Constitutionality of United Nations Security Council Resolutions 1718 and 1874

Caio Bernardes Fonseca Weber Abramo

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Track Conflict and Security

Supervisor: mr. dr. Otto Spijkers MA

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Abbreviations

DPRK – The Democratic People's Republic of Korea, official name of North Korea, used interchangeably.

IAEA – International Atomic Energy Agency.

ICJ – International Court of Justice.

ICTY – International Criminal Tribunal for the Former Yugoslavia.

INF – Intermediate-Range Nuclear Forces Treaty.

GA, UNGA – General Assembly of the United Nations.

NATO – North Atlantic Treaty Organization.

New-START – Treaty between The United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms of 10 April 2010.

NWS, **N-NWS** – (Non-)Nuclear Weapons State, as defined in the NPT.

NPT – Treaty on the Non-Proliferation of Nuclear Weapons, a.k.a. Nuclear Non-Proliferation Treaty.

P5 – Permanent 5, the veto-yielding members of the Security Council: China, France, Russia, United Kingdom, United States.

PCIJ – Permanent Court of International Justice (predecessor of the ICJ).

SC, **UNSC** – Security Council, United Nations Security Council, used interchangeably.

UN – The United Nations organization.

UK – United Kingdom of Great Britain and Northern Ireland.

USA – United States of America.

USSR – Union of the Soviet Socialist Republics. Used only historically; the Russian Federation is its successor state.

VCLT – Vienna Convention on the Law of Treaties of 1969.

WMD – Weapons of Mass Destruction: chemical, biological and nuclear weapons.

WWI, **WWII** – First World War (1914-1918), Second World War (1939-1945).

Introduction

In 2006 and 2009 the United Nations Security Council adopted Resolutions 1718 and 1874,[1] respectively, in response to nuclear test explosions by the Democratic People's Republic of Korea. In these resolutions the SC demanded that North Korea "immediately retract its announcement of withdrawal" and "return" to the Nuclear Non-Proliferation Treaty, imposing further other obligations based on the NPT.

This is unusual not only because the DPRK's status as a party to the NPT was by then already highly controversial but also because it was the first time that the SC imposed on a state the obligation to adopt a specific treaty regime. Since treaties are based on the principle of state consent,[2] it seems odd that a sovereign entity would be compelled to enter into an agreement which is in opposition to its express will.

The fact that this particular power is not explicitly given to the SC in the UN Charter gives another cause for consideration.

The question thus arises regarding the legality of Resolutions 1718 and 1874 in these particular points. Are the resolutions in agreement with the UN Charter and therefore legally binding, or has the UNSC acted *ultra vires* and, if so, what is the consequence to these resolutions?

What follows is a legal analysis of this situation in the attempt to answer these questions.

A similar issue did arise already in relation to Res. 1373, adopted after the September 11 2001 terrorist attacks on the USA, and Res. 1540 which deals with proliferation to non-State actors and terrorism.[3] Both cases generated much scholarly debate on the legality of resolutions.[4] These studies focused on the legality of "law making" in general by the SC and, unlike the case in point, Resolutions 1373 and 1540 did not involve a specific state or treaty. The questions set above thus call for a complementary approach.

The first step is to establish both factual and legal backgrounds that prompted the adoption of the resolutions. Thus in Chapter 1 the NPT regime itself and the history of the DPRK's involvement in it, which culminates in the "withdrawal process" with steps in 1993 and 2003, are looked into. North Korea's official statements and announcements, circulated both by the press and as documents of the UNSC, are examined. Besides the NPT's text, recourse is also taken to its drafting history and the proceedings of its review

[1] "The resolutions".

[2] Expressed, eg. in : PCIJ *Lotus* case, VCLT preambular paragraph 3 and art 34.

[3] S/RES/1373 (2001) and S/RES/1540 (2004).

[4] See chiefly Happold (2003) and Joyner (2007).

conference in 1995, this last one as evidence of *opinio juris*. The work of Joyner (2011) is used as support in the interpretation of this treaty.

Section 1.1 addresses the NPT and particularly the withdrawal clause in art. X, discussing among others the role of the SC. The suggestion of Rhinelander and Bunn (2005) of a possible review power is tackled as well.

Section 1.2 then analyses the actual withdrawal process of the DPRK, focusing on the announcements of 1993 and 2003, as well as its position during the treaty's review conference in 1995. Here both the DPRK's practice and *opinio juris* and how they can be legally characterized are looked into.

