law, with Commentaries’ in Report of the Work of its Seventieth Session (30 April – 1 June and 2 July – 10 August 2018) UN Doc A/73/10 Conclusion 9.1.
76 Columbian-Peruvian Asylum Case (Judgment) [1950] ICJ Rep 266, 277.
78 Cf the rare position adopted explicitly by Peru: ‘[T]he international community, especially the Security Council, has an obligation to unite and take action to end the suffering of millions in various regions of the world’, GAOIR, 75th session, 64th plenary meeting (17 May 2021) UN Doc A/75/PV.64 11; and the recent ‘Statement delivered on behalf of the Group of Friends of R2P at the UN Security Council Open Debate on the Peaceful Settlement of Disputes’ (20 October 2023) <https://www.globalr2p.org/resources/statement-delivered-on-behalf-of-the-group-of-friends-of-r2p-at-the-un-security-council-open-debate-on-the-peaceful-settlement-of-disputes/> accessed 16 February 2024, which ‘call[ed] on all Members of the Security Council
it emphasises the primary responsibility of the host State and tends not to refer to its own responsibility in this regard. 79

5 THE GLOBAL RESPONSIBILITY NOT TO VETO

The responsibility to protect concept has given rise to a third sense of UNSC responsibility. Unlike in the second sense, the addressee of this sense of responsibility is not the UNSC as such, but it is triggered by UNSC conduct. Specifically, some States and commentators suggest that permanent members have a responsibility to refrain from exercising their inherent veto power in situations that meet the responsibility to protect threshold, framed as a ‘global responsibility not to veto’. 80

The dilemma is as old as the UNSC itself. As early as 1946, UNGA Resolution 40(1) called upon permanent members to ‘ensure that the use of the special voting privilege . . . does not impede the Security Council in reaching decisions promptly’. 81 The association between responsibility and ‘privilege’ has been a recurring theme over time. Reflecting on the capacity of the global pandemic to accelerate existing conflicts, the UN Secretary-General noted that the ‘privilege of membership carries vital responsibilities to uphold the Charter’s tenets and values, particularly in preventing and addressing conflict’. 82 The problem of abusing the privilege of permanent membership is, of course, particularly apparent in the context of Russia’s invasion of Ukraine, which according to some delegates has forcefully demonstrated ‘the imperative need for the Security Council to emerge from the paralysis to which it has been held hostage and fulfil its responsibilities, namely, to stop the war and restore peace in Ukraine’. 83 It manifests in President Zelensky’s provocative proposal that the ‘UN system must be reformed immediately so that the right of veto is not a right to kill’. 84

Some commentators have taken this a step further, arguing that the responsibility not to veto is a responsibility of obligation. 85 As a matter of principle, at least, any obligations that the UNSC might be under apply equally to action and inaction; that is, ‘every decision to act is at the same time a decision not to act in a different manner, and vice versa’. 86 So, if the responsibility to protect is a duty, then the failure to live up to that duty by exercising an abusive veto would constitute a breach of the UNSC’s legal obligations. The strongest argument in this regard is that the obligation to refrain from the veto emanates from a peremptory obligation to prevent violations of jus cogens norms, for example, the duty to prevent genocide. 87 The ICJ’s finding that ‘a great many rules of humanitarian law applicable in armed conflict . . . are to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law’, adds

to respond to and address the risk or commission of mass atrocities’. In doing so, the group implicitly acknowledged that such a response is discretionary, not obligatory.

