

# Securing the climate: what role for the Security Council in addressing climate change?

by Daniel Wiseman\*

Climate change<sup>1</sup> remains one of the great challenges facing the international community in the 21<sup>st</sup> century. With greenhouse gas ('GHG') emissions continuing to rise, the impacts of climate change are starting to be felt around the world and are predicted to escalate, even with concerted action to mitigate emissions. The international community is becoming aware of the possible security implications associated with climate change. Small island states are concerned about the ultimate security threat of losing their territory to rising sea levels, and the 'threat multipliers' of extreme weather events, changing rainfall patterns, food insecurity and environmentally induced migration are strengthening a perceived imperative to manage climate change as a security issue.

On 20 July 2011, for the second time in its history,<sup>2</sup> the United Nations ('UN') Security Council ('Security Council') met to discuss the security implications of climate change.<sup>3</sup> While a number of major European countries and the United States ('US') argued that the potential effects of

climate change had critical consequences for global peace and security, Russia, China and much of the developing world rejected the notion that the climate change belonged on the Security Council agenda, and the meeting failed to produce even a non-binding resolution on the issue.<sup>4</sup>

This article examines the potential role of the Security Council in addressing the causes and effects of climate change. It provides a brief outline of the implications of climate change for international peace and security and the shortcomings of the current multilateral climate change regime. It addresses the substantive legal and political issues posed by non-traditional security issues, and suggests that while the legal impediments on the Security Council taking action may be easily overcome, as with much in the realm of international governance,<sup>5</sup> far greater challenges are posed by political barriers. Whether the Security Council *should* take action in regards to climate change and in what form is also explored. It will be argued that there are serious problems for representative and democratic international governance in framing economic and environmental concerns such as climate change as security issues, in broadening the scope of the Security Council's mandate, and in subjecting the international community to 'governance by crisis management' at the expense of more inclusive and democratic law and policy making.

## Climate change and international peace and security

The likely security implications of climate change have been recognised by academics,<sup>6</sup> non-government organisations,<sup>7</sup> national governments<sup>8</sup> and multilateral international institutions.<sup>9</sup> The key concerns raised have been twofold. Firstly, there are direct security threats to individuals and states as a result of extreme weather events and rising sea levels. This is reflected in the small island State of Palau's registered intention to seek an advisory opinion from the International Court of Justice ('ICJ') as to whether countries have a legal responsibility to ensure

\* University of Melbourne (BA, major in Pol Sci and Dev Studies), final year Juris Doctor, and a regular volunteer at the Environment Defender's Office (Victoria). This article was one of the highly-ranked entries in the 2011 NELA environmental law essay competition.

- 1 The UN Framework Convention on Climate Change, opened for signature 9 May 1992, 1771 UNTS 164 (entered into force 24 March 1994) art 1(2) ('UNFCCC') defines climate change as 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.'
- 2 The first UN Security Council ('UNSC') meeting to discuss the impact of climate change on peace and security occurred on 17 April 2007: UN SCOR 62nd sess, 5663rd mtg, UN Doc S/PV.5663 (17 April 2007);
- 3 *Maintenance of International Peace and Security*, UN SCOR 65<sup>th</sup> sess 6587<sup>th</sup> mtg UN Doc S/PV.6587 (20 July 2011); See also, UN News Service, 'Warning of Climate Change's Threat to Global Security, Ban Urges Concerted Action' *UN News Centre* (online) 20 July 2011 <<http://www.un.org/apps/news/story.asp?NewsID=39093&Cr=climate+change&Cr1=&Kw1=security+council&Kw2=climate+change&Kw3=>>; Neil MacFarquhar 'UN Deadlock on Addressing Climate Shift', *The New York Times* (online), 20 July 2011 <<http://www.nytimes.com/2011/07/21/world/21nations.html>>; Suzanne Goldenberg, UN Security Council to Consider Climate Change Peacekeeping', *The Guardian* (online) 20 July 2011 <<http://www.guardian.co.uk/environment/2011/jul/20/un-climate-change-peacekeeping>>.

- 4 See UN SCOR 6587<sup>th</sup> mtg, UN Doc S/PV.6587 (20 July 2011).
- 5 See Martti Koskeniemi, 'The Politics of International Law' (1990) 4 *European Journal of International Law* 4.
- 6 See, eg, Shirley V Scott, 'Securitizing Climate Change: International Legal Implications and Obstacles' (2008) 21 *Cambridge Review of International Affairs* 603.
- 7 See, eg, Alan Dupont and Graeme Pearman, *Heating Up the Planet: Climate Change and Security* (Lowy Institute for International Policy, 2006).
- 8 See, eg, German Advisory Council on Global Change (WGBU), *Climate Change as a Security Risk* (WGBU, 2007).
- 9 See, eg, *Climate Change and its Possible Security Implications*, GA Res/63/281, UNGAOR, 63<sup>rd</sup> sess, 85<sup>th</sup> plen mtg, Agenda Item 107, UN Doc A/Res63/281 (11 June 2009).

that their GHG emissions do not harm other States.<sup>10</sup> The second is that the effects of climate change will operate as 'threat multipliers' in existing conflicts and unstable regions.<sup>11</sup> A recent report released by the UN Environment Programme ('UNEP') emphasised a strong link between land degradation and the conflict in Darfur, where a shift in rainfall had led to conflict between the nomadic herders and settled pastoralists.<sup>12</sup>