In section 1.3 the validity of this process is briefly discussed, as well as whether North Korea is still a party to the NPT, since this forms a crucial element in the legal landscape and about which official state positions differ.

Chapter 2 then turns to the Security Council proper and, more specifically, its mandate, roles and powers. An interpretation of the UN Charter is given, to which extensive reference is made to Simma *et.al.*(2002). The focus is naturally on the keeping of peace and security, so chapters I, III and V-VIII of the Charter received the greater attention. Here we attempt to shed light on the more specific issue of arms/armaments control and how the Charter envisioned this system to be.

Since the ordinary language of the UN's constitutive document is the object of legal debate, this analysis turns also to its drafting history and scholarly doctrine.[5] For the first we use the proceedings of both the Dumbarton Oaks conference of 1944 (in which the United States, United Kingdom and the Soviet Union discussed the general outline of what was to be the UN) and the San Francisco conference of 1945, the official gathering of states to draft and approve the text of the Charter. The works of Russell (1958) and Hildebrand (1990) with the text and extensive commentary on the discussions in these two meetings is relied upon. Regarding the SC specifically, a number of authors are consulted regarding the limits (or lack thereof) to its powers. These include de Wet (2004), Bedjaoui (1994), Schweigman (2001) and Gill (1995).

Section 2.1 scrutinizes the mandate of the SC and analyses arts. 24, 25 and 26, which show the relationship between the Council and the UN members and some limitations to its powers.

Section 2.2 outlines the structure and explicit powers given to the SC in the Charter by analysing arts. 39 and 41, also discussing limits to their exercise.

Section 2.3 discusses the role of the SC as a keeper or builder of the peace, also touching on the issue of implied powers in the case in point.

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5 VCLT art 32.

With these tools at hand it will then be possible to interpret the resolutions themselves and how their content relate to fact and law.

A brief discussion on SC Resolutions generally, the practice around them and their interpretation form section 3.1.

An extensive interpretation of Resolutions 1718 and 1874, as well as the SC President's statement of 1992, is done in section 3.2. It is then made explicit which powers the SC is using, the way they are used and how the DPRK's position is modified by it. The results of the previous chapter are here applied to establish how the resolutions' *dicta* fit in the whole legal framework.

Finally, the fourth chapter provides our Conclusion and what the legal consequences would be for the resolutions and to North Korea.

Caveat: the VCLT

The Vienna Convention on the Law of Treaties is used and referred to throughout this analysis. This has been done with care, of which the reader is hereby also forewarned: only those parts of the VCLT which are clearly expressions of customary law should apply. The main treaties referred to here, the Charter of the UN and the NPT, are not subject to the VCLT's non-customary rules due to its non-retroactivity clause (Art.4), but more poignantly the Democratic People's Republic of Korea is not a signatory of this Vienna Convention.[6] This would preclude its application to any treaty or treaty law obligation falling on the DPRK, though of course it could still be applied to that treaty in relation to other states *inter se*. It is also important to note that arms control regimes often incorporate rules differing from those of the VCLT and should be treated as *lex specialis*.[7]

[6] UN treaty collection at https://treaties.un.org/doc/Publication/MTDSG/VolumeII/ChapterXXIII/XXIII-1.en.pdf [last accessed 19th July 2015].

[7] den Dekker and Coppen(2012) p 46-47.

Chapter 1 - North Korea and the NPT

In this chapter we will lay out the legal obligations that compose the NPT regime and discuss its withdrawal clause and underlying rationale within an arms control context. We shall also present in brief the history of North Korea with the NPT, the factual circumstances that led to its withdrawal and the substantial and procedural adequacy of it. Finally, we will shortly discuss the current status of the DPRK under the treaty.

The Treaty on the Non-Proliferation of Nuclear Weapons was drafted and signed under the promotion of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics in 1968 in an effort to keep the number of states in possession of nuclear weapons limited. The NPT became in time the central piece of the nuclear arms control regime, in concert with the International Atomic Energy Agency which monitors the application of nuclear technology.