79 See most recently UNSC, Res 2683 (2023) UN Doc S/RES/2683 Preamble (South Sudan).
80 The concept first emerged in the original ICISS Report. Indeed, the very idea of a ‘responsibility’ not to veto and the initialism ‘RN2V’ reflects the concept’s origins as an element of the responsibility to protect or ‘R2P’, see, generally, Vilmer (n 10) 331.
81 UNGA, Res 40/1 (1946).
82 UNSC, Verbatim Record (9 January 2020) UN Doc S/PV.8699 4.
83 UNSC, Verbatim Record (5 May 2022) UN Doc S/PV.9027 10 (Mexico). Moyn expresses the irony of the Russian veto aptly: ‘We might not tolerate a criminal law that openly provided the most powerful members of society a get-out-of-jail-free card. Yet through their veto on the Security Council, certain states have a stack of never-get indicted cards – and they can never run out’, Samuel Moyn, The ‘Rules-based International Order’ Doesn’t Constrain Russia – or the United States’ (1 March 2022) Washington Post <https://www.washingtonpost.com/outlook/2022/03/01/ukraine-international-order-un/> accessed 16 February 2024.
85 Jennifer Trahan, Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes (CUP, Cambridge 2020); Peters (n 65).
86 Peters (n 65) 32. This sentiment has a strong philosophical foregrounding. The essence of Arendt’s account of political responsibility is that even acquiescence in the face of evil can make one complicit in the evil act, Hannah Arendt, The Human Condition (2nd edn, University of Chicago Press, Chicago 2019).
fuel to the suggestion that the whole spectrum of cases that trigger the ‘responsibility to respond’ enjoy peremptory status. As such, it has been argued that the duty to prevent genocide, war crimes, ethnic cleansing and crimes against humanity equates to a duty to refrain from exercising the veto to block resolutions aimed at preventing the same and that ‘the only conceivable lawful exercise of discretion would be to authorise coercive military measures’. There is a clear trajectory within the wider UNSC membership towards the realisation that the abusive veto is unacceptable. We can even say that UNSC members agree that the most responsible course of conduct would be to respond when the responsibility to protect concept is met, as evidenced by the plethora of voluntary initiatives that have generally been met with approval. But this is responsibility in the same sense as responsible conduct requires us to give up our seats to an elderly or pregnant passenger on the train. It is a responsibility of prudence. Therefore, notwithstanding ‘elaborate theories’ of scholars, there remains ‘all the difference in the world between a voluntary commitment to restraint in the use of the veto, and acceptance of a legal obligation not to cast a veto’. There may have been ‘many academic proposals to abolish (or appreciably reduce) the veto power’, but, to date, they remain ‘entirely moot-exercise[s]’.

6 THE RESPONSIBILITY TO COMPLY WITH SECURITY COUNCIL DECISIONS

While there is legitimate debate about whether the UNSC has a responsibility in the sense of a duty to act under Chapter VII under the responsibility to protect doctrine, one thing is clear: under Article 25, Member States ‘agree to carry out the decisions of the Council in accordance with the present Charter’. Thus, in a fourth sense of UNSC responsibility, if the UNSC does impose measures, States have a responsibility to comply. As the ICJ confirmed in the Kosovo Advisory Opinion, ‘the Security Council may adopt resolutions imposing obligations under international law.’

The nature and scope of the responsibility to comply have been the subject of great controversy. At the root of this controversy lies a deep disagreement about the meaning and relevance of the all-important final five words of Article 25. There are four conceivable interpretations. The first suggests that the provision merely describes the source of the responsibility to comply, clarifying that it derives from the Charter itself. According to this, ‘in accordance with’ speaks to where the responsibility derives from. The second interpretation views the final part of Article 25 as instructive; it speaks to how States should fulfil their responsibility. That is, it suggests that States are indeed obliged to implement UNSC decisions, but the chosen means of implementation must be compatible with the Charter. In other words, States may not violate some other obligation under the Charter in fulfilling their Article 25 responsibility.

While the first two interpretations suggest that the gaze of the provision is directed towards Member States, the remaining interpretations insist that the target of Article 25 is the UNSC itself. These more normative interpretations propose that Article 25 pre-sets a limit on the types of decisions that are binding. Here, ‘in accordance with’ speaks not to why or how States should comply with UNSC decisions, but whether the conditions of bindingness are met.

Some have argued that the conditions of bindingness are substantive. This maximalist position places great weight on Article 24(2) which provides that ‘in discharging its duties the Security Council

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89 Peters (n 65) 34.
90 For an excellent overview, see Trahan (n 85) 102–141.
92 Ibid 31.
shall act in accordance with the Purposes and Principles of the United Nations’. 95 To one ICJ judge, Article 24(2) offers ‘an immediate signpost to . . . a circumscribing boundary . . . [t]he duty is imperative and the limits are categorically stated’. 96 The implication is that if a decision manifestly violates the Purposes or Principles of the UN, it would be ultra vires and thus void.