In recognition of these broad concerns, on 3 June 2009 the UN General Assembly ('UNGA') adopted by consensus a resolution entitled 'Climate change and its possible security implications' which urged the relevant UN bodies to strengthen their efforts to combat climate change and requested the Secretary General to submit a comprehensive report outlining its potential security implications.<sup>13</sup> The ensuing report, by the then Secretary General, Kofi Annan recognised that climate change would affect human and national security.<sup>14</sup> Drawing on the *Fourth Assessment Report* of the Intergovernmental Panel on Climate Change ('IPCC'),<sup>15</sup> the Secretary General's report highlighted the likely impacts on human well-being arising from greater food insecurity, the increased incidence of vector-borne diseases, the increased frequency and intensity of extreme weather events, and sea level rise.<sup>16</sup> Secondly, the report linked these impacts to their effects on economic development and highlighted the potential for this to lead to greater political instability within states.<sup>17</sup> Thirdly, the report identified that this potential large-scale disruption to economic development could lead to conflict as a result of population displacement and involuntary migration.<sup>18</sup> Fourthly, the report explored the potential for both intra-state violence and inter-state conflict over

scarce or transboundary natural resources, particularly in the absence of coordinated coping strategies.<sup>19</sup> Lastly, the report highlighted the potential 'ultimate security threat' of loss of territory and statelessness for some small island developing states as a result of sea level rise.<sup>20</sup>

While the likely impacts of climate change are uncertain,<sup>21</sup> this report provides a useful overview of the likely implications of climate change for human and national security. In particular, the framing of climate change as a 'threat multiplier' provides a useful conceptual tool that recognises the social, cultural and political dynamics that operate concurrently at the local, national, regional and international levels. The consequences of climate change have the strong potential to initiate or exacerbate conflicts in already unstable states or regions, particularly in a world undergoing significant shifts in its geopolitical balance.<sup>22</sup>

### The limits of multilateral climate treaties

Over the past three decades there have been significant international efforts taken to limit GHG emissions and to address the issues posed by climate change. The UN Framework Convention on Climate Change ('UNFCCC')<sup>23</sup> adopted at the Rio Earth Summit 20 years ago and now ratified by 194 parties and the European Union, was the first binding international legal instrument to address climate change.<sup>24</sup> It aims to 'protect the climate system for present and future generations'.<sup>25</sup> Given recent reports that the effects of GHG emissions on the earth's climate system are already starting to raise sea levels,<sup>26</sup> cause extreme weather events<sup>27</sup> and contribute to the mass displacement of people<sup>28</sup> this aspiration has clearly not been met.

10 UN News Centre, *Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases*, (UN News Service, 22 September 2011) <<http://www.un.org/apps/news/story.asp?NewsID=39710&Cr=pacific+island&Cr1=>>.

11 Shirley V Scott, *Climate Change and Peak Oil as Threats to International Peace and Security: is it Time for the Security Council to Legislate?* 9 (2008) *Melbourne Journal of International Law* 495, 504.

12 UN Environment Programme ('UNEP'), *Sudan: Post-Conflict Environmental Assessment* (UNEP, 2007) 73–80.

13 *Climate Change and its Possible Security Implications*, GA Res 63/281, UN GAOR, 63<sup>rd</sup> sess, 85<sup>th</sup> plen mtg, Agenda Item 107, UN Doc A/RES/63/281 (3 June 2009).

14 *Climate Change and its Possible Security Implications — Report of the Secretary-General*, 64<sup>th</sup> sess, Agenda Item 114, UN Doc A/64/350 (11 September 2009).

15 See Intergovernmental Panel on Climate Change, *IPCC Fourth Assessment Report: Climate Change 2007*, (Cambridge University Press, 2007).

16 *Climate Change and its Possible Security Implications — Report of the Secretary-General*, 64<sup>th</sup> sess, Agenda Item 114, UN Doc A/64/350 (11 September 2009) [28].

17 Ibid [45]–[52].

18 Ibid [54]–[63].

19 Ibid [64]–[70], [74]–[76].

20 Ibid [72]–[73].

21 See generally, Gabriele Gramelsberger and Johann Feichter (eds) *Climate Change and Policy: The Calculability of Climate Change and the Challenge of Uncertainty* (Springer 2011).

22 For an analysis of particular conflict 'hotspots' and climate change, see German Advisory Council on Global Change (WGBU), *Climate Change as a Security Risk* (WGBU, 2007) chap 7.

23 UNFCCC, opened for signature 9 May 1992, 1771 UNTS 164 (entered into force 24 March 1994).

24 Nicola Durant, *Legal Responses to Climate Change* (The Federation Press, 2010) 39.

25 UNFCCC, opened for signature 9 May 1992, 1771 UNTS 164 (entered into force 24 March 1994) preamble.

26 See Intergovernmental Panel on Climate Change, *IPCC Fourth Assessment Report: Climate Change 2007*, (Cambridge University Press, 2007).

27 See Pardeep Pall et al, 'Anthropogenic Greenhouse Gas Contribution to Flood Risk in England and Wales in Autumn 2000' (2011) 470 *Nature* 382; Seung-Ki Min et al, 'Human Contribution to More-Intense Precipitation Extremes' (2011) 470 *Nature* 370.

