
Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)

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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 room³ 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 indicators⁶ 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

¹ Koskenniemi ‘International Law in Europe: Between Tradition and Renewal’, 16 *EJIL* (2005) 113, 119.

² See <http://www.elmundo.es/documentos/2004/03/espana/atentados11m/>—an invaluable media resource on 3/11.

³ Lederer, ‘Annan: Spain’s blaming Basque separatists for train bombings in Madrid influenced election victory by the Socialists’, *Manila Times* (Internet edn), 18 Mar. 2004.

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.

⁷ Lorna Scott Fox, ‘Diary’, *London Review of Books* 35, 1 Apr. 2004.

⁸ ‘Palacio instruye a todos los embajadores para que confirmen la responsabilidad de ETA’, *El Pais*, 13 Mar. 2004, available at www.elpais.es; Sciolino, ‘Many in Europe suspect Spain misled them about attackers’, *New York Times*, 16 Mar. 2004; ‘Silencing the truth about the attacks in Spain’, Inter Press Service Team, available at <http://www.antiwar.com/article.php?articleid=2151>.

expeditiousness.⁹ Serious pressure was brought to bear on press agencies.¹⁰ Such doggedness recalled pre-Operation Iraqi Freedom dogma that Iraq possessed weapons of mass destruction (WMD).¹¹ Only the arrest of suspects, including three Moroccans, for the attacks finally nailed the coffin on the Spanish government's ETA incantations.¹²

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,¹³ New York and Washington,¹⁴ Russia,¹⁵ Bali,¹⁶ Colombia¹⁷ and Turkey.¹⁸ Alternatively, Presidential statements regularly expressed complaint, noticeably regarding the 2003 attack on the UN Headquarters in Baghdad¹⁹ and the 2004 attacks in Grozny²⁰ and Beslan.²¹ Resolution 1530's uniqueness lay in the Security Council's naming of the alleged perpetrator group.²² Usama bin Laden and Al-Qaida had been identified in previous resolutions, but not as perpetrators of specific attacks.²³ 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'.²⁴ Even Resolution 1450 (2002)²⁵ merely deplored Al-Qaida's claims of responsibility.²⁶ Resolution 1213 (1998) was closer to Resolution 1530 in specifically naming UNITA,

⁹ Sciolino, *supra* note 8.

¹⁰ See the editorial in *El Pais* that appeared on the Sunday of the elections, available at www.elpais.es; Inter Press, *supra*, note 8 and Richburg, 'Spain campaigned to pin blame on ETA', *Washington Post*, 17 Mar. 2004.

¹¹ Scott Fox, *supra* note 7. In fairness, certain Al-Qaida hallmarks (suicide bombers and targets' symbolic significance) were missing: Norton-Taylor and Tremlett, 'British experts await forensic tests to pinpoint the next threat', *Guardian*, 13 Mar. 2004.

¹² Popham, 'Police "identify" train bombers: Spain admits bombs were work of Islamists', *Independent*, 16 Mar. 2004, available at www.independent.co.uk.

¹³ Res. 1189 (1998), and Res. 1450 (2002).

¹⁴ Res. 1368 (2001).

¹⁵ Res. 1440 (2002).

¹⁶ Res. 1438 (2002).

¹⁷ Res. 1465 (2003).

¹⁸ Res. 1516 (2003).

¹⁹ Security Council presidential statement S/PRST/2003/13.

²⁰ Security Council presidential statement S/PRST/2004/14.

²¹ Security Council presidential statement S/PRST/2004/31.

²² *Euskadi Ta Azkatasuna*, or Basque Homeland and Freedom. It has been operating since 1968. Recent attacks involve bombings perpetrated in the summers of 2002 and 2003. See Tremlett's articles, 'Britons hurt as ETA hits Spanish tourist towns', *Guardian*, 22 June 2002, 'Benidorm bomb launches ETA's summer campaign', *Guardian*, 23 July 2003, 'ETA bombing shuts Spanish airport', *Guardian*, 28 July 2003; and Roman, 'Car bomb in Spanish resort kills girl, 8', *Guardian*, 5 Aug. 2002, available at www.guardian.co.uk.

²³ Usama bin Laden was named in Res. 1267 (1999). Al-Qaida was mentioned in Res. 1333 (2000) regarding the freezing of its assets (para. 8(c)).

²⁴ See Stromseth, 'The Security Council's Counter-terrorism Role: Continuity and Innovation', 97 *American Soc'y of Int'l Proceedings* (2003) 41, at 42–43, on the 1267/1390 committee's potentially broad power to name names. See also Res. 1455 (2003) and Res. 1526 (2004).

²⁵ Referring to a particular attack in Kenya.

²⁶ See preambular para. 3 of Res. 1450.

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’ explicatory comments emerged off-the-record without any public ‘justificatory discourse’,³⁰ 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.

²⁸ Sciolino, ‘Socialist victor in Spain criticizes Bush and Blair’, *New York Times*, 16 Mar. 2004.

²⁹ Mahhubani, ‘The Permanent and Elected Council Members’ in D. M. Malone (ed.), *The UN Security Council: from the Cold War to the 21st Century* (2004), at 263.

