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Abstract

Security Council Resolution 1530, adopted within hours of the Madrid bombings on 11 March 2003, should give international lawyers pause for thought. It sought to denounce atrocity but, in so doing, it also unequivocally attributed responsibility for the bombings to ETA. It quickly emerged that this was a case of mistaken identity. The revelation of this mistake produced a wealth of questions regarding the capacity of states to manipulate the Security Council, the Council’s procedures themselves, the need or otherwise for evidence of attribution of responsibility, and the consequences, legal or political, that might arise in the light of a glaringly incorrect resolution. In focusing on Resolution 1530, this article considers law’s domain in the Security Council’s political context, particularly the hasty drafting and tabling of a resolution explicable only by reference to a rhetorical war on terror. It also considers the techniques of interpretation regarding so-called ‘terrorism resolutions’, the Security Council’s role as inquisitor and arbiter of evidence and the assumption of good faith on the part of members. It concludes by considering the Council’s future counter-terrorist role and the issue of the Council’s legitimacy.

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The realist critique usefully reminds us that, in law, political struggle is waged on what legal words such as... ‘terrorist’ mean, whose policy they will include, and whose they will exclude.

To think of this struggle as hegemonic is to highlight that the objective of the contestants is to make their partial view of the meaning appear to be the total view, their preference seem like the universal preference.\(^1\)

1 Introduction

When terrorist bombs detonated in central Madrid on 11 March 2004 (3/11),\(^2\) embodying the worst terrorist attack in Europe since the Lockerbie bombing, an immediate response from the United Nations Security Council ensued. Resolution 1530 condemned the bombings ‘perpetrated by the terrorist group ETA...’ and regards such act, like any act of terrorism, as a threat to peace and security; and urged all states to comply with their Resolution 1373 obligations in locating and bringing to justice those responsible. Expressing sympathy while denouncing massive human carnage, the resolution left no wiggle room\(^3\) regarding responsibility.

Despite traditional judicial deference towards states’ assessments of emergencies,\(^4\) this never extended to unquestioning ‘trust’. In focusing on Resolution 1530, this article considers law’s domain in the Security Council’s political context, in particular, the hasty drafting and tabling of a resolution explicable only by reference to a rhetorical war on terror. It also considers the techniques of interpretation regarding so-called ‘terrorism resolutions’, the Security Council’s role as inquisitor and arbiter of evidence and the assumption of good faith on the part of members. Finally, it considers the Security Council’s future counter-terrorist role and the issue of legitimacy,\(^5\) so crucial to its credibility and effectiveness.

Days after 3/11, initial indicators\(^6\) all pointed towards Al-Qaida involvement, rather than domestic terrorism, yet Al-Qaida linkage remained ‘obstinately downplayed’.\(^7\) Foreign Minister Ana Palacio insisted that her country’s diplomats confirm ETA’s responsibility for the attacks,\(^8\) later justifying this as being due to administrative

\(^4\) See the Strasbourg Court’s often light touch towards the UK regarding Northern Irish terrorism.
\(^5\) See T. Franck, Power of Legitimacy Among Nations (1990), at 24, with its emphasis on the eye of the beholder.
\(^6\) Discoveries regarding the use of mobile phone detonation, explosives used, a van containing the Koran and explosives, video testimony, and date links with 9/11.
Naming and Shaming

expeditiousness. Such doggedness recalled pre-Operation Iraqi Freedom dogma that Iraq possessed weapons of mass destruction (WMD). Only the arrest of suspects, including three Moroccans, for the attacks finally nailed the coffin on the Spanish government’s ETA incantations.

2 Naming . . . But Who’s Shamed?

Security Council condemnation of terrorist attacks as threatening peace were common, as evidenced in the resolutions condemning attacks in Kenya and Tanzania, New York and Washington, Russia, Bali, Colombia and Turkey. Alternatively, Presidential statements regularly expressed complaint, noticeably regarding the 2003 attack on the UN headquarters in Baghdad and the 2004 attacks in Grozny and Beslan. Resolution 1530’s uniqueness lay in the Security Council’s naming of the alleged perpetrator group. Usama bin Laden and Al-Qaida had been identified in previous resolutions, but not as perpetrators of specific attacks. Resolution 1390 (2002), which condemned 9/11, noted bin Laden’s and Al-Qaida’s ‘continuing activities’, condemning the latter for ‘multiple criminal, terrorist acts’. Even Resolution 1450 (2002) merely deplored Al-Qaida’s claims of responsibility. Resolution 1213 (1998) was closer to Resolution 1530 in specifically naming UNITA,
but the Security Council delayed before attributing responsibility. Germany unsuccessfully attempted to insert ‘allegedly’ into Resolution 1530, concerned about setting a precedent usable for future score-settling. 27 Apparently a draft resolution omitting identification was verging on passage when Spain’s delegation indicated its governmental instructions to include ETA’s direct condemnation. 28 Spain’s action illustrated the pre-eminence of a state’s national interest above collective security interests in formulating a national position on a Security Council issue. 29

Departing from customary dilatoriness, the Security Council passed Resolution 1530 within hours of the attacks, with debate being non-existent. Generally, Security Council members’ expensively comments emerged off-the-record without any public ‘justificatory discourse’, legal, political or evidential. The Secretary-General was, however, circumspect regarding the bombers’ identity. 31 Resolution 1530 illustrated a reactive, negative aspect of the ‘CNN effect’ and a misunderstanding of ‘crisis management’. 32 Spain’s certainty was embodied in its lightning-speed drafting and tabling of the resolution. 33 The Security Council’s swift response reinforced the idea that Spain was urgently experiencing clear and present danger. 34 This seemed cruelly ironic when recalling Inocencio Arias’ Council President’s address in July 2003, maintaining that there were ‘no shortcuts’ in counter-terrorism and urging caution in responding to ‘siren songs’ demanding ‘swift and drastic solutions’. 35 He would ultimately enter Spain’s collective mea culpa. 36

After the vote, Deputy Permanent Representative of Spain, Ana María Menéndez thanked ‘the international community’ and Security Council members ‘for their solidarity and their support’, thus broadening out and transforming Spain’s domestic concerns and objectives into global ones with identifiable outlaws. 37 The invocation of ‘international community’ encapsulated the ‘war on terror’ – acceptable because

27 Sciolino, supra note 8. In a contrasting tactic, US insistence upon condemning terrorist action by Hamas stonewalled a draft resolution (S/2004/240) condemning the Israeli killing of Sheikh Yassin. Asked if Res. 1530 undermined ‘the Negroponte doctrine’, the US Ambassador simply replied that it was based on Spanish government information: see http://www.un.int/usa/04_039.htm.