The NPT regime is based in a trade-off. On the one side are the so-called non-nuclear weapon states (NNWS), that is any state that up to 1967 did not possess nuclear weapons.[8] They commit not to develop nor acquire them in any form and not to help others do so.[9] On the other side are those states that already had nuclear weapons in their arsenals (NWS). Their commitment, besides not transferring these weapons to any other state,[10] was to aid the NNWS in developing nuclear technology for peaceful purposes,[11] mostly for energy production and the creation of radioactive isotopes for medical use and research, among others. They were also bound to enter into negotiations to reduce and eventually eliminate altogether their nuclear weapons.
This framework allowed the NWS (which are the same countries that hold permanent seats in the UN Security Council) to keep their nuclear arsenals while stopping other nations from getting them, which preserves their strategic advantage; but at the same time the dis-advantaged NNWS would benefit from the gradual reduction of the world's nuclear weapons and have facilitated access to nuclear technology.[12]

The treaty entered into force in 1970, after the ratification of the above mentioned depositaries and 40 other states as per its art. IX.3.

At the time a number of states still had nuclear weapons programmes, including West Germany, South Africa, Argentina, Brazil, South and North Korea. The latter acceded to the NPT in 1985 after concluding agreements on aid to its peaceful nuclear programme aimed at power generation.[13]

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8 NPT art IX.3.

9 NPT art II.

10 NPT art I.

11 NPT art IV.2.

12 See e.g. Joyner (2009), Joyner (2011), WMDC (2007).

13 Annex III to S/2003/91.

1.1 The NPT and art. X

An important aspect of any treaty regime is the mutual assurance of compliance by all parties. When the obligations involve the performance of certain activities these can be checked and communicated. Different treaty systems include other methods to ensure compliance. In the arms control area common methods include on-site inspections and surveillance.[14]
Some regimes include specific tools to deal with non-compliance. Besides the suspension of treaty rights and sanctions by appropriate bodies, it is also considered[15] that the ability to abandon, denounce or withdraw from a treaty is an option left to the parties, serving as incentive for cooperation from the others. It works in the reverse of expulsion, which is a rarely employed option in arms control regimes.[16]
Denunciation of a treaty in view of exceptional circumstances or non-compliance by other treaty parties is also part of customary international law, expressing the intention of a state to be bound in the same way that signing an instrument does. It is thus a manifestation of statehood and sovereignty.

The NPT explicitly acknowledges this view in its art. X.1, which deals with withdrawals. It reads:

> Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests. [emphasis added]

We can identify two elements in this withdrawal process: a substantial and a procedural.

The substantial part relates to the reasons the party has to consider its ("supreme") interests endangered ("jeopardized") by certain circumstances ("extraordinary events"). We note that this is not a permission to leave the treaty for **any** reason. Interpreting art. X.1 logically we can identify four filters these reasons must pass:

1- It must be qualified as a *factual* occurrence (extraordinary *events*). The state could not claim a concern *in abstracto* or a potential future development that is not certain or highly likely. It could not offer a new interpretation of treaty provisions or any other such theoretical support;
2- It must be *extraordinary*. This means foremost that it is out of the state's control and that could not have been reasonably foreseen. It cannot be a common or regular event which should have entered its considerations before. Here it might be useful to take recourse to art. 62 of the VCLT on fundamental change of circumstances, keeping in mind its restricted applicability previously mentioned;

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[14] Treaty Between The United States Of America And The Union Of Soviet Socialist Republics On The Elimination Of Their Intermediate-Range And Shorter-Range Missiles (INF); NewSTART treaty.

[15] Chayes and Chayes (1995), den Dekker and Coppen (2012).

[16] The idea being that it's better to keep a state within that legal framework and not outside it, where the other parties would lose all legal control. For more on this issue see, e.g. White(1997).

3- It has to be related to the regime in a substantive way, that is, to the treaty's object and purpose. The events can't be based on economic, social, environmental or other such grounds. It has to relate clearly to one of the main parts of the NPT: non-proliferation and control, development for peaceful purposes, and/or disarmament;

4- It must be actually detrimental to the state's interests, as opposed to being merely not beneficial. The events must come at the expense of those interests, in such a way that the continuation of treaty obligations would impede or deny their realization substantially or altogether.

It must be noted these are not judicial filters as a court of law would apply mandatorily in the review of an action, but only a suggested logical interpretation of art. X.1. Judicial review of substantive reasons is not prescribed; the ultimate (one might say, the only) authority regarding particularly the fourth aspect (jeopardizing a state's supreme interests) is the state itself; the very principle of sovereign equality would be denied otherwise. This view, particularly in the area of arms control treaties, finds ample support in the literature.[17] It is also interesting to note that several proposed amendments to art. X during the treaty's drafting in the UNGA's Disarmament Commission did explicitly detail the content and form of notifying withdrawal reasons, and none of them were accepted.[18]

The procedural elements describe the form in which the action is to be undertaken. It can be broken down in this case so:[19]

1- Production of a notice of withdrawal and the reasons thereto according to the formula above;

2- Communication of this to all states parties to the treaty and to the United Nations Security Council;

3- A waiting period of three months between the notice and the effective withdrawal.