³⁰ See generally Johnstone, ‘Security Council Deliberations: The Power of Better Argument’, 14 *EJIL* (2003) 437 and J. Habermas, *Moral Consciousness and Communicative Action* (trans. C. Lenhardt and S. Weber Nicholsen, 1990).

³¹ Secretary General’s comments, available at his office website, <http://www.un.org/apps/sg/offthecuff.asp?nid=558>.

³² Charlesworth, ‘International Law: A Discipline of Crisis’, 65 *MLR* (2002) 377.

³³ Draft UN Security Council Resolution, S/2004/186.

³⁴ Lowe, ‘“Clear and Present Danger”: Responses to Terrorism’, 54 *Int’l and Comp L Quarterly* (2005) 185.

³⁵ UN Security Council verbatim record, UN SCOR 58th Sess., 4792nd Mtg, UN Doc S/PV. 4792 (2003).

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.

³⁷ Paulus, ‘The Influence of the United States on the Concept of the “International Community”’ in M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (2003), at 60.

that hegemonic ideal was wise and good.³⁸ Spain's manipulations exemplified post-modernist concerns regarding international law's capacity to obscure individual projects.³⁹ Afterwards an Algerian representative apprehensively stated: 'If it is established in two days that it was someone else, that would be really embarrassing.'⁴⁰

The other principal statements specifically mentioning ETA came from two permanent Security Council members, Spain's prime erstwhile political allies, the US and UK.⁴¹ 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.⁴² A special edition of *El País* issued on 3/11 identified ETA,⁴³ although even as early as this an editorial suggested similarities to Al-Qaida.⁴⁴ The EU President simply referred to 'perpetrators of this appalling act of blind hate'⁴⁵ and the President of the European Council, was similarly reticent.⁴⁶ The Council of Europe expressed itself in silent tribute,⁴⁷ 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'.⁴⁸ In his afternoon address Prime Minister Aznar did not name ETA but clearly implied its identity.⁴⁹ 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'.⁵⁰ Emotional shows of solidarity were held at the Basque

³⁸ Koskeniemi, '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.

⁴⁰ Deen, 'UN loses face over hurried vote on Spain bombing', *Inter Press Service*, 16 Mar. 2004, available at www.globalpolicy.org.

⁴¹ 'President Bush condemns terrorist bombings', 11 Mar. 2004, and 'President Bush honors victims of bombings in Spain', 12 Mar. 2004, both available at www.whitehouse.gov. The US Senate also expressed outrage (House Concurrent Res. 79, 2004 Regular Session). See also the UK Foreign Secretary, in George Wright, 'Carnage in Madrid', *Guardian*, 11 Mar. 2004.

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.

⁴³ 'Matanza de ETA en Madrid: Mas de 170 muertos en cuarto atentados en trenes de cercanias', *El País*, 11 Mar. 2004. The headline was later explained by the editor Jesús Ceberio, 'A propósito de mentiras', *El País*, 27 Mar. 2004, both available at www.elpais.es.

⁴⁴ Ramoneda, 'Al estilo Al Qaeda', *El País*, 11 Mar. 2004, available at www.elpais.es.

⁴⁵ EU Press Release IP/04/327.

⁴⁶ Statement by the Taoiseach on the Bombings in Madrid, 11 Mar. 2004.

⁴⁷ See 'Council of Europe pays tribute to the victims in Madrid', Council of Europe press release, 12 Mar. 2004, available at www.coe.int.

⁴⁸ 'Discurso del Rey Juan Carlos I por los atentados de Madrid del 11 de marzo', available at <http://www.laventanita.net/Noticia.asp?IdN=136> (in Spanish), <http://news.bbc.co.uk/1/hi/world/europe/3503184.stm> (in English), and Muzilla, 'Madrid's Fight Against Terrorism: 11M Municipal Action, Cultural Connection, and Political Ramifications', discussion document, available at <http://www.american.edu>.

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.

⁵⁰ See the *El Mundo* archive on the bombings, available at <http://www.elmundo.es/elmundo/2004/03/11/espana/1079010638.html>.

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

⁵¹ The first government official to make a comment shortly after 10am on 3/11: see <http://www.elmundo.es/elmundo/2004/03/11/espana/1079010638.html>.

⁵² Prime Minister Aznar declared ‘zero tolerance’ for terrorism in the Security Council: see UN SCOR 58th Sess., 4752nd Mtg, UN Doc S/PV. 4752 (2003). Discussions regarding a joint anti-terrorism agreement between the US and Spain took place in 2003.

⁵³ See the interview given by Secretary of State Colin Powell in Washington, DC, on 18 Mar. 2003, available at <http://www.state.gov/secretary/former/powell/remarks/2003/18810.htm>. Bush called Aznar ‘a steadfast friend’ in Sept. 2003: see <http://www.whitehouse.gov/news/releases/2003/09/20030923-5.html>.

⁵⁴ Tran *et al.*, ‘Bush and Blair at “war council”’, *Guardian* 16 Mar. 2003.

⁵⁵ As opposed to ‘Old Europe’: see Secretary Rumsfeld Briefs at the Foreign Press Center, 22 Jan. 2003, available at http://www.defenselink.mil/transcripts/2003/t01232003_t0122sdfpc.html, who clarified it to mean ‘Old’ and ‘New’ NATO http://www.defenselink.mil/news/Jun2003/n06102003_200306101.html.