36 ‘We have to apologize for that. We were in shock, the emotion was high and we, in good faith, pushed the Council to do it’: Arias, ‘Press Conference by the Counter-Terrorism Committee Chairman’, UN Press Briefing, 26 Mar. 2004.

that hegemonic ideal was wise and good. Spain’s manipulations exemplified post-modernist concerns regarding international law’s capacity to obscure individual projects. Afterwards an Algerian representative apprehensively stated: ‘If it is established in two days that it was someone else, that would be really embarrassing.’

The other principal statements specifically mentioning ETA came from two permanent Security Council members, Spain’s prime erstwhile political allies, the US and UK. Surprisingly, Javier Solana, the EU’s top foreign policy official (and former Socialist Spanish foreign minister), also condemned ETA. As former NATO Secretary-General and a terrorism expert, his statement carried particular weight. A special edition of El País issued on 3/11 identified ETA, although even as early as this an editorial suggested similarities to Al-Qaida. The EU President simply referred to perpetrators of this appalling act of blind hate and the President of the European Council, was similarly reticent. The Council of Europe expressed itself in silent tribute, and King Juan Carlos urged simply ‘[u]nity, firmness and calm in the fight against terrorism, with all the instruments with which the rule of law provides us’. In his afternoon address Prime Minister Aznar did not name ETA but clearly implied its identity. The Spanish Interior Minister Ángel Acebes had accused ETA of ‘seeking an attack with wide repercussions’. Within hours, he accepted that ‘no possibilities have been discarded’. Emotional shows of solidarity were held at the Basque

38 Koskenniemi, ‘Comments’, in ibid, at 95, although (at 98) it can cast terrorists as engaging in anti-hegemonic struggle rendering them intuitively attractive.
39 Paulus, supra note 37, at 76.
42 Solana allegedly told colleagues ‘I am a patriot. I am a Spaniard. I am going to follow my government’s line. I have an international responsibility’: Sciolino, supra note 28.
45 EU Press Release IP/04/327.
49 Referring to ‘the terrorist band’, the Spanish Government’s usual code for ETA. The address is available at http://news.bbc.co.uk/1/hi/world/europe/3503184.stm. See also Muzilla, supra note 48.
parliament and the Basque head of government, Juan José Ibarretxe Markuartu, unequivocally blamed ETA.51

3 History of Co-operation

Spain was one of the most prominent states coalesced around the US-led ‘war on terror’.52 It firmly identified itself within the ‘coalition of the willing’,53 supporting Operation Iraqi Freedom (itself identified with counter-terrorism) both politically and militarily. Prime Minister Aznar took a prime position at the Azores Conference ‘war council’.54 Aznar seemed committed to Spain’s political elevation and integration into the so-called ‘New Europe’.55 Overall, his strategy had a vicarious ‘hegemonic resonance’56 in facilitating the furtherance of key US policy objectives. Such cooperation inevitably cast ‘the rest as weaklings’.57

This elevation dramatically backfired after 3/11. Perceptions of exploitation of a tragic situation fuelled voters’ anger. The government’s mistake regarding ETA was conflated with Aznar’s insistence on participating in Iraq and the (similarly mistaken) allegations regarding WMDs.58 Many Spaniards (90 per cent of whom opposed it59) identified Spain’s Iraqi involvement as responsible for 3/11. Such sentiments were hardly dissipated by the revelation that the late Al Qaida leader Yusuf al-Airi had left instructions demanding terror strikes against countries involved in Iraq, with a view to forcing their withdrawal.60 In October 2003, bin Laden threatened retaliation against Spain over Iraq. For Spaniards, already sensing deceit regarding reasons for the war in Iraq (perceived as the source of their victimization), the sense of further

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51 The first government official to make a comment shortly after 10am on 3/11: see http://www.elmundo.es/elmundo/2004/03/11/espansa/1079010638.html.
57 Koskenniemi, supra note 38, at 96.
being misled was a final straw. During voting, protesters taunted Aznar with the chant, ‘Your war, our dead’.

4 Threats to the Peace

Davidsson considers good faith to be key to Security Council characterizations of threats. This entails acting responsibly, with peace and security as the central focus, not permanent members’ particular interests. Action should also be based on objectively verifiable facts, conduct or threats, not speculation, and it should avoid being inconsistent or applying double standards. Finally, measures should be proportionate to the immediacy and severity of the threat. Since 1989 the Security Council has increasingly focused on the issue of terrorism, notably in the watershed ‘Lockerbie resolutions’, and has typically characterized terrorist bombings as Article 39 threats. While the Security Council could potentially mischaracterize a threat, trimming ‘ETA’ from Resolution 1530 would have left an acceptable exercise of Security Council prerogative. 3/11 could have signalled rogue state sponsorship of terrorism to which Spain could have invoked self-defence, so disrupting the peace.

Resolution 1368 considered 9/11 a threat to international peace and security, indirectly invoking Chapter VII. Similarly, Resolution 1530 did not mention Chapter VII, but stated that 3/11 constituted a threat, invoking Article 39 language and ‘Chapter VII precincts’. Perhaps a follow-up resolution would have explicitly referenced Chapter VII, by, for example, mandating states to root out any ETA-linked organizations. Instead, as mentioned above, Resolution 1530’s paragraph 3 referred to Resolution 1373 and states’ obligations thereunder. In one fell swoop, 3/11 was tied to mandatory Chapter VII action and the global war on terror. Ambiguity, though not unusual in resolutions, is often cured by external explanations or subsequent resolutions. For example, Resolution 688 arguably permitted humanitarian intervention, but the Legal Under-Secretary-General clarified that it was not Chapter VII action. Similarly, Resolution 731 was not mandatory and Resolution 748 clarified that sanctions would be imposed. Resolution 1530 is distinguishable from Resolutions 688 and 731, which each had an eye on potential future action and necessitated

61 Supra note 58.
62 An early Art. 39 initiative concerned (unsuccessfully) denouncing Franco’s regime as a threat. See UN Docs S/75 and S/76. See also UNGA Res. 39(I) and 386(V).
64 Evolving from ‘ambivalence and hesitation’: see Luck, ‘Tackling Terrorism’, in Malone, supra note 29, at 85.
68 T. Franck, Fairness in International Law and Institutions (1995), at 236.
69 Ibid.
initiatives to reign in any possible interpretations authorizing action. Perhaps that caution was not clearly felt in the context of Resolution 1530, which envisaged no enforcement or self-defence. However, why was it thought appropriate to invoke Article 39 in a situation of domestic terrorism?