It is theoretically possible to conceive of a UNSC decision that does not give due weight to the principle of ‘equal rights and self-determination of peoples’, 97 or falls foul of the obligation to promote and encourage ‘respect for human rights and for fundamental freedoms’. 98 However, it is not clear from this finding that the decision would automatically be ultra vires. There is much weight to the alternative argument that these other objectives stem from and can only be understood in the context of the maintenance of international peace and security, considering its position at the apex of the Purposes of the UN. 99 After all, the specific formula of invoking Chapter VII requires a determination that a situation constitutes at the very least a ‘threat to the peace’. As such, all Chapter VII decisions will de facto be said to be furthering (at least one of) the Purposes as opposed to conflicting with them. Considering the hierarchical superiority of the primary purposes of the UN, therefore, it is difficult to conclude that Article 24(1) provides any practical, substantive limitation on the responsibility to comply.

Conversely, a minimalist perspective holds that the conditions of bindingness are merely procedural. This interpretation chimes with the ICJ’s suggestion in its Namibia Advisory Opinion that a ‘resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ’s rules of procedure . . . must be presumed to have been validly adopted’. 100 Thus, when it comes to Article 25, a paradox becomes apparent. To give maximum effect to the first part of the provision, ‘states agree to carry out decisions of the Council’, which would seem to be the core, operative element of the provision, one must adopt a minimalist, procedural interpretation of the second part, ‘in accordance with the present Charter’. Any alternative reading of the final stanza that ascribed to the words a capacity to substantively condition the bindingness of UNSC decisions would necessitate a narrower reading of the provision in the round.

It would also run contrary to the general telos of the Charter regime, which is defined by the move to collectivise, centralise and institutionalise decisions relating to international peace and security. This view is reinforced by Article 103 of the Charter, which explicitly provides that obligations under the Charter prevail over any other international obligations. This provision also applies to secondary obligations deriving from the Charter, including the obligation to comply with UNSC decisions, and is not limited to primary obligations directly set out in the Charter text itself. We can conclude, therefore, that subject to fidelity to procedural expectations, the responsibility to comply is, in the eyes of international law, near absolute.

7 THE RESPONSIBILITY OF THE SECURITY COUNCIL TO DETERMINE RESPONSIBILITY FOR WRONGFUL ACTS

In a fifth sense of responsibility, the binding nature of UNSC decisions provides a springboard to consider the relationship between UNSC enforcement measures and the enforcement of international law. Classical doctrine draws a clear line of distinction, 101 but the UNSC’s post-Cold War practice

95 “The determination that there exists [a threat to the peace] is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter”, Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [1995] IT-94-1-AR72 para 29.
96 Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) (Provisional Measures) [1992] ICJ Rep 114, 61 (dissenting opinion, Judge Weeramantry).
97 UN Charter art 1(2).
98 UN Charter art 1(3).
99 UN Charter art 1(1); ‘The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition’, Certain Expenses (n 37) 168.
101 As Kelsen famously observed, ‘the purpose of the enforcement action … is not to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law’, Kelsen (n 54) 294.
suggests that the two are not necessarily mutually exclusive. In other words, ensuring that States, non-state groups and individuals alike comply with their legal obligations is increasingly understood as an ancillary aspect of the UNSC’s responsibility for the maintenance of international peace and security.  

This section discusses the UNSC’s role in determining responsibility a) in international criminal law and b) under the law of State responsibility respectively.

The UNSC plays a quasi-judicial role in the enforcement of individual criminal responsibility. By means of example, it created two ad hoc criminal tribunals, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the successor International Residual Mechanism for Criminal Tribunals. It also helped to establish mixed tribunals, for example, the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

It has also referred two situations to the International Criminal Court (ICC), Darfur and Libya, as empowered under Article 13(b) of the Rome Statute. In relation to the former, it should be stressed that Sudan is a signatory to the Rome Statute but not a State party. As such, the Court had no jurisdiction over crimes committed on Sudanese territory, except with respect to nationals of State parties. For all other crimes, the UNSC referral represented the sole jurisdictional avenue to ensure the enforcement of individual criminal responsibility, so its significance should not be underplayed. In relation to the latter, having ‘stress[ed] that those responsible for or complicit in attacks targeting the civilian population, including aerial and naval attacks, must be held to account’, in addition to authorising forcible measures against Libya, which could instead be viewed as a countermeasure in response to human rights abuses, the UNSC referred the situation to the ICC. The Libya example solidified what had previously been a gradual incorporation of individual criminal responsibility for international crimes into the UNSC’s peace and security mandate.