28 Severin Carrell, 'Al Gore: Clear Proof that Climate Change Causes Extreme Weather' *The Guardian* (online) 28 September 2011 <<http://www.guardian.co.uk/environment/2011/sep/28/al-gore-proof-climate-change?newsfeed=true>>.

When the UNFCCC was negotiated the scientific and political uncertainty as to whether climate change was a real and immediate threat to the international community,<sup>29</sup> in conjunction with opposition from major developed countries, such as the United States, ultimately prevented the inclusion of any binding targets or specific GHG emission reduction standards for individual states.<sup>30</sup> The UNFCCC instead established a broad set of guiding principles and institutional arrangements under which it was hoped that the international climate regime would develop.<sup>31</sup> In this regard, art 3 of the UNFCCC endorses and details the principles of intra- and inter-generational equity, the precautionary principle, the principle of sustainable development and the principle of common but differentiated responsibility.<sup>32</sup> Articles 7–8 establish the institutional machinery of the regime.<sup>33</sup> This primarily comprises of the main decision making body of the State parties, known as the Conference of the Parties ('COP') and an administrative secretariat.<sup>34</sup>

On 11 December 1994 the COP unanimously adopted the Kyoto Protocol which imposed firm timetables and targets for individual states to reduce their GHG emissions.<sup>35</sup> In what is generally regarded as a fairly 'modest target'<sup>36</sup> the Kyoto Protocol aims to reduce global GHG emissions by committing developed member states to reduce their GHG emissions by at least 5% below 1990 levels over the first commitment period 2008–12.<sup>37</sup> Importantly the Kyoto Protocol does not specify how exactly countries must reduce their emissions and provides for significant flexibility whereby countries can gain credits for sponsoring projects which lower emissions in other countries.<sup>38</sup>

The political dynamics of the climate change regime have proved the greatest difficulty. A product of intense international debate as to the economic costs and benefits of the agreement, the Protocol only came into force on 16 February 2005 and there remain significant problems

with its implementation.<sup>39</sup> After arguing fiercely for watered down targets, the US (the world's second biggest GHG emitter) has not ratified the protocol, seriously undermining the regime.<sup>40</sup> The key stumbling block continues to be the distribution of the emissions reduction burden between developing and developed countries.<sup>41</sup> The future role of the Kyoto Protocol remains unclear.<sup>42</sup>

Although the UNFCCC has been ratified by a majority of the world's countries this is also one of its major weaknesses. The voting procedures for the COP and the equivalent Meeting of the Parties under the Kyoto Protocol ('MOP') are complicated but essentially require either consensus or a three-quarters majority vote, depending on the issue in question.<sup>43</sup> This has meant that country groupings have strong bargaining power, pushing the outcome towards the lowest common denominator.<sup>44</sup> This is evident in the general and vague language used in the UNFCCC originally and the failure of countries to reach any consensus on developing a successive agreement to the Kyoto Protocol and a second commitment period.<sup>45</sup> It is as a result of these shortcomings that both countries and academic commentators are starting to look towards the more streamlined and effective executive body of the Security Council to take action on climate change.

### The legal issues

The link between climate change and security has been well recognised in recent years, and countries<sup>46</sup> and academic commentators<sup>47</sup> have called on the Security Council to intervene.

29 Durant, above n 24, 39.

30 Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010) 364.

31 Durant, above n 24, 39.

32 *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 164 (entered into force 24 March 1994) art 3.

33 *UNFCCC*, opened for signature 9 May 1992, 1771 UNTS 164 (entered into force 24 March 1994) arts 7–8; see also Godden and Peel, above n 30, 364.

34 See Godden and Peel, above n 30.

35 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 10 December 1997, 37 ILM 32 (1998) (entered into force 16 February 2005) ('*Kyoto Protocol*').

36 See Godden and Peel, above n 30, 365.

37 *Kyoto Protocol*, art 3.

38 Durant, above n 24, chap 5.

39 For a discussion of the key implementation issues see *Ibid*.

40 Meinhard Doelle, 'The Legacy of the Climate Talks in Copenhagen: Hopenhagen or Brokenhagen?' (2010) 4 *Carbon & Climate Law Review* 86, 89.

41 See generally Karen Mickelson 'Beyond a Politics of the Possible? South-North Relations and Climate Justice' (2009) 10 *Melbourne Journal of International Law* 411.

42 See generally Doelle, above n 40.

43 Brian Dawson, Matt Spannagle, *The Complete Guide to Climate Change* (Routledge, 2009) 237.

44 Scott, above n 11, 500.

45 Christina Voigt 'Security in a 'Warming World': Competences of the UN Security Council for Preventing Dangerous Climate Change' in Cecilia M Bailliet (ed) *Security: A Multidisciplinary Normative Approach* (Leden 2009) 291, 305.

46 So far Britain and Germany have been the two countries to explicitly place climate change on the agenda of the Security Council. See : UN SCOR 62nd sess, 5663rd mtg, UN Doc S/PV.5663 (17 April 2007); *Maintenance of International Peace and Security*, UN SCOR 65th sess 6587th mtg UN Doc S/PV.6587 (20 July 2011).