The Security Council had never characterized ETA attacks as threats to peace (not even those occurring post-9/11) so it is unclear why 3/11 posed one. Hundreds of terrorist incidents occurring annually remain unreferred to the Security Council. While the Security Council has considered internal situations as threats to the peace (and obviously no arguments were raised in defence of Article 2(7) of the UN Charter), Spain was unlikely to dissolve into civil war. Despite 3/11’s magnitude, ETA’s recent attacks and the discovery of serious amounts of ETA explosives in February 2004, it remains understood that it is the international character of acts which renders them an Article 39 threat.

Although Resolution 1269 could be read as being a general call against terrorism, preambular paragraphs 1, 3, 6, 8, and operative paragraph 5 all refer to ‘international terrorism’. Arguably 9/11 set in motion a new paradigm for states combating terrorism, but even Resolution 1368 in operative paragraph 1 condemned the 9/11 attacks, ‘like any act of international terrorism’ as a threat to international peace and security. Perhaps with the increasing use of the stock phrase that it ‘regards such acts, like any acts of terrorism as a threat to the peace’, the Security Council was drawing a parallel between the two types of terrorism. Indeed, General Assembly resolutions regularly condemned ‘all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security’. However, the General Assembly was never the primary body regarding peace and security.

While Resolution 1373 heralded counter-terrorism as a mandatory obligation of states, the High-level Security Council meeting held on 9/11’s first anniversary
concerned international terrorism.\textsuperscript{80} Even Resolution 1440, concerning hostage-taking in a theatre by Chechen rebels in Russia, an internal war (perhaps surprisingly) referred to the traditional formulation. Similarly, Resolution 1455 condemning all terrorist acts reaffirmed that international terrorism constituted a threat.\textsuperscript{81} Thus, between 9/11 and January 2003, the focus was on describing terrorism’s international character or effects and was in line with the Security Council’s increasingly thematic approach. Counter-terrorism’s importance implicitly derived from terrorism’s transnational threat to peace and security.\textsuperscript{82} ETA was reputed to have members, supporters and training connections in South America, Europe and the Middle East\textsuperscript{83} and to operate from French territory. French police arrested ETA suspects in the weeks post-3/11. Perhaps this bestowed an international dimension upon ETA’s terrorism or perhaps 3/11 was so vehemently condemned due to an inherent European bias on the part of Security Council members linked by economics, culture (through colonial and cultural heritage) or geography.\textsuperscript{84}

Post-January 2003, a sea change appeared. Resolution 1465, condemned a Bogota nightclub’s bombing by the internal Colombian rebel group FARC. ‘[T]hreats to international peace’ were mentioned in the preamble. However, operative paragraph 1 stated that this act ‘like any act of terrorism’ represented a threat to peace and security. Resolutions became bolder in their drafting – all acts of terrorism were general threats to the peace. Resolution 1516 similarly condemned attacks in Istanbul and Resolution 1530 followed this formula. In fairness, Article 39 refers to a ‘threat to the peace’ with references to restoring international peace and security occurring in Articles 41 and 42. It is true that ‘[I]nternational bombing is among the “easy cases” in the sense that a “threat to international peace” is self-evident’.\textsuperscript{85} Nevertheless, if it is accepted that all forms of terrorism threaten peace and security,\textsuperscript{86} that all states have an \textit{erga omnes} obligation to prevent and suppress any act of terrorism and that every ‘State and competent international organization has a legal interest in ensuring compliance with this obligation’,\textsuperscript{87} then Resolution 1530 appears to be in line with international legal trends.

But how did Resolution 1530 enable Spain or other states to carry out their obligations? Perhaps 9/11 and the shocking end to perceived American invulnerability indicated

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\item This may be paralleled with obligations under the Genocide Convention: see \textit{A More Secure World: Our Shared Responsibility, Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change} (2004), Executive Summary, para. 200, available at www.un.org/secureworld/.
\item Preambular paras 6 and 7 of Res. 1455, \textit{supra} note 24.
\item See the Institute for Counter-Terrorism website, available at http://www.ict.org.il.
\item Indeed, Krisch notes the equivalence of international law and European law: Krisch, ‘More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law’, in Byers and Nolte, \textit{supra} note 37, at 141.
\item Franck \textit{supra} note 68, at 241.
\item \textit{Ibid.}
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terrorism’s apotheosis. Maybe the apparent ‘spinning top’ effect of terrorism generally, from Al-Qaida or similar, had (expressly or impliedly) reconfigured any act of terrorism as a ‘threat’. Indeed, Resolution 1373 pointed to generic counter-terrorism obligations and Spain’s December 2001 report to the Counter-Terrorism Committee drew specifically on its experience with ETA, thus twinning pre- and post-9/11 terrorism. Denouncing terrorism’s ‘thousand different faces’, Prime Minister Aznar also grouped domestic and international terrorism together, indicating that any distinctions ‘belong . . . more to . . . academic treatises than to that of political leadership and . . . contribute to the sowing of confusion. All types of terrorism . . . must be combated with the same aggressiveness and the same absence of condescension.’

Terrorism does not stop at state borders, but such an inexpert, intuitively based conclusion is a perilous sleight of hand basis for resolution drafting. In Resolution 1530, Spain appealed to the common counter-terrorism interest, realizing its special interest without contest. Ironically, Spain had been the victim of Al-Qaida’s international terrorism. If Resolution 1530 had omitted reference to ETA it would have been a perfectly respectable example in the canon of Security Council counter-terrorist action. Further, if Spain had avoided identification or had suggested Al-Qaida involvement, it would have retained its international and domestic support, and been in a position to undertake self-defence measures (e.g. against Morocco if harbouring suspects).