In its practice, the UNSC has also demonstrated a willingness to navigate the full spectrum of the repertoire of State responsibility, which operates on an obligation-breach-sanction nexus. In its dalliances into legislative acts, the UNSC has imposed binding obligations upon States. Separately, the UNSC has made quasi-judicial determinations that a State has breached other obligations. Under Article 39, to open the door to enforcement measures under Chapter VII, the UNSC may determine that a situation constitutes a threat to the peace and this is the route that the UNSC takes in most cases. However, a situation cannot constitute a breach of the peace or an act of aggression. On the few occasions that the UNSC has invoked these terms, it is essentially determining that a State has breached the peace, or committed an act of aggression, that the legal responsibility of that State has been engaged, and that the State is liable to face the consequences that flow from that unlawful act.

Under the law of State responsibility, consequential responsibility takes two main forms: reparation and countermeasures. In relation to the former, the duty of reparation has two limbs: cessation of the wrongful act and assurances of non-repetition and compliance with the demand for reparation in the most appropriate form, ie restitution, compensation (damages) and/or satisfaction.

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102 The ICJ insinuated tacit support for such a proposition in the Wall Advisory Opinion: ‘the Security Council . . . should consider what further action is required to bring to an end the illegal situation’, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, para 160.


108 Ultimately, of course, the Russian veto ensured that the situation in Ukraine could not be referred to the ICC, but the Council’s general competence in this area was nevertheless stressed by States. The French representative, for example, insisted that ‘credible and independent investigations must be conducted to enable the competent national and international courts to try those responsible for those atrocities’, see UNSC, Verbatim Record (5 April 2022) UN Doc S/PV.9011, 23.


112 ARSIWA (n 32) art 30.

113 Ibid arts 35-37.
to the latter, although countermeasures may have a coercive character, they function not to punish but to induce a wrongdoing State to comply with its obligations of cessation and reparation.\textsuperscript{114} The UNSC’s response to Iraq’s invasion of Kuwait illustrates how UNSC decision-making navigates the repertoire of State responsibility. In Resolution 660, the UNSC recognised that the invasion constituted a breach of the peace, thus determining the legal responsibility of Iraq, but also explicitly ‘[d]emand[ed] that Iraq withdraw immediately and unconditionally all its forces’,\textsuperscript{115} invoking the duty of cessation.\textsuperscript{116} In Resolution 686, the UNSC demanded that Iraq ‘accept in principle its liability under international law for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq’\textsuperscript{117} The UNSC did not confine itself to confirming the obligation to make reparation, it took a proactive step to ensure its implementation. First, in the form of satisfaction. The UNSC itself decided to guarantee the inviolability of the international boundary and the allocation of islands between Iraq and Kuwait.\textsuperscript{118} Secondly, in the form of compensation. The UNSC established the UN Compensation Committee, mandated to receive and decide claims arising directly from the occupation and to pay compensation for such claims.\textsuperscript{119} The UNSC also took a range of enforcement measures to ensure compliance with its demands, ranging from economic sanctions\textsuperscript{120} to the authorisation of the use of force.\textsuperscript{121} Interestingly, the form of the enforcement measures resonates with the requirements of lawful countermeasures articulated by the ICJ in the Gabčíkovo-Nagymaros case, namely that the measures must constitute a proportionate and reversible response in response to a prior wrongful act, directed against the State responsible for the act, taken in the light of a refusal to comply with a prior demand to remedy it.\textsuperscript{122} Some commentators take the view that UNSC enforcement measures constitute a hierarchical ‘form of countermeasures undertaken on the basis of a collective and institutionalised decision of an international organisation, in the defence of fundamental community interests’.\textsuperscript{123} This argument requires some conceptual innovation, considering that countermeasures are traditionally conceived as a residual right of States to act unilaterally within a horizontal, bilateral context. However, its appeal can be understood, especially in the context of the perennial difficulty in enforcing obligations \textit{erga omnes}, that is, multilateral obligations owed by States individually to the whole international community. Although the ICJ itself articulated the modern understanding of obligations \textit{erga omnes},\textsuperscript{124} it has been surprisingly reluctant to grant legal standing to third States for a breach of a multilateral obligation.\textsuperscript{125} Thus, while third-party countermeasures and UNSC enforcement measures under Chapter VII are traditionally treated as separate entities under the law of State responsibility,\textsuperscript{126} the argument that the UNSC may serve as a vehicle for the realisation of collective interests in the form of collective countermeasures is alluring, not least because under Article 24 of the Charter the UNSC acts ‘on behalf’ of all States.