⁵⁶ Campbell, ‘“Wars on Terror” and Vicarious Hegemons: the UK, International Law, and the Northern Ireland Conflict’, 54 *Int’l and Comp L Quarterly* (2005) 321, at 322.

⁵⁷ Koskeniemi, *supra* note 38, at 96.

⁵⁸ Letters, ‘How José Maria Aznar treated the Spanish people like serfs’, *Independent*, 22 Mar. 2004.

⁵⁹ Chrisafis, ‘Sick, afraid, defiant—they marched in their millions’, *Guardian*, 13 Mar. 2004; see also Kofi Annan’s comments cited in Lederer, *supra* note 3.

⁶⁰ See also the video depicting an alleged Al Qaeda spokesman’s link of 3/11, Iraq, and Afghanistan, Carvajal, ‘Tape cites Iraq war as reason for bombs; 5 suspects arrested: In Madrid, a claim for Al Qaeda’, *International Herald Tribune*, 15 Mar. 2004; editorial, ‘Spain vote reshaped by attacks’, *International Herald Tribune*, 15 Mar. 2004 and Reynolds, ‘Bombs shake up war on terror’, 15 Mar. 2004, which appeared on the BBC website, available at www.bbc.co.uk.

being misled was a final straw.⁶¹ 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.⁶² 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.⁶³ Since 1989 the Security Council has increasingly focused⁶⁴ on the issue of terrorism,⁶⁵ notably in the watershed 'Lockerbie resolutions', and has typically characterized terrorist bombings as Article 39 threats.⁶⁶ 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.⁶⁷ Similarly, Resolution 1530 did not mention Chapter VII, but stated that 3/11 constituted a threat, invoking Article 39 language and 'Chapter VII precincts'.⁶⁸ 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.⁶⁹ 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).

⁶³ Davidsson, 'The U.N. Security Council's Obligations of Good Faith', 15 *Florida J Int'l L* (2003) 541, at 550–551.

⁶⁴ Evolving from 'ambivalence and hesitation': see Luck, 'Tackling Terrorism', in Malone, *supra* note 29, at 85.

⁶⁵ See Res. 731 (1992), 748 (1992), 1044 (1996), and 1054 (1996).

⁶⁶ E. De Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), at 167–172.

⁶⁷ Res. 1373 more clearly invoked Chap. VII because it ordained states' action. See generally Szasz, 'The Security Council Starts Legislating', 96 *AJIL* (2002) 901 and, for criticism of an unacceptable exercise of Council powers, Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' in P. Eden and T. O'Donnell, *September 11th: A Turning Point?* (2005), at 617.

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.⁷⁰ 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 Charter⁷¹), Spain was unlikely to dissolve into civil war.⁷² 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.⁷³ 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'.⁷⁴ 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.⁷⁵ 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',⁷⁶ the Security Council was drawing a parallel between the two types of terrorism.⁷⁷ 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'.⁷⁸ 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,⁷⁹ the High-level Security Council meeting held on 9/11's first anniversary

⁷⁰ Luck, *supra* note 64, at 87.

⁷¹ Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future', 8 *J Conflict & Security L* (2003) 15, at 56.

⁷² Unlike, e.g., Liberia, Yugoslavia, or Somalia: see Res. 713 (1991), 733 (1992), 788 (1992), and 794 (1992).

⁷³ Wellens, *supra* note 71, at 42 referring to Res. 1269 (1999) and 1368 (2001), *supra* note 14, and N. D. White, *Keeping the Peace* (1997), at 47.

⁷⁴ See also Res. 1189 condemning the 1998 Kenyan and Tanzanian attacks.

⁷⁵ Emphasis added. See also preambular para. 3 of Res. 1373. See reference to 'transnational terrorism' in UN Secretary General, *In Larger Freedom*, a report for decision by the Heads of State and Government, Sept. 2005, paras 87–94, available at <http://www.un.org/largerfreedom/>. 'International terrorism' is also referred to in the declaration attached to Res. 1377 (2001), Res. 1438 (2002), Res. 1440 (2002), and Res. 1450 (2002).

⁷⁶ Res. 1465 (2003), 1516 (2003), and 1530 (2004).

⁷⁷ e.g. under the UK Terrorism Act 2000, s. 2, 'terrorism' was widened to embrace, not just Northern Irish terrorists, but international terrorists. See Lord Lloyd's comments at <http://www.archive.official-documents.co.uk/document/cm41/4178/chap-03.htm>.

⁷⁸ GA Res 40/61, Declaration on Measures to Eliminate International Terrorism, UN GA Res 49/60, UN GA Res 51/210.

⁷⁹ As well as passing Res. 1373, the Council itself declared a global effort to combat terrorism (Res. 1377 and annex) and Security Council presidential statement PRST/2002/25 reinforced this. Wellens considers that this confirmed the existence of a charter-based and customary legal obligation *erga omnes* for Member States not to commit, acquiesce in, or support, directly or indirectly, acts or courses of conduct which may constitute or result in a threat to international peace and security: *supra* note 71, at 43 and 58.

concerned *international* terrorism.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.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.⁸² ETA was reputed to have members, supporters and training connections in South America, Europe and the Middle East⁸³ 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.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'.⁸⁵ Nevertheless, if it is accepted that all forms of terrorism threaten peace and security,⁸⁶ that all states have an *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',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

This may be paralleled with obligations under the Genocide Convention: see *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/.