The Spanish government’s gain in political terms from Resolution 1530 was potentially enormous (Aznar was tough on ETA), but what was Spain’s legal advantage? By seeing Article 39’s definition of threat less as an instrument towards future action, a growing autonomy for the notion of ‘threat’ itself emerges and does so with a currency of its own. Spain never sought authorization for sanctions or military enforcement. Even if it sought blue-ribbon approval for potentially repressive domestic legislation pursuing counter-terrorist ends, it did not require authorization for its passage. However, Spain’s political alliance pursued and detained ‘enemy combatants’ seeking to guard the ‘international community’s’ very existence. Not a conventional armed conflict, the ‘war on terror’ was thus a rhetorical war, with potentially more powerful and wide-ranging effects because of its profound way of impacting upon realities. Thus, winning the rhetorical war, even at the expense of

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88 Luck, supra note 64, at 96 and ‘any acts of terrorism are criminal’: see Security Council presidential statement S/PRST/2003/17, supra note 86.
89 ‘Having lived for years under the threat of terrorism, especially as represented by . . . ETA, the Spanish authorities . . . have been constantly vigilant in this regard’: UN Doc S/2001/1246, para. 1B(b)(1).
90 UN Doc S/PV.4752, supra note 52.
93 See also the statements of the US President on 7 and 11 Oct. 2001, available as news releases at www.whitehouse.gov (referred to in Krisch, supra note 84, at 170).
94 See generally P. Heymann, Terrorism, Freedom and Security: Winning Without War (2003) and Lowe, supra note 34, at 187. Lowe (at 190) criticizes use of either the rhetoric or the law of war to deal with terrorism, given their capacity to label entire communities as ‘enemies’.
denying an existing reality, was acceptable and possible because that rhetoric had the power to switch and change existing realities.95 The latent non-legitimacy of Resolution 1530 could thus be converted. Hurd’s point about the Security Council’s symbolic value96 becomes apparent. Official acknowledgement of Spain’s imperilment imbued Spanish domestic counter-terrorism measures, both existing and potential, with international legitimacy. It indicated a reversal of the traditional resistance of strong states to Security Council involvement in domestic terrorism. The British specifically avoided war analogies regarding Northern Ireland (by a policy of non-internationalization of the conflict and via the use of UN procedural devices97), except occasionally to justify harsh measures.98 New Spanish legal measures99 were unnecessary, but obtaining their international accreditation must have been irresistible. The highly critical report of UN Special Rapporteur on Torture, regarding Spain’s treatment of ETA suspects,100 issued only one month before 3/11, and to which Spain had reacted badly,101 heightened the urgency of conferring/reinstating legitimacy upon its counter-terrorism initiatives. Resolution 1530 provided Spain with a powerful legal weapon in its artillery in the rhetorical war.

5 Evidential Issues

Wellens notes that when assessing the evidence demanded prior to the passing of a resolution, theoretically, a law enforcement solution creates a high threshold for adducing evidence;102 if, however, the motivation is to maintain peace where the threat is obvious,
then the facts may be apparent. Yet, clear and convincing evidence may be unavailable immediately and the lower ‘preponderance of evidence’ standard may in both approaches be the only one which can be complied with given the pressures of time’. Nevertheless, the *actor incumbit probatio* obligation remains with any requesting state.

The Security Council was not under any time constraints. Military enforcement action or self-defence were not envisaged. Resolution 1530 could have expressed condemnation whilst simultaneously displaying the restraint befitting a credible decision-maker. Any sense of the Security Council being in thrall to a time-pressed crisis was exploited by the Spanish delegation. The fear of fatal chaos welcomed the decisiveness of a hegemony, even if that hegemonic ideal in fact undermined an international organization which provided structure, process and participation. Perhaps the Security Council was seduced by the allure of strong decision-making – there was a palpable sense of Spain urging the Security Council to display ‘a combination of guts and brains’. Regardless of any prevailing rhetoric of being ‘with us or against us’, the Security Council’s members were duty-bound to critically interrogate the authenticity of the need for urgency. Without signifying softness on terrorism, the validity of the Security Council’s legal order would have remained unquestioned.

It was dubious that Spain even satisfied a ‘preponderance of evidence’ standard. A *direct* comparison cannot be made between evidence in the Security Council’s political context and its use in the ICJ’s judicial context – political choices will not be

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103 Wellens, *supra* note 71.

104 See O’Connell, ‘Evidence of Terror’, 7 *J Conflict & Security L* (2002) 19 for a discussion of the various standards. Even in such a volatile situation as self-defence it is unclear ‘how, and under what evidentiary standard, nations and scholars are to assess the factual allegations upon which the use of force against terrorism is premised’: Lobel, *supra* note 102, at 538.


106 ‘[T]he Council should use considered arguments and aims for impartiality and consistency’: Wallenstein and Johansson, *supra* note 84, at 29.

107 See Krisch, *supra* note 84, at 174–175.

108 Or of being strongly relevant: see Charlesworth, *supra* note 32.

109 As referred to by the US Permanent Representative William W. Scranton in relation to the Entebbe raid: Luck, *supra* note 64, at 89.

110 ‘Either you are with us, or you are with the terrorists’: statement in President Bush’s Address to a Joint Session of Congress and the American People. 20 Sept. 2001. which he re-emphasized in his UNGA address, 23 Sept. 2003, where he said, ‘[a]ll governments that support terror are complicit in a war against civilization’. The address is available at www.whitehouse.gov.

entirely juridified. However, this does not mean that an exercise of political authority needs no evidential authority. Further, ‘axis of evil’ rhetoric reduces certain states to second-class status politically and legally (by excluding them from law-making processes). Equally, ‘war on terror’ rhetoric potentially invokes a lower threshold standard for any measures taken in the offensive. Legal argumentation can render issues elliptical, but a basic legal technique of collecting and presenting supporting evidence is the basis of the actori incumbit probatio principle. To disrespect such rules means that ‘the whole game is broken off, for everyone’. Concretized rules regarding the production of evidence may not exist, but an evaluation exercise of evidence supporting these opposable positions is required, particularly given the absence of judicial review and the fact that a resolution on a legal issue indicates members’ support for the legal claim embodied therein. Resolutions provide evidence in themselves when a legal landscape is being surveyed and changing expectations of states are being evaluated.