In short, the UNSC’s practice has seen it navigate the full spectrum of the law of State responsibility, from the determination that conduct attributable to a State constitutes a breach of an

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{114} Ibid art 49.
\item \textsuperscript{115} UNSC, Res 660 (1990) para 2.
\item \textsuperscript{117} UNSC, Res 686 (1991) para 2(b).
\item \textsuperscript{118} UNSC, Res 687 (1991) paras 2-4.
\item \textsuperscript{120} UNSC, Res 661 (1990) para 3.
\item \textsuperscript{121} UNSC, Res 678 (1991) para 2.
\item \textsuperscript{122} Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment) [1997] ICJ Rep 7 paras 83-87.
\item \textsuperscript{123} Gowlland-Debbas (n 10) 58.
\item \textsuperscript{124} The ‘essential distinction’ is ‘between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State . . . By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection’, \textit{Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)} (Judgment) [1970] ICJ 3, para 33.
\item \textsuperscript{125} For a rare exception, see, \textit{Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)} (Judgment) [2012] ICJ Rep 422, para 69.
\end{enumerate}
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international obligation to the imposition of sanctions to enforce compliance. However, it is not clear that UNSC enforcement measures necessarily need to be conceptualised as countermeasures to fulfil this task. The international lawyer is drawn in this direction, however, because of the limits of our professional vocabulary and the association between responsibility and its doctrinal form.

8 THE SECURITY COUNCIL AND THE RESPONSIBILITY OF THE UNITED NATIONS

The previous section demonstrated that when the UNSC looks in the mirror, it essentially sees itself as a global enforcer of the responsibility of others. The sixth sense of responsibility turns the mirror back on the UNSC. In other words, it asks, ‘[q]uius custodiet ipsos custodies’ (who watches the guardians)? This is, of course, not only a hypothetical question. To name just a few examples, UNSC-mandated peacekeepers have been accused of widespread sexual exploitation and abuse and have been directly implicated in the spread of cholera to Haiti, which has caused more than 10,000 deaths to this day.\(^{127}\) The counter-terrorist sanctions regime established by Resolution 1267 (1999) has come under intense and continued scrutiny for violating the targeted persons’ rights of access to a court and to an effective remedy.\(^{128}\) The North Atlantic Treaty Organization’s methods in the implementation of its mandate to use force in Libya have been criticised for potentially violating international human rights and humanitarian law.\(^{129}\) In these circumstances, to what extent does the doctrine of legal responsibility apply to the UNSC itself?

Since the publication of the Articles on the Responsibility of International Organizations, the question of whether the rights guaranteed by the UN’s legal personality relate to corresponding obligations in international law and, if so, how and why has engaged the minds of the international legal academy.\(^{130}\) In line with the ILC’s formulation, in exactly the same way as responsibility is engaged under the law of State responsibility, for UNSC conduct to engage the legal responsibility of the UN, it must be shown that an act or omission that is attributable to the UN constitutes a breach of an international obligation incumbent upon the organisation.\(^{131}\) A decision of the UNSC is prima facie an act that is attributable to the UN as an act of one of its principal organs.\(^{132}\) The slightly complicating factor, of course, is that the UN does not implement UNSC decisions; for this, it relies upon Member States. In these circumstances, though, the implementing State is effectively acting as an ‘agent’ of the UN, which suffices to attribute conduct to the UN\(^{133}\) or at least ‘concurrent attribution’ to both the State and the UN.\(^{134}\)