47 See, eg, Alexandra Knight 'Global Environmental Threats: Can the Security Council Protect our Earth?' (2005) 80 *New York University Law Review* 1549, 1585; Voigt, above n 45; Trina Ng 'Safeguarding Peace and Security in our Warming World: A Role for the Security Council' (2010) 15 *Journal of conflict and Security Law* 275.

## A brief background

When it was originally conceived, the Security Council was intended to be an executive organ of the UN entrusted with 'the primary responsibility for the maintenance of international peace and security'.<sup>48</sup> The primary concern was to provide a streamlined and efficient body, incorporating the world's major political powers, to ensure 'prompt and effective action'<sup>49</sup> in protecting states from military threats and to 'save succeeding generations from the scourge of war'.<sup>50</sup> Since the end of the Cold War the Security Council has attempted to deliver on this mandate, authorising the use of coercive measures in response to a range of conflicts, most notably between Iraq and Kuwait<sup>51</sup> and within the former Yugoslavia<sup>52</sup> and a number of countries in sub-Saharan Africa.<sup>53</sup> In more recent years, the Security Council has explicitly broadened its area of concern to include non-traditional threats to international peace and security, such as infectious diseases<sup>54</sup> and terrorism.<sup>55</sup>

## Composition, mandate and powers

Drawing its mandate and legal authority directly from the Charter of the United Nations ('UN Charter'), under which it was created, the Security Council is composed of five permanent members (China, France, the Russian Federation, the United Kingdom ('UK') and the United States ('US')) and 10 non-permanent members, elected for two-year terms.<sup>56</sup> The Security Council acts on behalf of all UN members,<sup>57</sup> but also acts as an agent for all members and not independently of their wishes.<sup>58</sup> It is bound to 'act in accordance with the 'Purposes and Principles of the United Nations'<sup>59</sup> and cannot act arbitrarily and unfettered by any restraints.<sup>60</sup> At the same time members are bound by the decisions of the Security Council when it does

act *intra vires*<sup>61</sup> and 'agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.<sup>62</sup>

The Security Council is provided with two avenues for pursuing its mandate. The first involves the pacific settlement of disputes under Chapter VI of the Charter, whereby the Security Council is empowered to investigate 'any dispute, or any situation which might lead to international friction or give rise to a dispute'.<sup>63</sup> It may make non-binding recommendations to the concerned parties<sup>64</sup> if it determines that the situation 'might endanger the maintenance of international peace and security'.<sup>65</sup> The second avenue, available under Chapter VII of the Charter, gives the Security Council a much broader power to take coercive, binding action to maintain or restore international peace and security.<sup>66</sup> Pursuant to art 41 the Security Council has broad discretion to apply coercive measures such as targeted sanctions or the suspension of diplomatic ties.<sup>67</sup> Where this is deemed inadequate it has the power to order military measures and the use of direct force to counter potential threats under art 42.<sup>68</sup> The ability to take such actions is however contingent upon their being 'a threat to the peace, breach of the peace, or act of aggression' pursuant to art 39 of the Charter.<sup>69</sup>

In effect the Security Council has taken a very wide view of a 'threat to the peace' as the lowest threshold for Chapter VII action and has included threats arising out of internal conflicts and more recently, refusals to act against terrorism.<sup>70</sup> It does however remain unclear to what extent the Security Council's discretion to identify a 'threat to the peace' is limited legally by the terms of the Charter.<sup>71</sup>

Under the terms of Chapter VII of the Charter, the Security Council has discretion in deciding *when* to act pursuant to art 39 and *how* to act pursuant to arts 40–42.<sup>72</sup> The extent

48 *Charter of the United Nations*, art 24(1); See also Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (Thomson Reuters 2009, 6<sup>th</sup> edtn) 37.

49 *Charter of the United Nations*, art 24(1).

50 *Charter of the United Nations*, preamble.

51 See SC Res 687, UN SCOR, 46<sup>th</sup> sess, 2981<sup>st</sup> mtg, UN Doc S/RES/687 (3 April 1991).

52 See SC Res 713, UN SCOR, 46<sup>th</sup> sess, 3009<sup>th</sup> mtg, UN Doc S/RES/713 (25 September 1991).

53 See SC Res 794, UN SCOR, 47<sup>th</sup> sess, 3245<sup>th</sup> mtg, UN Doc S/RES/794 (3 December 1992); SC Res 955, UN SCOR, 49<sup>th</sup> sess, 3453<sup>rd</sup> mtg, UN Doc S/RES/955 (8 November 1994).

54 See SC Res 1308, UN SCOR, 55<sup>th</sup> sess, 4172<sup>nd</sup> mtg, UN Doc S/RES/1308 (17 July 2000).

55 See SC Res 1373, UN SCOR, 57<sup>th</sup> sess, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (28 September 2001).

56 *Charter of the United Nations*, art 23.

57 *Ibid* art 24(1).

58 Sands and Klein, above n 48, 37.

59 *Charter of the United Nations*, art 24(2).

60 Sands and Klein, above n 48, 40.

61 *Ibid*.

62 *Charter of the United Nations*, art 25.

63 *Charter of the United Nations*, art 34.

64 *Ibid* art 36.

65 *Ibid* art 37.

66 *Ibid* chap VII.

67 *Ibid* 41.

68 *Ibid* art 42.

69 *Ibid* art 39.

70 Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm D Evans (ed) *International Law* (3<sup>rd</sup> edtn Oxford University Press, 2010) 615, 634.