Absence of warnings pre-3/11 and the scale of the attack indicated a sudden departure in ETA’s modus operandi, and it quickly denied involvement – this in itself would be unique for a terrorist organization, which is proud of its armed struggle resulting in death, to lie about involvement. Thus, a commonplace, rather than reasonable, suspicion was operating. If international scrutiny and investigation is considered crucial prior to self-defence being undertaken by a state when it operates outwith Security Council authorization, it seems perverse not to demand the same rigour of a resolution impliedly invoking the UN Charter. It was also unclear whether revealing to international scrutiny the information leading to ETA’s blame would have raised a major security risk. Evidence of attribution rather than operational detail was needed and could have been disclosed by Spain. Finally, merely because Resolution 1530 related to a threat rather than an act of aggression or a breach of the

112 Herdegen, ‘Comments’ in Byers and Nolte, supra note 37, at 187, although, as Krisch notes, international politics have become significantly ‘legalized’: Krisch, supra note 84, at 153.
113 Krisch, supra note 84, at 146.
114 Lowe, supra note 34, at 193.
115 Dupuy, supra note 111, at 180.
118 Ratner, supra note 116.
119 ETA’s largest-scale attack involved 21 dead in a 1987 Barcelona supermarket bombing.
peace, as some lesser form of Charter breach, should not eliminate some burden of proof. Indeed, the evidence threshold may be more easily overcome for a state in the case of an obvious breach or aggression.

On 15 March, the day after Spain’s election and Aznar’s defeat, Inocencio Arias wrote to Security Council members saying that at the time the resolution was adopted, his government was ‘firmly convinced’ of ETA’s responsibility. Ana Palacio similarly maintained that Spain’s belief in ETA’s culpability was honest. Particulars of evidence are unmentioned. Insistences on honesty and good faith (a rather general constraint) reinforced Spain’s acting on sovereign instinct or government impulse. Subsequent official Spanish explanations did little to convince or mollify Security Council members. The UN Secretary-General was clear that there was ‘a lesson here for everybody, including the Council members’.

The Security Council’s approach was exemplified by a senior French official reported as saying: ‘Under the circumstances, nobody wanted to say no.’ Yet asking for this evidence was the Security Council’s right, and arguably its obligation. One year earlier the Security Council had witnessed a titanic struggle over evidence that Iraq was breaching its obligations in relation to weapons inspections. Solid evidence is an indispensable requirement for legitimacy. If it is crucial that international organizations are not perceived as being enslaved to the imperatives of a particular hegemony, then they must pause before undertaking emotionally intoxicated action. Resolution 1530’s unanimous vote was principally an expression of the Security Council’s sympathy, but is that really its role? Resolution 1530’s passage reinforces Koskenniemi’s recent accusation that international law is burdened by a sense of kitsch and that we congratulate ourselves on our capacity for being moved (and being seen to be moved) upon witnessing hardship. It is ‘the dictatorship of

124 There is almost certainly a hierarchy regarding the seriousness of any particular threat. As Davidsson, supra note 63, at 551–552, notes, Art. 41 demands that the threat jeopardize peace such that immediate action is necessary.

125 Wellens, supra note 71, at 31.

126 Letter from the Representative of Spain to the President of the Security Council, at UN Doc S/2004/204.

127 Sciolino, supra note 28.

128 Norman Solomon of the US-based Institute for Public Accuracy described Res. 1530, supra note 76, as a ‘journey into Alice in Wonderland—first the verdict, then the evidence’: Deen, supra note 40.

129 Shaw, referred to in Wellens, supra note 71, at 21.

130 One Council ambassador stated that the Security Council members were ‘very, very angry’, at being ‘utilized for political maneuvering’ and that it was ‘irresponsible to pressure’ them. Another spokesman said the Council had been ‘hijacked’: Sciolino, supra note 8.

131 US Ambassador John Negroponte was reported as saying, ‘[t]hey tell us there have been other threats . . . some threats . . . intercepted recently. . . . it is [Spain’s] judgement . . . that these attacks were carried out by ETA and we have no information to the contrary’: Deen, supra note 40.


133 Sciolino, supra note 8.

134 S/PV.4701, supra note 102.

135 See High-level Panel’s Report, supra note 79, at para. 204.

136 Koskenniemi, supra note 1, at 121–122.
the heart’ which renders something kitsch, telling easy truths and simple certainties. Koskenniemi has been criticized for offering no criteria for distinguishing between a sincere and a cynical appeal to international morality. Perhaps insistence on evidence would assist.

In response to 9/11, the Security Council has been described as taking ‘a lead role . . . quick, firm and unequivocal. . . . a necessary and prudent exercise of [its] power and prerogative. . . .’ Although opinions differ on the possibility of judicial review, examples such as Resolution 1530 and an apparently unfettered and inexplicable exercise of Chapter VII do little to justify the Security Council’s current broad and independent power. Why did the Security Council become unnecessarily complicit in harming the UN’s reputation? Arguably, the UN’s structural rot was glimpsed. Thus, perhaps criticizing the Security Council over Resolution 1530 misses the point because there is no longer any perception of independence about the Security Council’s power. It is this independence, or perception thereof, which is indispensable.

Despite having little fact-finding capacity itself, paradoxically, the Security Council creates binding obligations for UN members. It has been concerned about its access to information from other UN bodies and traditionally has been self-consciously cautious, pursuing a rigorously interrogative process. Consequently, the proposal of an independent, standing fact-finding commission is one of the more interesting innovations suggested for the Security Council, representing development on the work of ad hoc bodies like those in Iraq and Yugoslavia and the UN International Independent Investigation Commission charged with investigating the Rafic Hariri assassination. A permanent body could begin to develop a distinguished reputation for serving the Security Council, cooperating with the 1373 Committee and thus diminishing the compartmentalization of the Security Council’s work (in particular the

117 Reminding us of Kundera’s warning that kitsch’s function as a lie is to ‘set up a folding screen to curtain off death’: M. Kundera, The Unbearable Lightness of Being (1999 [1984]), at 248.
120 As exemplified in the Lockerbie litigation: Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v United States; Libya v United Kingdom) (request for the Indication of Provisional Measures) [1992] ICJ Rep 114.
121 See the interview with Solomon in Deen, supra note 40.
122 Wellens, supra note 71, at 22 referring to UN Security Council presidential statement PRST/1994/22 and Res. 1353 B.
work of the various delegated committees\textsuperscript{146}) which has been the focus of criticism.\textsuperscript{147} A standing body would avoid constant infrastructural re-invention and repetitive start-up expenses.\textsuperscript{148} Arguably such a permanent body would not have helped in the Resolution 1530 scenario because its focus is likely to envisage enforcement measures. Nevertheless, Security Council fact-finding involvement was identified as pertinent in initiating on-site investigations to identify states harbouring or supporting terrorist networks or facilities.\textsuperscript{149} Undoubtedly, it may run into the same difficulties which beset UNMOVIC and one body might be insufficiently multi-faceted for use in widely varying scenarios. Additionally, the institutional motivation towards this new body may be explained by a desire to deflect attention away from the real problem of respect in state action for Security Council processes and procedures. However, discussions on reconfiguring and redirecting Security Council expertise is heartening, indicating an awareness of responsibility and an acceptance that Security Council power is not unquestioned or preserved in amber.