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129 Speaking against the decision to authorise force, the Russian representative used the language of responsibility explicitly: ‘[r]esponsibility for the inevitable humanitarian consequences of the excessive use of outside force in Libya will fall fair and square on the shoulders of those who might undertake such action’, UNSC, Verbatim Record (17 March 2011) UN Doc S/PV/6498, 8. See generally Geir Ulfstein and Hege Fosund Christiansen, ‘The Legality of the NATO Bombing in Libya’ (2013) 62 The International and Comparative Law Quarterly 159.
131 DARIO (n 32) art 4. The extension of UN responsibility to incorporate omissions as well as acts is particularly pertinent considering the controversy relating to the Council’s failures to prevent genocides in Rwanda and Bosnia, see Jan Klabbers, ‘Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act’ (2017) 28 European Journal of International Law 1133.
132 DARIO (n 32) art 6.
133 Ibid art 4(1).
134 Tzanakopoulos (n 10) 36.
The next stage is to identify the source of obligations incumbent on the UNSC. Relevant obligations can be internally imposed ‘under the rules of the organisation’, \(^\text{135}\) ie by the UN Charter. \(^\text{136}\) Controversies surrounding whether Article 39 of the Charter provides an obligation to determine a threat to the peace or whether Article 24(2) provides an obligation to comply with the Principles and Purposes of the UN have been discussed above and need not be repeated here. Obligations can also be externally imposed, ie be customary in nature, as the ‘origin or character of the obligation concerned’ is not relevant for purposes of identifying a breach. \(^\text{137}\) Following the maxim nemo plus juris transferre potest quam ipse habet, States should be barred from escaping their obligations by hiding behind the UNSC, if the UNSC itself is unbound. \(^\text{138}\) This maxim is put to the test when we consider whether the UNSC is bound to comply with human rights standards, not least because the justifications offered to support such a proposition tend to feel rather superficial. Some argue that the UNSC is bound ‘transitively’ by international human rights standards as a result and to the extent that its members are bound. Others submit that the UNSC is under a ‘special obligation’ to comply with human rights treaties passed under its auspices or with rights that it has drawn specific attention to in its resolutions. \(^\text{139}\) However, these claims dramatically underplay the extent of the structural shift that would be required in terms of the primary addressees of these rules: the relevant obligations to respect, protect and fulfil would need to be extended from States to the UN. Thus, the case that human rights standards bind the UNSC, as opposed to Member States acting through the UNSC, has not been definitively made.

As the lowest common denominator, we can say that as ‘[n]othing . . . precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law’, \(^\text{140}\) the UNSC is categorically obliged to respect jus cogens norms, including the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination. The non-derogatory character of jus cogens norms means that all subjects of international law, including the UNSC, must abide by them. Such a proposition enjoys almost unanimous scholarly and judicial support. \(^\text{141}\)

This finding complicates our conclusions above concerning the responsibility to comply. The binding nature of UNSC decisions under Article 25 of the Charter, supplemented by the supremacy of obligations deriving under the Charter ensured by Article 103 cannot, ‘as a matter of simple hierarchy of norms – extend to a conflict between a UNSC resolution and jus cogens’. \(^\text{142}\) Indeed, in the absence of a compulsory judicial mechanism to review the legality of UNSC decisions, it has been argued that, in the decentralised international legal order, the decision not to comply with an unlawful UNSC decision might constitute the most effective means of enforcing the legal responsibility of the UN if it is engaged by a UNSC decision. \(^\text{143}\) Disobeying the UNSC in this way has even been conceptualised as a type of countermeasure. \(^\text{144}\) The explicit invocation of the structural elements of doctrinal responsibility;

\(^{135}\) DARIO (n 32) art 10(2).

\(^{136}\) The ICJ has made clear that the Council must respect the ‘treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment’, Conditions of Admission of a State to Membership of the United Nations (Article 4 of the Charter) (Advisory Opinion) [1948] ICJ Rep 57, 64.

\(^{137}\) DARIO (n 32) art 10(1). The ICJ has confirmed that ‘international organizations are subjects of international law, and, as such, are bound by any obligations incumbent upon them under general rules of international law’, Interpretation of the Agreement between the WHO and Egypt (Advisory Opinion) [1980] ICJ Rep 73, 89–90.


\(^{139}\) For a broader critique of these justifications, see Murphy (n 128) 190-192.

\(^{140}\) DARIO (n 32) art 26.