⁸⁰ Security Council verbatim debate, UN SCOR 57th Sess., 4607th Mtg, UN Doc S/PV. 4607 (2002).

⁸¹ Preambular paras 6 and 7 of Res. 1455, *supra* note 24.

⁸² Hume, 'The Security Council in the Twenty-First Century', in Malone, *supra* note 29, at 610.

⁸³ See the Institute for Counter-Terrorism website, available at <http://www.ict.org.il>.

⁸⁴ Wallenstein and Johansson, 'Security Council Decisions in Perspective', in Malone, *supra* note 29, at 25. 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, *supra* note 37, at 141.

⁸⁵ Franck *supra* note 68, at 241.

⁸⁶ Security Council presidential statement PRST/2003/17 and Corell, 'Legal Responses', in P.R. Neumann (ed.), *Towards a Democratic Response: the Club de Madrid Series on Democracy and Terrorism* (2005), III, at 13, 14.

⁸⁷ *Ibid.*

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 obligations⁸⁸ 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.⁸⁹ 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.'⁹⁰

Terrorism does not stop at state borders,⁹¹ 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.⁹² 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.⁹³ Not a conventional armed conflict,⁹⁴ 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

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.

⁹¹ Annan, "'In Larger Freedom": Decision Time at the UN', *Foreign Affairs* (May/June 2005).

⁹² Koskeniemi, *supra* note 1, at 116, referring 'Völkerrechtliche Formen des modernen Imperialismus', in C. Schmitt, *Positionen und Begriffe im Kampf gegen Weimar-Genf-Versailles 1923–1939* (1988), at 162–180, and E.H. Carr, *The Twenty-Years' Crisis 1919–1939* (2nd edn., 1946), especially at 51–53.

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,

⁹⁵ 'Once more our prime minister fishes out his favourite word: evil . . . we can expect heavy use of war, . . . and an attempt to collate all terrorist outrages into one "global threat"'. This was criticized as 'empty . . . theological jargon' ill-befitting 'the complex, profound experience' endured post mass carnage: Letters, Mather, 'A blast of harsh reality', *Guardian*, 13 Mar. 2004.

⁹⁶ Hurd, 'Legitimacy, Power, and the Symbolic Life of the UN Security Council', 8 *Global Governance* (2002) 35.

⁹⁷ Luck, *supra* note 64, at 86 and Campbell, *supra* note 56, at 324–325, 329–330, 332, and 335. See also White, *supra* note 73, at 44.

⁹⁸ Campbell, *supra* note 56, at 325.

⁹⁹ Detail on certain Spanish laws is contained in Van Boven, 'Civil and Political Rights, including the Question of Torture and Detention' (2004), E/CN.4/2004/56/Add.2. See also Amnesty International, 'Spain: Torture Allegations Must be Investigated Now', News Release, 11 Mar. 2003, available at <http://hardy.amnesty.org.uk/news/press/14388.shtml>; Human Rights Watch, 'The Use of Incommunicado Detention' (2005), available at hrw.org/reports/2005/spain0105/6.htm.

¹⁰⁰ Van Boven maintained that 'in the light of the internal consistency of the information received and the precision of factual details' particular allegations of torture and ill-treatment could not be considered fabrications, being 'more than sporadic and incidental'. The absence of an effective and prompt investigative practice and policy regarding the issue of torture and ill-treatment was also noted: *ibid.*, paras 58 and 59.

¹⁰¹ On 4 Mar. 2004 Spain criticized the Special Rapporteur and his report. *Notes verbales* from Permanent Mission of Spain to the UN are contained in E/CN.4/2004/G/19.

¹⁰² Consider the vociferousness of the debates during US Secretary of State Colin Powell's attempts to convince that Iraq posed a threat: UN SCOR 58th Sess., 4701st Mtg, UN Doc S/PV. 4701 (2003), 5 Feb. 2003. Lobel suggested reconfigured criteria including the importance of publishing relevant facts, that such facts are open to international scrutiny and investigation, and that the defending State has carefully evaluated the evidence: Lobel, 'The Use of Force to Respond to Terrorist Attacks: the Bombing of Sudan and Afghanistan', 24 *Yale J Int'l L* (1999) 537, at 547.

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’.¹⁰³ Nevertheless, the *actor incumbit probatio* obligation remains with any requesting state.¹⁰⁴

The Security Council was not under any time constraints. Military enforcement action or self-defence¹⁰⁵ were not envisaged. Resolution 1530 could have expressed condemnation whilst simultaneously displaying the restraint befitting a credible decision-maker.¹⁰⁶ 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.¹⁰⁷ Perhaps the Security Council was seduced by the allure of strong decision-making¹⁰⁸ – there was a palpable sense of Spain urging the Security Council to display ‘a combination of guts and brains’.¹⁰⁹ Regardless of any prevailing rhetoric of being ‘with us or against us’,¹¹⁰ 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.¹¹¹

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

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.