71 It is not even clear whether any other body such as the ICJ would have the power to challenge a finding under art 39 by the Security Council. See Christine Gray, above n 70, 634.

72 See Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004) 133.



of these discretions remains a contested issue and is one that the ICJ has avoided ruling on in a number of cases.<sup>73</sup> According to one commentator, 'a threat to the peace ... seems to be whatever the Security Council says is a threat to the peace, which is a political decision ... not easily subject to legal interpretation.'<sup>74</sup> This is a position indicative of those who see both questions as falling within the absolute discretion of the Security Council.<sup>75</sup>

Chapter VII of the Charter gives the Security Council significant scope to deviate from customary international law or treaty law when resorting to enforcement measures.<sup>76</sup> When imposing a trade embargo or the use of coercive military action, the Security Council will inevitably impinge on the legal rights of the state its actions are directed against, as well as other states that may have relations with them.<sup>77</sup> It is also important to note that art 103 of the Charter provides that obligations under the Charter prevail over any other international agreements.<sup>78</sup> It is also relevant that the actions of the Security Council under Chapter VII are unlikely to be bound by the general principle of proportionality, as this would limit the flexibility and effectiveness of the enforcement provisions.<sup>79</sup>

Others argue that international law in the form of *jus cogens* and the purposes and principles of the UN Charter would limit *how* the Security Council could act.<sup>80</sup> Erika De Wet suggests that there may be some limits under art 40 based on the 'right to life'<sup>81</sup> and the 'right to health',<sup>82</sup> although based on past practice this may be limited merely to a requirement to monitor the impact of such sanctions.<sup>83</sup> Dapo Akande suggests that although 'the Security Council is empowered to use force in the maintenance of

international peace but this does not relieve it of its duty in using such force to respect international humanitarian law in armed conflict'.<sup>84</sup> While this point remains unresolved, academics tend to agree that the Security Council's discretion in both these regards is very broad.<sup>85</sup>

While it entirely depends on what form of action is taken, it is likely that the Security Council will be bound by certain *jus cogens* norms of international humanitarian law and certain fundamental human rights laws stemming from the good faith requirement in art 2(2) of the Charter.<sup>86</sup>

### The political issues

Whether the Security Council would choose to exercise its apparent legal capacity is highly questionable. The Charter provides that substantive Security Council decisions on nonprocedural matters require 'an affirmative vote of nine members including the concurring votes of the permanent members'.<sup>87</sup> This effectively grants each permanent member a veto over Security Council decision-making and creates a power dynamic where any one of the P5 can prevent the Security Council from taking action.<sup>88</sup>

On 20 July 2011 when the Security Council met to discuss the security implications of climate change,<sup>89</sup> it failed to produce an effective outcome. There were two distinct perspectives, with some states recognising that the potential effects of climate change had critical consequences for global peace and security, while others rejected the notion that the issue even belonged on the Security Council agenda.

73 Christopher K Penny 'Greening the Security Council: Climate Change as an Emerging "Threat to International Peace and Security"' (2007) 7 *International Environmental Agreements* 35, 56.

74 Peter Malanczuk, Michael Barton Akehurst, Akehurst's Modern Introduction to International Law (7th edtn, Routledge, 1997) 426.

75 See, eg, Gabriel H Oosthuizen, 'Playing the Devil's Advocate: the UN Security Council is Unbound by Law' (1999) 12 *Lieden Journal of International Law* 538.

76 See Dapo Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 *International and Comparative Law Quarterly* 309, 320.

77 See De Wet, above n 72, 182.

78 Ibid 183.

79 Charter of the United Nations, art 103.

80 See Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Stevens 1950) 734–5.

81 Protected under the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6(1)–(2).

82 Protected under the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 12.

83 De Wet, above n 72, 247.

84 Akande, above n 76, 320.

85 See Jo Stigen and Ole Kristian Fauchald, 'Environmental Security and the UN Security Council' in Cecilia M Bailliet (ed) *Security: A Multidisciplinary Normative Approach* (Leden 2009) 313, 339; Penny, above n 73, 51; Knight, above n 47, 1585.

86 For a detailed discussion of these issues see Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004) 184–5.

87 *Charter of the United Nations*, art 27.

88 See Kishore Mahbubani, 'The Permanent and Elected Council Members' in David M Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers, 2004) 253.

89 *Maintenance of International Peace and Security*, UN SCOR 65<sup>th</sup>, sess 6587<sup>th</sup>, mtg UN Doc S/PV.6587 (20 July 2011); See UN News Service, 'Warning of Climate Change's Threat to Global Security, Ban Urges Concerted Action' *UN News Centre* (online) 20 July 2011 <<http://www.un.org/apps/news/story.asp?NewsID=39093&Cr=climate+change&Cr1=&Kw1=security+council&Kw2=climate+change&Kw3=>>>; Neil MacFarquhar 'UN Deadlock on Addressing Climate Shift', *The New York Times* (online), 20 July 2011 <<http://www.nytimes.com/2011/07/21/world/21nations.html>>; Suzanne Goldenberg, 'UN Security Council to Consider Climate Change Peacekeeping', *The Guardian* (online) 20 July 2011 <<http://www.guardian.co.uk/environment/2011/jul/20/un-climate-change-peacekeeping>>.