\(^{141}\) For an overview of scholarly opinion, see Erika de Wet, Chapter VII Powers of the United Nations Security Council (Hart, Oxford 2004) 187–191. In relation to judicial institutions, it is precisely on this basis that the European Court of Justice controversially held that it had ‘jurisdiction to review . . . indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling with the ambit of jus cogens’, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities [2005] Case T-315/01, para 282.


\(^{143}\) Tzanakopoulos (n 10) 155-200.

\(^{144}\) Ibid.
obligation, breach and sanction, in this new context is perhaps the strongest example of how doctrinal responsibility influences the international legal psyche in explicit and implicit ways.

9 CONCLUSION

This article has attempted to capture the various senses in which UNSC enforcement measures under Chapter VII of the UN Charter collide with the concept of international responsibility. In addition to this mapping exercise, which is hopefully a valuable endeavour on its own terms, the article has criticised the proclivity, in international law scholarship, to treat responsibility almost as if it is a monosomy, by equating responsibility only with its doctrinal form. Taken to its logical conclusion, this tendency implies that all we need ‘is a clear sense of the conceptual structure of responsibility; there is a ‘right answer’ to how responsibility should be understood, and this properly delineated concept is either assumed to have – or treated as if it had – metaphysical status’.  

The conceptual structure of doctrinal responsibility operates on an obligation-breach-sanction nexus. However, in the UNSC context, this structure limits responsibility analyses in important ways. It produces a tendency to ‘read in’ obligations incumbent upon the UNSC that do not necessarily stand up to scrutiny. In turn, the focus on sanctioning the UNSC as a form of consequential responsibility seemingly reduces responsibility to a form of accountability. This conceptual conflation is problematic because the concept of responsibility is both narrower and broader than the concept of accountability. It is narrower because identifying a breach of a legal obligation is not the only way to ensure that an actor is accountable for their actions. The conflation of responsibility and accountability in this context, therefore, underplays the possibility of moral and political forms of accountability.  

But the concept of responsibility is broader than merely holding an actor ‘accountable’ for the failure to comply with legal obligations, i.e., making them ‘take responsibility’ as a form of punishment. This is only one sense of the dynamic concept of responsibility. Doctrinal responsibility encourages only de minimis compliance with the UNSC’s set of nebulous legal obligations. It leaves very little room for other senses of responsibility, notably the notions of role-capacity responsibility and responsibility as prudence.

If, in the alternative, doctrinal responsibility is understood as only one element of a polysemous, chameleon-like concept, it emerges that different senses of UNSC responsibility can coalesce simultaneously. This is not to say that there will not be important links between different mobilisations, ‘[b]ut these links should be the object of investigation and not a priori assumptions’.  

When we close our eyes to the variety of potentialities for the term, we fail to appreciate subtle but important differences in the ramifications of a finding that the UNSC is ‘responsible’ or ‘irresponsible’ in any given context. For example, it is perfectly plausible to say that States have a legal responsibility to comply with irresponsible UNSC decisions, but the (morally) responsible course of conduct may be to refuse compliance with a UNSC decision or to act unilaterally in the face of UNSC inaction. This type of unilateral conduct might best be conceptualised as ‘responsible irresponsibility’. Likewise, it is equally plausible to say that the UNSC (or permanent members of the UNSC acting therein) have a moral responsibility to act even where there is no legal responsibility to do the same. This conclusion is already built into the conceptual architecture of responsibility. Indeed, even in the absence of a legal obligation, the UNSC has been allocated role-capacity responsibility for the maintenance of international peace and security. When it comes to evaluating whether the UNSC has fulfilled its role effectively (responsibility as prudence), the criteria to be taken into account are much more dynamic and nuanced than the base question of whether the UNSC has fulfilled its legal responsibilities.

In short, this article has sought to demonstrate the possibility and plausibility of a broader conceptualisation of international responsibility that takes the notion of obligation seriously but is not blinded by it, one that goes ‘beyond accountability and … norm compliance’. Essentially, it represents a call to save the concept of responsibility from its doctrinal form, to open space for a more

147 Lacey (n 145) 254.
context-sensitive perspective on UNSC responsibility. It is hoped that it might prompt others to ask broader questions about the meaning(s) of the concept of responsibility in international law more generally.