6 The Turn to (Un)ethics

The passing of Resolution 1530 echoed the ‘turn to ethics’ – the pursuit of goals ascertained by invoking the received wisdom of foreign office officials and government leaders.\textsuperscript{150} It is a semi-theocratic characterization and Resolution 1530’s passage did nothing to dispel a conclave atmosphere. Spain (perceived as expert) convinced because it ‘just knew’ ETA was involved.\textsuperscript{151} If self-interest must at least coincide with common good for action to be considered legitimate\textsuperscript{152} or ethical then Aznar’s electoral imperative divested the action of such privilege. Spain had not sought Security Council condemnation of ETA outrages, despite the ‘war on terror’ and despite terrorism long having been on the Security Council’s\textsuperscript{153} and Spain’s


\textsuperscript{147}Compartmentalization is not a fault confined to the Security Council: see High Level Panel report, \textit{supra} note 79, at paras 73, 98, 176, 284, and 294.


\textsuperscript{149}Hampson, ‘International Institutions’, in Club de Madrid, \textit{supra} note 86, at 7, 9. See Res. 1455, \textit{supra} note 24, at para. 11, which invites the 1267 Sanctions Committee to consider visits to specified countries in order to ascertain compliance with counter-terrorist measures.

\textsuperscript{150}Koskenniemi, ‘“The Lady Doth Protest Too Much”: Kosovo, and the Turn to Ethics in International Law’, 65 \textit{MLR} (2002) 159.

\textsuperscript{151}In relation to the US, post-Cold War, it can no longer claim ‘[t]rust us, we know what we’re doing’: Kagan, ‘Looking for Legitimacy in All the Wrong Places’, \textit{Foreign Policy}, 26 Aug. 2003. Regarding the US bombings of Sudan and Afghanistan, ‘[t]rust us’ suggests error is not possible: Lobel, \textit{supra} note 102, at 553.

\textsuperscript{152}In the context of argumentative technique see Johnstone, \textit{supra} note 30, at 454.

\textsuperscript{153}Spain’s report to the UN Security Council’s Counter-Terrorism Committee of Dec. 2001 (UN Doc S/2001/1246) at paras 1B(b)(1) and 2D, also acknowledged the arrest in Nov. 2001 of citizens with Al-Qaida ties.

Prime Minister Zapatero himself emphasized how Spaniards with their long experience of terrorism empathized with Americans after 9/11, noting the expressions of solidarity received post-3/11: ‘Statement by the President of the Spanish Government, Mr. Jose Luis Rodriguez Zapatero, to the United Nations General Assembly’, available at www.spainun.org.


Paraphrasing Hurd, supra note 96, at 46, referring to Bourdieu’s, Language and Symbolic Power.

Koskeniemi, supra note 150, at 171.

Malone, ‘Conclusion’, in Malone, supra note 29, at 635.

An uncertain State should definitely err on the side of caution: O’Connell, supra note 104, at 36.

High-Level Panel. supra note 79, at para. 41.

7 Longer-term Problems for the UN and the Security Council

The failure to adequately deal with the Rwandan genocide, the increasingly ad hoc nature of responses in use of force, the imbroglio witnessed in relation to Srebrenica’s
'safe' havens, the oil-for-food scandal, the failure to deal adequately with peacekeepers accused of sexual violence, and indeed Resolution 1530, have all conspired to emphasize and exaggerate the dissipated legitimacy of the Organization. Chesterman cautions about a reversion towards pre-Charter trends where the Security Council would exist only to advise Member States rendering international decisions once again contingent on the will of the powerful.

Murky Security Council politics doubtlessly embody the dark side of the international institutional personality – the Security Council’s manipulation for the dirty work of states. Nearly 20 years ago, Allott noted that despite a dramatic rise in the energy of public life within international society, with a corresponding intensification of activity and power on the part of specialists and professionals, there was no corresponding increase in democratic accountability. Diplomacy remained a relatively closed world, esoteric and remote, animated by a bureaucratic spirit seeking the quiet life rather than the good life, without attempting to make original and energetic contributions to the general interest of society. If both the Security Council and UN are perceived (mostly wrongly) as being apologists for hegemonic states or policies, this potentially compromises UN field personnel’s safety. ‘Bluewashing’ no longer guarantees protection. Making oneself a target by flying the UN flag could partly be due to the delegitimization of the UN. The attack upon the UN Headquarters in Iraq in August 2003 was not perpetrated randomly or because the locus was viewed as neutral. Indeed, the passing of Resolution 1483 (the so-called ‘occupation resolution’) may have done little to diminish the perception of UN bias, despite its refusal to authorize the intervention. If, after this resistance, the UN could still be viewed as partisan, then perceptions post-Resolution 1530 are shudder-inducing.

The intertwining of legitimacy, effectiveness and, consequently, credibility is invaluable. Therefore, if legitimacy is the elusive blue ribbon of approval, ‘illegitimacy’ is a death knell for any decision-making body’s credibility and the enforcement of its declarations. It denotes President Bush’s criticism of irrelevancy, suggested in his speech to the UN in September 2003. Indeed, Richard Perle, in a coruscating essay of...
21 March 2003, disparaged the UN’s ‘anarchy of... abject failure’ and proclaimed a neo-Westphalian world order of ‘coalitions of the willing’. Nevertheless, ‘the speed and yardstick for collective action cannot be determined solely by strategic geo-political considerations’. It is true that the Security Council is caught on the horns of a dilemma – inactivity leads to accusations of irrelevancy while engagement is accompanied by accusations of self-interest of particular states. The Security Council should perhaps become more proactive, but under-committed states hamper UN achievements.