The most insistent call to have climate change placed on the Security Council agenda has come from the small island states whose existence is threatened by rising sea levels. On behalf of the Pacific small island developing States President Marcus Stephen of Nauru called for the Security Council to 'join the General Assembly in recognising climate change as a threat to international peace and security' and to appoint a special representative on climate and security.<sup>90</sup> This position was largely supported by the major European countries including Germany, France and the UK and also, somewhat surprisingly, by the US.<sup>91</sup>

The US has a veto as a permanent member and also has an influential position in world affairs. It is widely recognised that 'the Security Council could not legislate on climate change and energy without the acquiescence, if not leadership, of the US.'<sup>92</sup> Given that the US did not take a prominent role in the Security Council debate in 2007<sup>93</sup> and their well-documented reluctance to ratify the Kyoto Protocol, their position in the most recent meeting is surprising. In remarks indicative of a changing approach, the US Permanent Representative to the UN, Susan Rice stated that 'climate change had very real implications for peace and security' and that 'the Security Council needs to start now — today and in the days to come — to act on the understanding that climate change exacerbates the risks and dynamics of conflict.'<sup>94</sup> She closed by stating that the failure of the Security Council to formally recognise climate change as a threat to peace and security was 'more than disappointing', 'short sighted', 'pathetic' and a 'dereliction of duty'.<sup>95</sup>

In direct contrast to the US perspective, two members of the P5 in Russia and China, and the G77, vociferously rejected the call for the Security Council to take action. While the Chinese delegate accepted that climate change could affect security, it framed the issue as one of sustainable development and argued that the Council did not have the appropriate expertise or resources to address it. It also highlighted the primacy of the UNFCCC as the appropriate UN institution to address climate change.<sup>96</sup> In a similar vein, Ambassador Argüello of Argentina, speaking on behalf of the G77 stated that he 'strongly reject[ed] the consideration of human rights and development questions

such as migration, refuge, food insecurity and poverty eradication as security concerns' and that 'nothing was to be gained from such a narrow approach'.<sup>97</sup> This concern was also enunciated by the delegate from Egypt, representing the countries in the non-aligned movement ('NAM'), who stressed concern over the idea that the 15 member Security Council should take executive type action in an area requiring international coordination which was better suited to multilateral governance through the UNFCCC, the General Assembly and the UN Economic and Social Council.<sup>98</sup>

### Possible future actions

It is clear that strong Security Council action to address climate change is not an immediate likelihood. Certainly the creation of a 'green helmets' environmental peacekeeping force<sup>99</sup> or an 'international tribunal for climate and environmental justice'<sup>100</sup> is not on the agenda. With the negative effects of climate change quickly escalating and the dynamics of international politics in constant flux it is possible that the Security Council will recognise climate change as a threat to peace and security and become more involved at some point in future. Although it is entirely speculative at this point, the following mentions the possible actions that the Security Council may take.

Under art 41, the Security Council can impose measures 'not involving the use of armed force',<sup>101</sup> and under art 42 it is given the power to apply coercive military measures.<sup>102</sup> With the political ramifications likely to be significant, it is very difficult to imagine circumstances in which the Security Council might authorise the use of military force in relation to climate change. In any regard, as Catherine Tinker has noted, 'sending in military troops under UN auspices to prevent trees being cut down or to stop the building of a factory using polluting technology is clearly inappropriate'.<sup>103</sup>

90 *Maintenance of International Peace and Security*, UN SCOR 65<sup>th</sup>, sess 6587<sup>th</sup>, mtg UN Doc S/PV.6587 (20 July 2011) 22.

91 Ibid.

92 Scott, above n 11, 508.

93 UN SCOR 62<sup>nd</sup> sess, 5663<sup>rd</sup> mtg, UN Doc S/PV.5663 (17 April 2007).

94 *Maintenance of International Peace and Security*, UN SCOR 65<sup>th</sup>, sess 6587<sup>th</sup>, mtg UN Doc S/PV.6587 (20 July 2011) 6.

95 Ibid 7.

96 Ibid 9.

97 Ibid 27.

98 Ibid 26.

99 As speculatively reported in a recent article by the *Guardian*: Suzanne Goldenberg, UN Security Council to Consider Climate Change Peacekeeping', *The Guardian* (online) 20 July 2011 <<http://www.guardian.co.uk/environment/2011/jul/20/un-climate-change-peacekeeping>>.

100 In the Security Council meeting on 20 July 2011, the representative for Bolivia called for the creation of an international tribunal for climate and environmental justice to sanction those nations that did not comply with emission reduction commitments. See *Maintenance of International Peace and Security*, UN SCOR 65<sup>th</sup>, sess 6587<sup>th</sup>, mtg UN Doc S/PV.6587 (20 July 2011).

101 Ibid art 41.

102 Ibid art 42.

103 Catherine Tinker, 'Environmental Security' in the United Nations: Not a Matter for the Security Council' (1991) 59 *Tennessee Law Review* 181, 794: quoted in Scott, above n 11, 506.