¹⁰⁵ Theoretically, if ETA bases existed abroad any Spanish action would recall South Africa’s 1986 attacks on alleged ANC installations in Zambia, Zimbabwe, and Mozambique, which recalled the recent US bombings of Libya. Both raids were condemned by Security Council members: Kwakwa, ‘South Africa’s May 1986 Military Incursions into Neighbouring African States’, 12 *Yale J Int’l L* (1987) 421. Despite recent controversies, self-defence remains legally ‘safe’ only against States, not terrorists, as the ICJ confirms in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004 [2004] ICJ Rep 136, para. 139 (see also Judge Higgins’ Separate Opinion at para. 33 doubting the Court’s conclusion on this point), and *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, 6 Nov. 2003 [2003] ICJ Rep 161, at para. 51.

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.

¹¹¹ See Dupuy, ‘Comments’, in Byers and Nolte, *supra* note 37, at 176–177.

entirely juridified.¹¹² 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.¹¹³ Legal argumentation can render issues elliptical,¹¹⁴ 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’.¹¹⁵ 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.¹¹⁶ Resolutions provide evidence in themselves when a legal landscape is being surveyed¹¹⁷ and changing expectations of states are being evaluated.¹¹⁸

Absence of warnings pre-3/11 and the scale of the attack¹¹⁹ indicated a sudden departure in ETA’s *modus operandi*,¹²⁰ and it quickly denied involvement¹²¹ – 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,¹²² 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.¹²³ 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.

¹¹⁶ Ratner, ‘The Security Council and International Law’, in Malone, *supra* note 29, at 602.

¹¹⁷ See *Case Concerning Armed Activities on the Territory of the Congo, Judgment (Dem. Rep. Congo v Uganda)*, 19 Dec. 2005, para. 60.

¹¹⁸ Ratner, *supra* note 116.

¹¹⁹ ETA’s largest-scale attack involved 21 dead in a 1987 Barcelona supermarket bombing.

¹²⁰ See all the articles referred to *supra* note 22. EUROPOL director Jürgen Storbeck’s comments in ‘El director de Europol cree que los atentados no se corresponden con el modo de actuar de ETA’ *El Mundo*, 11 Mar. 2004, available at <http://www.elmundo.es/elmundo/2004/03/11/espana/1079024499.html>. See also ‘France heightens state of alert’, *Guardian*, 12 Mar. 2004.

¹²¹ Tremlett, ‘ETA still main suspect despite denials’, *Guardian*, 13 Mar. 2004.

¹²² See Lobel, *supra* note 102, at 549 and the evidence offered by the US prior to the bombing of Tripoli in 1986. Lobel draws on the work of Leigh, ‘Contemporary Practice of the United States Relating to International Laws’, 80 *AJIL* (1986) 612, at 633–635.

¹²³ Schneideman, ‘Standards of Proof in Forcible Responses to Terrorism’, 50 *Syracuse L Rev* (2000) 249, at 255.

peace, as some lesser form of Charter breach,¹²⁴ should not eliminate some burden of proof.¹²⁵ 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.¹²⁶ Ana Palacio similarly maintained that Spain's belief in ETA's culpability was honest.¹²⁷ Particulars of evidence are unmentioned.¹²⁸ Insistences on honesty and good faith (a rather general constraint¹²⁹) reinforced Spain's acting on sovereign instinct or government impulse. Subsequent official Spanish explanations did little to convince¹³⁰ or mollify Security Council members.¹³¹ The UN Secretary-General was clear that there was 'a lesson here for everybody, including the Council members'.¹³²

The Security Council's approach was exemplified by a senior French official reported as saying: 'Under the circumstances, nobody wanted to say no.'¹³³ 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.¹³⁴ Solid evidence is an indispensable requirement for legitimacy.¹³⁵ 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 Koskeniemi'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.¹³⁶ 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.

¹³² UN Secretary-General, 'Off-the-Cuff Remarks', 16 Mar. 2004, available at <http://www.un.org/apps/sg/offthecuff.asp?nid=560>.

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 Koskeniemi, *supra* note 1, at 121–122.

the heart' which renders something kitsch, telling easy truths and simple certainties.¹³⁷ Koskenniemi has been criticized for offering no criteria for distinguishing between a sincere and a cynical appeal to international morality.¹³⁸ 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. . .'.¹³⁹ Although opinions differ on the possibility of judicial review,¹⁴⁰ 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.¹⁴¹ 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 bodies¹⁴² 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,¹⁴³ representing development on the work of ad hoc bodies like those in Iraq and Yugoslavia¹⁴⁴ and the UN International Independent Investigation Commission charged with investigating the Rafic Hariri assassination.¹⁴⁵ 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

¹³⁷ 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.

¹³⁸ Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi', 16 *EJIL* (2005) 131, at 136.

¹³⁹ Ward, 'Building Capacity to Combat International Terrorism: the Role of the United Nations Security Council', 8 *J Conflict & Security L* (2003) 289, at 292–293.

¹⁴⁰ 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.

¹⁴¹ See the interview with Solomon in Deen, *supra* note 40.

¹⁴² Wellens, *supra* note 71, at 22 referring to UN Security Council presidential statement PRST/1994/22 and Res. 1353 B.