The sense that Security Council decisions have the benefit of legitimacy invest them with potency. It is almost certainly true that legality is the indispensable foundation of legitimacy and, taken together, enhance effectiveness. As Kagan notes, although an intangible factor in foreign policy (and unpopular with lawyers), legitimacy potentially has great practical significance. Indeed, Koskenniemi was clear that law’s place in collective security as a working culture was as a ‘gentle civilizer’, and presumably legitimizer, of discussions around security. This necessitates acceptance of a supranational body’s standing and authority, something traditionally difficult for the US, potentially more so, in a unipolar world. Multilateral decision-making becomes the key to legitimacy and consequently states need the Security Council. Spain schizophrenically promoted its partial view via international endorsement for it. Allegedly, Washington toyed with the idea of claiming legitimacy for the 2003 Iraqi intervention if it could get nine affirmative votes on a failed resolution authorizing intervention. Alternatively, arguably Washington sidestepped the Security Council, because rejection of its resolution would have made apparent its


176 Malone, supra note 160, at 634.

177 Kagan, supra note 151.


illegality and, by implication, its illegitimacy. Either way, evidence of the Security Council’s symbolic power to confer/withhold legitimacy is apparent.

... although the Security Council did not deter war, it provided a clear and principled standard with which to assess the decision to go to war. The flood of Foreign Ministers into the Security Council chambers during the debates, and widespread public attention, suggest that the United States decision to bring the question of force to the Security Council reaffirmed not just the relevance but the centrality of the Charter of the United Nations.

Franck’s definition of legitimacy of an institution’s capacity to exert a pull towards compliance seems particularly pertinent. Indeed, as the anti-war protests clearly indicated, large sections of the public identified themselves as actors equipped to judge the legality and thus the legitimacy of certain actions because they believed in the UN and its Security Council.

The process of delegitimizing the Security Council is well underway and it must be guarded against. Confidence in the Security Council may be diminished due to perceptions regarding the quality, objectivity and consistency of its decision-making, which is ‘less than fully responsive to very real State and human security needs’. At the same time, states and their peoples have a vested interest in maintaining decision-making in (a more transparent) Security Council because otherwise decision-making would be likely to migrate to even less democratic fora – destroying the Security Council is easier than replacing it. It is true that the Security Council system is not properly Austinian in that states relinquishing power to it can presumably re-take it (e.g., by leaving the UN) but then, whither goest thou? A return to pre-1648, pre-1815, pre-1918 or pre-1939 times? Although it struggles against appearing like a figleaf for particular states’ hegemonic interests, the UN still enjoys unique normative strength, global reach and convening powers, no doubt principally by not being a state. The ascent of terrorism onto the Security Council’s agenda has huge symbolic power for that issue. Those involved in it are ‘players’ and the fact that states fight for this territory emphasizes the Security Council’s importance.

The Security Council’s accountability and performance are questioned, but these criticisms are largely due to its lack of transparency and image of ‘clubbiness’, contributed to by its procedures and membership.

181 Pellet, supra note 174.
182 Luck, supra note 64, at 93.
183 High-Level Panel, supra note 79, at para. 83.
184 Franck, supra note 5.
185 High-Level Panel, supra note 79, at para. 197.
186 Malone, supra note 169. [T]he solution is not to reduce the Council to impotence and irrelevance: it is to work from within to reform it...: High-Level Panel, supra note 79, at para. 197. See also UN Secretary-General, supra note 75, at para. 126 and 'Secretary-General’s address to the General Assembly’, 21 Sept. 2004, UN Doc SG/SM/9491 GA/10258.
187 Annan, supra note 91.
188 Hurd, supra note 96, at 38–41.
8 The Future for Security Council Decision-making

The global phenomenon of terrorism points to the increasing need for, and relevance of, international law responses to terrorism; scrupulous respect for the rule of law, good governance and accountability at the national as well as the international level are absolute requirements for the maintenance of international peace and security and for effectively preventing and suppressing terrorism.189

It goes without saying that any hegemony, of a state or an idea like the ‘war on terror’, flies in the face of equality under the law.190 It is supremely ironic that Security Council reform lost impetus when attention was diverted to the war on terror.191 Further, if the legitimacy of the legal process itself is questioned, a key component of the rule of law is jeopardized192 and the UN’s focus on the rule of law should be simultaneously directed towards both its existence in states and in itself.193 Legitimacy demands that a decision be both substantively legal and procedurally correct. It is not known whether Spain invoked principled legal arguments in support of its draft Resolution 1530, but its cross-reference to Resolution 1373 spoke volumes.194 The irony was that rather than the recourse to legality serving to bookend195 options for action, it opened them out saying something about the open-textured nature of Resolution 1373. Nevertheless, with a flexible interpretation of Article 39, Resolution 1530 can be judged to be substantively legal. It was, however, only procedurally legal because the procedures were so flexible, rendering procedural legality an empty vessel and divesting the resulting decision of fairness, authority and legitimacy.196 ‘Diplomacy by posse’ is not remotely desirable,197 but if the UN is side-stepping the rule of law, its measures are no more attractive than are unilateral options – a particularly vulnerable Achilles heel. Equally, a myth of collectivity198 to obscure the fundamentally unilateral nature of a Security Council members’ action, a legitimacy veneer, is no more appealing. Lack of transparency (particularly evident in secret meetings) has long been a criticism of Security Council procedure,199 as borne out in its discretion as to disposal.200 Glennon’s comment in relation to the aborted resolution of 24 February 2003 seems apt in the light of Resolution 1530. ‘Eighty-five years after Wilson’s

189 Corell, supra note 86, at 14.
190 Glennon, supra note 179, at 107. See also Corell, ibid.
192 Pellet, supra note 174.
193 Annan, supra note 186.
194 See Ratner on the power of invoking legal norms within Council deliberations, supra note 116, at 593–595.
195 Ibid., at 601.
196 With a potentially negative impact on efficiency: see OCGG, supra note 143.
198 Hurd, supra note 96, at 48.
200 Aznar-Gómez, supra note 146, at 224.
Fourteen Points, international law’s most solemn obligations had come to be memorialized in winks and nods, in secret covenants, secretly arrived at.\(^{201}\)