An action that may be more politically and practically feasible however is the threatened or actual imposition of economic sanctions on countries that fail to adequately reduce their GHG emissions. As has been suggested by a number of authors, in this way the Security Council could potentially play a 'gap filling role'<sup>104</sup> or act as the 'peak body on climate change'<sup>105</sup> by coordinating and enforcing the standards set by other bodies such as the UNFCCC and the General Assembly. The shift by the Security Council in recent years to act in a more legislative manner sets a strong precedent for action of this sort under art 41 of the Charter.<sup>106</sup> Under Resolution 1373 relating to terrorism<sup>107</sup> and Resolution 1540 relating to weapons of mass destruction<sup>108</sup> the Security Council, somewhat controversially,<sup>109</sup> identified threats to peace and placed the obligation on all states to take or refrain from taking particular actions. Under both these Resolutions committees were set up to enforce the implementation of their respective requirements. While it is unlikely to occur in the immediate term it is not inconceivable that the Security Council could at some point introduce binding measures on relevant States to limit their GHG emissions and even establish a subsidiary committee, to oversee compliance with such measures and to complement the multilateral climate regime under the UNFCCC.<sup>110</sup>

### Some theoretical issues

A remaining question is whether the Security Council *should* take such action and what the ramifications would be for the current system of international governance under the UN framework. In this regard the framing of climate change as a security matter is problematic for traditional notions of security, which have generally been framed around the concept of exceptional emergency measures in response to conflict. Although the effects of climate change will inevitably create security related issues, the legal approach to dealing with the root causes of these problems involve ongoing regulatory action that does not easily fit within the typical short term 'state of emergency' that characterises traditional security issues

in international law. This creates a twofold problem of potentially stretching the mandate of the Security Council beyond any meaningful boundary and simultaneously subjecting the international community to 'governance by crisis management', at the expense of inclusive law and policy making.

### From national to human to ecological security?

As the Security Council has extended its frame of action to include non-traditional security threats so too has the very term 'security' undergone significant change. Under classical international law, based on the sovereignty of states and their territorial integrity, the survival of states was the exclusive aim of international security.<sup>111</sup> In more recent years however the focus has increasingly moved towards 'human security'. Indicative of this is the *1994 Human Development Report* which attempted to reframe the concept of national security so that 'it focuses directly on human beings – respecting national sovereignty but only as long as nation states respect the human rights of their own people.'<sup>112</sup> Although not adopted by the Security Council, this report has informed much of the impetus behind the Security Council's more recent involvement in intra-national conflicts.<sup>113</sup> The move away from the nationalist focus on security has been regarded by many as positive development<sup>114</sup> but has also been treated with skepticism by some who see the rhetoric of human security as just simply a repackaging of welfare economics 'with the units of welfare conceived as whole lives rather than life-slices.'<sup>115</sup>

While the involvement of the Security Council in governing climate change would involve aspects of both 'national' and 'human' security it also potentially extends the scope of these concepts further to embrace 'environmental' or 'ecological' security. As Barry Buzan has pointed out '[e]nvironmental security concerns the maintenance of the local and the planetary biosphere as the essential support

104 Knight above n 49, 1585.

105 Scott, above n 11, 506–507.

106 See Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175; Scott, above n 11, 507.

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

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

109 See generally Eric Rosand, 'The Security Council as 'Global Legislator': *Ultra Vires* or *UltraInnovative*?' (2004) 28 *Fordham International Law Journal* 542.

110 Ng, above n 47, 291.

111 Marco Odello, 'International Security and International Organisations: Considerations under International Law' in Cecilia M Bailliet (ed), *Security: A Multidisciplinary Normative Approach* (Leden 2009) 23, 24.

112 UN Development Programme, *The Human Development Report* (Oxford University Press, 1994) 14.

113 See, eg, SC Res 713, UN SCOR, 46<sup>th</sup> sess, 3009<sup>th</sup> mtg, UN Doc S/RES/713 (25 September 1991); SC Res 794, UN SCOR, 47<sup>th</sup> sess, 3245<sup>th</sup> mtg, UN Doc S/RES/794 (3 December 1992); SC Res 955, UN SCOR, 49<sup>th</sup> sess, 3453<sup>rd</sup> mtg, UN Doc S/RES/955 (8 November 1994).

114 See Joachim Wolf, 'Responses to Non-Military Threats: Environment, Disease and Technology' in Peter Danchin and Horst Fischer (eds), *United Nations Reform and the New Collective Security* (Cambridge University Press, 2001) 173.

115 Christopher Kutz, 'Democratic Security' in Cecilia M Bailliet (ed) *Security: A Multidisciplinary Normative Approach* (Leden 2009) 231, 235.

system on which all other human enterprises depend'.<sup>116</sup> While framing climate change as an issue of environmental security has been advocated for by those seeking to raise the profile of the problem<sup>117</sup> as Maria Trombetta notes, it is important to recognise that the term 'security entails a specific logic or rationality, independent of the context or the intentions of the speakers.'<sup>118</sup> In this regard security is about survival, urgency and emergency and allows for exceptional measures.