¹⁴³ A. Dimitrijevic (ed.), *Strengthening the Legitimacy and Effectiveness of the Security Council: Advice to the UN High Level Panel on Threats, Challenges, and Change* (OCGG Government Advice No. 2, Nov. 2004), 9–10, available at <http://www.oxfordgovernance.org/fileadmin/Publications/GA002.pdf>.

¹⁴⁴ Res. 780 (1992).

¹⁴⁵ The International Humanitarian Fact-finding Commission established pursuant to Additional Protocol I of the 1949 Geneva Conventions can investigate allegations of grave breaches and serious violations of IHL. See details at <http://www.ihffc.org/en/index.html>.

work of the various delegated committees¹⁴⁶) which has been the focus of criticism.¹⁴⁷ A standing body would avoid constant infrastructural re-invention and repetitive start-up expenses.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.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.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.¹⁵¹ If self-interest must at least coincide with common good for action to be considered legitimate¹⁵² 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’s¹⁵³ and Spain’s

¹⁴⁶ Aznar-Gómez, ‘A Decade of Human Rights Protection by the UN Security Council: A Sketch of Deregulation?’, 13 *EJIL* (2002) 223, at 230.

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

¹⁴⁸ Controversies include the Jenin camp investigation (Res. 1405 (2002), UN SCOR 57th Sess., 4525th Mtg, UN Doc S/PV. 4525 (2003)) and the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (pursuant to Res. 1564 (2004)), available at www.ohchr.org/english/docs/darfurreport.doc.

¹⁴⁹ Hampson, ‘International Institutions’, in Club de Madrid, *supra* note 86, at 7, 9. See Res. 1455, *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.

¹⁵⁰ Koskeniemi, ‘“The Lady Doth Protest Too Much”: Kosovo, and the Turn to Ethics in International Law’, 65 *MLR* (2002) 159.

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’, *Foreign Policy*, 26 Aug. 2003. Regarding the US bombings of Sudan and Afghanistan, ‘[t]rust us’ suggests error is not possible: Lobel, *supra* note 102, at 553.

¹⁵² In the context of argumentative technique see Johnstone, *supra* note 30, at 454.

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.

agenda.¹⁵⁴ Only in March 2004 did Spain put the issue of ETA terrorism before the Security Council, implicitly allying 3/11 and Resolution 1530 to 9/11 and Resolution 1368, and Madrid to New York.¹⁵⁵ Invoking Resolution 1368 to say 'We are all Spaniards',¹⁵⁶ just as surely as we were all Americans¹⁵⁷ on 9/11, illustrated strategic and cynical manipulation of Resolution 1368. It also highlighted the 'social magic' of a resolution and its capacity to make a difference in international politics.¹⁵⁸ Resolution 1530 further exemplified a misplaced reliance on the wisdom of power-brokers in Madrid: '[t]o credit the decision-makers as having been involved in an emotional process about their moral obligations is to make precisely that mistake of fact (of being in a position of power) for right'.¹⁵⁹ Perhaps terrorism's (albeit Al Qaida-style international terrorism) presence on the Security Council's agenda made the calls for condemnation irresistible, yet Resolution 1530 rendered the Security Council incapable of condemning an actual international terrorist incident. There is a marked irony here as international terrorism is deplored by the UN and represents a genuine threat to peace.

Could Spain's behaviour at the Security Council on 3/11 have been considered legitimate if it was correct? If based on solid evidence then there might be a case for legitimacy, although bulldozing the Security Council is never comfortable. In the case of serendipity, popular memory would simply recall Spain's accurate assessment, and legitimacy, however theoretically unmerited, would be accorded. Legitimacy seems partially defined by how events actually develop. There may be a geographical divide. The US public focuses on achievement of objectives, European practitioners and scholars are more drawn to process-derived legitimacy.¹⁶⁰ In this writer's view, if Spain had adduced credible evidence regarding ETA's culpability, it would ultimately have been considered honestly mistaken rather than manipulative.¹⁶¹

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

The failure to adequately deal with the Rwandan genocide,¹⁶² the increasingly ad hoc nature of responses in use of force, the imbroglia witnessed in relation to Srebrenica's

¹⁵⁴ In June 2002 a law was passed allowing the suspension of ETA's political wings. A permanent ban upon Batasuna was obtained in Mar. 2003: 'El Supremo ilegaliza Batasuna por unanimidad', *El País*, 17 Mar. 2003, and Lázaro, 'El Supremo ilegaliza a Batasuna', *El País*, 17 Mar. 2003, both available at www.elpais.es; and Tremlett, 'Basque Party banned', *Guardian*, 18 Mar. 2003.

¹⁵⁵ 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.

¹⁵⁶ Tyrangiel, 'We are all Spaniards', *Time* (Europe), 14 Mar. 2004, available at <http://www.time.com/time/europe/html/040322/zone.html>; Ash, 'Is this Europe's 9/11?', *Guardian*, 13 Mar. 2004.

¹⁵⁷ Colombani, 'Nous sommes tous Américains', *Le Monde*, 12 Sept. 2001, available at www.lemonde.fr, and http://www.worldpress.org/1101we_are_all_americans.htm.

¹⁵⁸ Paraphrasing Hurd, *supra* note 96, at 46, referring to Bourdieu's, *Language and Symbolic Power*.