Sadly, it was when the Security Council came to fulfil its potential in the 1990s that the trend for discussing ‘real issues’ in informal discussions accelerated.\(^{202}\) Information on the outcome of informal consultations of the whole may be increasingly available. Summaries of such discussions are available on the national websites of some presidencies.\(^{203}\) Nevertheless, every formal Security Council meeting seems scripted in advance,\(^{204}\) a pro forma affair. Indeed, the Security Council President convened the 3/11 meeting familiarly referring to ‘the understanding reached in its prior consultations’.\(^{205}\) An acceleration in deliberations over decades is noticeable. In referring to Resolution 579 (1985) concerning the Achille Lauro hijacking, Security Council President Léandre Bassole commented: ‘Never have I attended a Council meeting where unanimous agreement was reached in such a short time.’\(^{206}\) In fairness, two months had passed since the actual event. The Security Council debate following the US airstrikes on Iraq in 1993 was described as ‘expeditious’.\(^{207}\) The formal meeting passing Resolution 1530 took five minutes.\(^{208}\)

Kofi Annan has seen one way of reflecting geopolitical realities as lying in the Security Council’s membership reform.\(^{209}\) Although the Security Council was never intended to be a representative or consultative body,\(^{210}\) its decisions bind all UN members. It seems unsustainable to resist the inexorable march towards wider participation which heartens Security Council supporters;\(^{211}\) after all, states would not wish to participate in an irrelevancy. However, if new members are merely passive participants and decisions occur among an elite in the ‘engine room’,\(^{212}\) where Articles 31 and 32 of the Charter do not operate,\(^{213}\) little will change. Processes ‘to improve transparency and accountability in the Security Council should be incorporated and

\(^{201}\) Glennon, supra note 179, at 104, although he thinks (at 108–109) that the Council insufficiently reflects prevailing geopolitics.


\(^{203}\) See Hulton, supra note 199, at 246. ‘Nonmembers . . . had to scramble for information, feeding off scraps in antechambers, a thoroughly humiliating experience’: Malone, supra note 160, at 630.


\(^{206}\) Luck, supra note 64, at 91.

\(^{207}\) Ibid., at 92, noting the contrasting outrage in the Council post-1989 US Panamanian action, highlighted in the vetoed resolutions S/21048 and S/21084.


\(^{209}\) UN Secretary General, supra note 75, at paras. 167–170, endorsing two models for Council membership reform suggested by the High Level Panel. supra note 79, at paras. 250–254 and Annex 1, at paras. 74–77.


\(^{211}\) Hurd, supra note 96, at 44.


\(^{213}\) Hawkins, supra note 202, at 26, and Bailey and Dawes, supra note 204, at 68–70.
formalized in its rules of procedure’. Criticisms that an expanded Security Council would result in more members opposing US views on terrorism definitions and counter-terrorist efforts effectively fuel the anti-hegemonic, pro-expansionist movement. Unwieldy and moribund decision-making is unattractive, but the desire for expeditiousness obscuring hegemonically-oriented endeavours is equally concerning.

Perhaps reconfiguring membership simply restyles power structures, thus maintaining notions of national sovereignty. A seat for a regional body (for instance, the European Union) might be more attractive and reinforce the appearance of multipolar power structures in the world. However, such institutional multipolarity may appear as a sop to compensate for the absence of genuine multipolarity in the international system. Perceptions regarding the EU’s economic or political elitism may suggest dilution of American hegemony but not hegemony itself, remembering ‘the ambivalent, neurotic, and often hypocritical politics of hegemony from which Europeans often articulate their criticisms of the American Empire’. Indeed, in fleeing Aznar’s US alliance, the newly elected Prime Minister Zapatero stated: ‘Spain is going to see eye to eye with Europe again . . . Spain is going to be more pro-Europe than ever’. Hegemony will never be cured by oligarchy.

9 Conclusion

The UN cannot remain passive or secondary in confronting terrorism and fortunately Resolution 1530 has not halted Security Council action. Resolution 1611 (2005), condemning the 7/7 London bombings, embodied measured normative condemnation. Resolution 1530 is nevertheless a cautionary tale reminding us of the need for procedural reform and cautious drafting. The Security Council cannot be perceived as

214 High-Level Panel, supra note 79, at para. 258.
216 Although even a hegemony may be paradoxical or multilayered in ideals, attitude, and execution, ‘[t]he dynamic . . . is not a struggle for salvation or damnation between Faust and Mephistopheles but a more nuanced fluctuation between less extreme poles’: Rawski and Miller, ‘The United States in the Security Council: A Faustian Bargain?’, in Malone, supra note 29, at 369.
218 Others have suggested moves towards a ‘uni-multipolar’ system, whereby several major powers contribute to the settlement of key international issues (arguably thus describing the Council): Scott, ‘The Impact on International Law of US Noncompliance’, in Byers and Nolte, supra note 37, at 450, citing the work of Samuel P. Huntington.
219 Which Kagan thinks is already the case with the P5: supra note 151.
220 Koskenniemi compares the hegemonies of American politics of empire and the European politics of law with its consequent turn to international law: supra note 1, at 118.
221 Koskenniemi, supra note 38, at 92.
222 Sciolino, supra note 28.
223 Paul and Nahory, supra note 212.
225 e.g. Res. 1535 (2004) and 1540 (2004), adopted shortly thereafter.
housing a reliquary cabal.\textsuperscript{226} Of course government officials engaged in counter-terrorism generally make the best decisions they can within tight time-frames, and they do so in good faith. However, the Security Council is a crucial counter-terrorist body and must not be sidetracked or marginalized in this endeavour\textsuperscript{227} – ‘those free of those pressures, and independent of government, should reflect on the issues with all the care and seriousness that the issues demand’.\textsuperscript{228}

When asked to evaluate 3/11’s impact on the Spanish election, Kofi Annan identified as key factors ETA’s attribution and the public’s sense of governmental misinformation.\textsuperscript{229} Similarly, the Security Council must evolve or risk a fate similar to that which befell José María Aznar, ‘[h]is political campaign led on gut issues and it was a gut reaction that turned the tables’.\textsuperscript{230}


\textsuperscript{227} Luck, supra note 64, at 98.

\textsuperscript{228} Lowe, supra note 34, at 196.

\textsuperscript{229} Annan, supra note 132.

\textsuperscript{230} Scott-Fox, supra note 7.