### Governance by 'crisis management'

Influential Italian philosopher Giorgio Agamben has posited that, rather than representing exceptional events, urgent 'crises' in the 20<sup>th</sup> century became the ordinary state of affairs. In this way the 'state of exception' has become the 'dominant paradigm of [modern] government'.<sup>119</sup> Updating Carl Schmitt's work on the relationship between sovereignty and the state of exception<sup>120</sup> to the contemporary era, Agamben observes that the fiction of the emergency creates a new space for law's production and reproduction by taking possession of the sphere of human action that we know as 'politics' and enabling law to extend its empire to colonise 'life itself'.<sup>121</sup> Developed in the wake of the terrorist attacks in New York in 2001, Agamben's concern here is that the legal measures taken in response to the emergency is unlikely to be a temporary derogation from the ordinary rule of law but will become the long term form of governance.<sup>122</sup> As Diane Otto also notes, in this way 'rather than acting as a constraint on executive power and action in the face of a crisis, law offers a means of authorising what would otherwise be an excessive use or abuse of power.'<sup>123</sup> This has clear consequences for the balance of the rule of law and democratic governance as executive emergency action, by definition, displaces political deliberation and individual rights.

Clearly these observations at the domestic level cannot be mapped directly on to the international legal and political landscape. For one, the separation of powers giving rise to the rule of law at the domestic level is simply not present to the same degree at the international level. Indeed as Martti Koskenniemi has suggested, 'the fight for an international rule of law is a fight against politics' itself.<sup>124</sup> While the analogy is not perfect, there are clear similarities between the structure of the international governance system under the UN and the domestic rule of law. As discussed earlier, the UN Security Council was originally conceived as the executive organ of the UN, responsible for responding quickly and efficiently to crises and threats to international peace and security. This is in direct contrast to the more representative General Assembly and other administrative and legislative type organs under the UN system, such as the UNFCCC in the climate change context.

With the movement of the Security Council's concern with international peace and security into non-traditional areas, there have necessarily been trade-offs in the deliberative political process and recognition of individual rights under the international system. Indeed the move by the Security Council in taking more legislative type action in response to terrorism and weapons of mass destruction has come under sharp critique for these very reasons.<sup>125</sup> Potentially however the movement of the Security Council into the governance of climate change could extend this executive governance of 'life itself' even further given that the primary legal means of limiting GHG emissions is likely to be through the legislated regulation of, both national and individual economic production and consumption. Further, given that the predicted effects, and measures to address, climate change are projected to continue into the foreseeable future, Agamben's envisioned 'state of exception' could prove equally indefinite. With the international security discourse being reframed around notions of environmental and ecological security, this potentially legitimises the application of 'crisis management' to the maintenance of the planetary biosphere and consequently every aspect of human and non-human life.

116 Barry Buzan *People, States and Fear: an Agenda for International Security Studies in the Post-Cold War Era* (Harvester Wheatsheaf, 1991) 19–20.

117 See, eg, David Spratt and Phillip Sutton, *Climate Code Red: the Case for Emergency Action* (Scribe Publications, 2008).

118 Maria Julia Trombetta 'Environmental Security and Climate Change: Analysing the Discourse' *Cambridge Review of International Affairs* (2008) 21, 585.

119 Giorgio Agamben, *State of Exception* (University of Chicago Press, 2005) 2.

120 See Carl Schmitt, *The Concept of the Political: Expanded Edition* (University of Chicago Press, 2007).

121 See Dianne Otto, 'Remapping Crisis through a Feminist Lens' (2011) 5 *University of Melbourne Law School Research Series* <<http://www.austlii.edu.au/au/journals/UMelbLRS/2011/5.html>>

122 Agamben, above n 119, 3–4.

123 Otto, above n 121.

124 Koskenniemi, above n 5, 5.

125 See Dianne Otto and Joo-Cheng Tham, 'Deconstructing the Logic of Responding to One Threat with Another: The Perils of Countering Terrorism by Eroding Human Rights' in Australian Human Rights Working Group, *Australian Human Rights Critique: A Selection of Essays* (Australian Human Rights Working Group, 2006) 22.



## Conclusions

Clearly the implications of climate change for human security, health and wellbeing pose enormous challenges for the international community. The tension that this is already creating between responding quickly and effectively to climate change on one hand and maintaining democratic and accountable forms of governance on the other, is brought into sharp focus by suggestions of the Security Council becoming involved in this area. As Nomi Lazar has suggested 'tensions between order and justice are inherent in any governance regime' and '[i]n this regard order requires constraint and justice suggests rights and freedoms.'<sup>126</sup> This is the balance that needs to be struck in the future development of the international regime to manage climate change and it will be a difficult one to negotiate.

Given the clear security implications of climate change there will clearly be a role for the Security Council in monitoring and minimising such threats. This however should not come at the cost of inclusive law and policy making. In this regard the Security Council should, at most, take a narrow role so as not to undermine the more representative and consultative multilateral treaty process under the UNFCCC. Countering climate change

with actions that erode individual rights and the basis of the international legal regime would ultimately be counterproductive. While it has so far proven unlikely it is not too late for climate change to serve as a common threat around which the international community can forge consensus and improve the accountability of international governance.

It is clear that climate change remains one of the great challenges facing the international community in the 21<sup>st</sup> century. These challenges include threats to human health and wellbeing, threats to security and threats to effective international governance. In the face of the difficulties facing the UNFCCC in delivering an effective response to climate change, the recent shift of attention on to the Security Council to assist in coordinating an international climate governance regime is not surprising. While the legal barriers to Security Council action on climate change are minimal however, and the difficult political issues may potentially be overcome, the resort to the Security Council's executive capacity creates particular problems for the conceptualisation of security, the realisation of representative and democratic international legal and political governance, and the competing imperatives of expediency and justice.

---

<sup>126</sup> Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge, 2009), 1.