¹⁵⁹ Koskeniemmi, *supra* note 150, at 171.

¹⁶⁰ Malone, 'Conclusion', in Malone, *supra* note 29, at 635.

¹⁶¹ An uncertain State should definitely err on the side of caution: O'Connell, *supra* note 104, at 36.

¹⁶² High-Level Panel, *supra* note 79, at para. 41.

‘safe’ havens, the oil-for-food scandal, the failure to deal adequately with peacekeepers accused of sexual violence,¹⁶³ 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.¹⁶⁴

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.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ ‘Bluwashing’ no longer guarantees protection. Making oneself a target by flying the UN flag could partly be due to the delegitimization of the UN.¹⁶⁹ 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 2003.¹⁷⁰ Indeed, Richard Perle, in a coruscating essay of

¹⁶³ ‘Annan urges sweeping UN reforms’, BBC website, 21 Mar. 2005, available at www.bbc.co.uk, and Lynch, ‘Annan drafts changes for U.N.’, *Washington Post*, 20 Mar. 2005, available at www.washingtonpost.com.

¹⁶⁴ Chesterman, ‘Legality and Legitimacy in International Affairs: Humanitarian Intervention, the Security Council, and the Rule of Law’, 33 *Security Dialogue* (2002) 293. See also Malone, *supra* note 160, at 625.

¹⁶⁵ ‘I met personally with all my Security Council counterparts in an intricate process of cajoling, extracting, threatening and occasionally buying votes. Such are the politics of diplomacy’: extracted from James A. Baker III, *The Politics of Diplomacy*, referred to in Davidsson, *supra* note 63, at 567.

¹⁶⁶ Allott, ‘State Responsibility and the Unmaking of International Law’, 29 *Harv Int’l LJ* (1988) 1, at 9.

¹⁶⁷ *Ibid.*, at 9–10.

¹⁶⁸ Lone, ‘I lived to tell the tale’, *Guardian*, 19 Aug. 2004.

¹⁶⁹ Malone, ‘The UN Security Council: From the Cold War to the 21st Century’, edited transcript of remarks, Carnegie Council Panel Discussion, 3 Apr. 2004, available at <http://www.cceia.org/resources/transcripts/4422.html>.

¹⁷⁰ In 1994 John Bolton (as US Under-Secretary for International Organizations) stated that ‘[w]hen the United States leads, the United Nations will follow. When it suits our interest to do so, we will lead. When it does not suit our interest to do so, we will not’: available at http://www.pbs.org/newshour/bb/international/jan-june05/senate_4-11.html. See also Luck, *supra* note 64, at 93–94.

21 March 2003, disparaged the UN's 'anarchy of . . . abject failure' and proclaimed a neo-Westphalian world order of 'coalitions of the willing'.¹⁷¹ Nevertheless, 'the speed and yardstick for collective action cannot be determined solely by strategic geo-political considerations'.¹⁷² 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.¹⁷³ The Security Council should perhaps become more proactive, but under-committed states hamper UN achievements.¹⁷⁴

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 legitimacy¹⁷⁵ and, taken together, enhance effectiveness. As Kagan notes, although an intangible factor in foreign policy (and unpopular with lawyers¹⁷⁶), legitimacy potentially has great practical significance.¹⁷⁷ Indeed, Koskenniemi was clear that law's place in collective security as a working culture was as a 'gentle civilizer',¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰ Alternatively, arguably Washington sidestepped the Security Council, because rejection of its resolution would have made apparent its

¹⁷¹ Perle, 'Thank God for the death of the UN', *Guardian*, 21 Mar. 2003. Perle resigned within a week, concluding in Nov. 2003 that Iraqi intervention was illegal: Burkeman and Borger, 'War critics astonished as US hawk admits invasion was illegal', *Guardian*, 20 Nov. 2003.

¹⁷² Jamaican representative to the Security Council, Sept. 2000—UN Doc S/PV.4194.

¹⁷³ Mikhailitchenko, 'Reform of the Security Council and its Implications for Peace and Security', *7 J of Military and Strategic Studies* (2004) 1, at 3, discussing Justin Morris; Falk, 'Reforming the Security Council', *Peace Magazine* (1995), at 13–15, available at www.peacemagazine.org/archive/v11n5p13.htm.

¹⁷⁴ High-Level Panel, *supra* note 79, at 77 and 5; Pellet, 'Legitimacy, Legality and the Use of Force', UN Foundation short issue paper, available at www.un-globalsecurity.org.

¹⁷⁵ OCGG, *supra* note 143. See also D. McGoldrick, *From 9/11 to War in Iraq* (2004), at 85–86. An illegal decision often denotes illegitimacy, although see the example of Kosovo and Cassese's comments thereon in 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', *10 EJIL* (1999) 23. See also Pellet, 'Brief Remarks on the Unilateral Use of Force', *11 EJIL* (2000) 385.

¹⁷⁶ Malone, *supra* note 160, at 634.

¹⁷⁷ Kagan, *supra* note 151.

¹⁷⁸ Koskenniemi, 'The Place of Law in Collective Security', *17 Michigan J Int'l L* (1996) 455, at 490.

¹⁷⁹ Kagan, *supra* note 151. See also Glennon, 'The UN Security Council in a Unipolar World', *44 Virginia J Int'l L* 91, at 97. By emphasizing the role of sovereign States in carrying out Council decisions, President Bush arguably questioned the Council's supranational nature: speech to UN General Assembly in Sept. 2003, available at <http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html>.

¹⁸⁰ Thakur, 'Enhancing UN legitimacy', *Japan Times*, 29 Apr. 2005.

illegality and, by implication, its illegitimacy.¹⁸¹ Either way, evidence of the Security Council's symbolic power to confer/withhold legitimacy is apparent.¹⁸²

... 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.¹⁸³

Franck's definition of legitimacy of an institution's capacity to exert a pull towards compliance seems particularly pertinent.¹⁸⁴ 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'.¹⁸⁵ 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.¹⁸⁶ 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,¹⁸⁷ 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.¹⁸⁸ 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.*

¹⁹¹ See Hammer, 'Reforming the U.N. Security Council: Open Letter to U.N. Secretary General Kofi Annan', 15 *Florida J Int'l L* (2002) 261, at 264. For a fairly pessimistic view of Council reform prospects see Fassbender, 'Pressure for Security Council Reform', in Malone, *supra* note 29, at 341.

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.

¹⁹⁷ Former State Department policy planning director, Richard Haas, referred to in Berkowitz, 'Legitimacy and Irrelevance', *Hoover Digest* (2004)(1).

¹⁹⁸ Hurd, *supra* note 96, at 48.

¹⁹⁹ Hulton, 'Council Working Methods and Procedure', in Malone, *supra* note 29, at 242–243.

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.

²⁰² V. Hawkins, *The Silence of the Security Council* (2004), at 25.

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.

²⁰⁴ Hurd, *supra* note 96, at 43. See also S.D. Bailey and S. Dawes, *The Procedure of the UN Security Council* (3rd edn., 1998), at 21–22 and 60–61. Because of the creation of 'formal informal' sessions, Council members created 'informal informal consultations!': Hawkins, *supra* note 202, at 25–26.

²⁰⁵ UN Security Council verbatim record, UN SCOR 59th Sess., 4923rd Mtg, UN Doc S/PV. 4923 (2004).

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.

²⁰⁸ Convening at 12.35pm, adjourning at 12.40pm: UN Press Release SC/8022, 11 Mar. 2004.

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.

²¹⁰ Schaefer, 'More is Not Better at U.N. Security Council', 28 Feb. 2003, available at www.heritage.org.

²¹¹ Hurd, *supra* note 96, at 44.

²¹² Non-permanent members have described themselves as 'tourists' or '[s]hort-term passengers on a long-distance train': Paul and Nahory, 'Theses Towards a Democratic Reform of the UN Security Council', 13 July 2005, available at <http://www.globalpolicy.org/security/reform/2005/0713theses.htm>.

²¹³ Hawkins, *supra* note 202, at 26, and Bailey and Dawes, *supra* note 204, at 68–70.

formalized in its rules of procedure'.²¹⁴ 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.²¹⁵ Unwieldy and moribund decision-making is unattractive, but the desire for expeditiousness obscuring hegemonically-oriented endeavours is equally concerning.²¹⁶

Perhaps reconfiguring membership simply restyles power structures, thus maintaining notions of national sovereignty. A seat for a regional body (for instance, the European Union)²¹⁷ might be more attractive and reinforce the appearance of multipolar power structures in the world.²¹⁸ However, such institutional multipolarity may appear as a sop to compensate for the absence of genuine multipolarity in the international system.²¹⁹ Perceptions regarding the EU's economic or political elitism may suggest dilution of American hegemony but not hegemony itself,²²⁰ remembering 'the ambivalent, neurotic, and often hypocritical politics of hegemony from which Europeans often articulate their criticisms of the American Empire'.²²¹ 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'.²²² Hegemony will never be cured by oligarchy.²²³

9 Conclusion

The UN cannot remain passive or secondary in confronting terrorism²²⁴ and fortunately Resolution 1530 has not halted Security Council action.²²⁵ 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.

²¹⁵ Schaefer, *supra* note 210.

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.

²¹⁷ Kaiser, 'Germany and the UN Security Council', © German Council on Foreign Relations.

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.

²²⁴ Arias, *supra* note 36. Ironically, a UN/OSCE counter-terrorism conference took place in Vienna on 3/11: Press Release SOC/CP/286, 11 Mar. 2004.

²²⁵ e.g. Res. 1535 (2004) and 1540 (2004), adopted shortly thereafter.

housing a reliquary cabal.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 endeavour²²⁷ – ‘those free of those pressures, and independent of government, should reflect on the issues with all the care and seriousness that the issues demand’.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.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’.²³⁰

²²⁶ ‘The United Nations and Global Institutions’, anonymous speech delivered at a conference in Erskine Childers’ memory, reported at 3 *Global Governance* (1997) 247 and cited in Davidsson, *supra* note 63, at 567.

²²⁷ Luck, *supra* note 64, at 98.

²²⁸ Lowe, *supra* note 34, at 196.

²²⁹ Annan, *supra* note 132.

²³⁰ Scott-Fox, *supra* note 7.