The underlying rationale of procedure is to respect the interests and rights of all parties and provide a mutually agreed upon way in which to take valid measures, akin to the domestic principle of due process. As such some procedural steps are more important than others, in that some may hamper rights while others are mere formalities without (much) substantive impact.

It must be noted that, unlike reservations or declarations, there is no customary tool another party to a treaty can use to engage withdrawals. A withdrawal can't be the target of objections. Reservations or declarations modify the obligations a state has inside a legal regime, while a withdrawal is a departure from that legal regime in its entirety. The purpose of objections to reservations is to maintain the consensual element of treaties, since obligations are taken mutually with the expectation that parties will behave as stated in the treaty text.
These questions do not arise in the case of withdrawals because, unlike the “reserving” state, an abandoning party loses also all rights and advantages stemming from the treaty.

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17 See e.g. den Dekker and Coppen (2012), Asada(2004), Fitzmaurice (1986).

18 DC/230. See e.g. the proposals by Romania (p 22) and Nigeria (p 24).

19 Asada(2004) p 342.

Conversely, other states also lose the ability to exert treaty-based pressure and bargain in treaty terms. That is to say there are few concrete actions to be taken to dissuade or recall a withdrawing state, which partially explains the corresponding lack of customary "response" to withdrawals.

Considering that abandoning a legal obligation *as an exercise of customary treaty law rights* or treaty-prescribed rights is a free expression of state will (of its sovereignty) it is also not surprising that it precludes authorization or express acceptance. Interpretation and acceptance of "treaty tools" are left to each state's discretion and to bodies specifically vested with such powers, but international law does now know a common rule or practice in this regard. Moreover, the NPT does not name an interpretation authority.[20]

It has nevertheless been suggested by Bunn and Rhinelander (2005) that the Security Council might have a review power implied in art. X.1 withdrawals. The obligation to notify the SC means, for these authors, that it has the capacity to interpret them and thus can accept or deny the withdrawal. We shall briefly entertain this proposition, starting with the plain language of the treaty text.
The treaty says "give notice of" the withdrawal. A notice, in its common meaning, is merely a communication or notification. It makes no sense to speak of it being accepted or denied. A number of different choices of language could have been used by the drafters of the NPT such as "submit", "consult", "request" etc. It would also include a term for deliberation and what effect would either decision have. The text however does not even oblige the SC to consider the notice or to take any other action whatsoever, as would be expected if it were to render judgment.

Despite the lack of ambiguity, obscurity, manifest absurdity or unreasonableness,[21] one could still refer to the NPT's drafting history to shed light on the admittedly non-usual requirement of notifying not only states parties but also the UNSC of a withdrawal. But these *travaux*, found in the proceedings of the First Committee of the UNGA,[22] do not further clarify the purpose behind it. It is found originally in the first draft proposed by the USA in 1966; that put forth by the USSR mentioned only that notice shall be given "to all other Parties to the Treaty".[23] Later in 1967 drafts from both states were identical and followed the USA's formula. Amendments proposed by several states mostly followed this formulation, one of them proposing "notice to the depository governments" instead. Other amendments to art. X were mainly directed at the reasons given for withdrawal as mentioned above (fn 13) and didn't make it to the final text in any event. No further discussion, comment or reference to it has been found in the proceedings.

Nor there exists any previous practice of submitting such decisions for the consideration of any non-national body, political or judicial. The supreme interests of the state party, determined via its national sovereign rights, are the arbiters. Treaty matters are an essential, constitutive part of state sovereignty. The authors above provide no evidence of this power being delegated in any way.

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[20] A gap remarked during the drafting by Switzerland. DC/230 p 25.

[21] The grounds on which supplementary means of interpretation can be resorted to as per VCLT art 32.

[22] UN symbols DC228, DC229, DC230 and DC231.

[23] DC/228, p15.

The proposition of a review power by the UNSC is therefore without any grounds.

The fundamental purpose of any notification and its appended term is to allow the other parties to adapt to the new situation. One of law's most crucial values is that of predictability. If agents were allowed to enter or cease agreements at any time it would nullify the organizing and stabilizing effects of legal orders. Parties must have their genuine expectations respected.
However, preparing and adapting is the most that other parties can do. In the end they must respect and live with each other's sovereign decisions. The UN order only imposes that this must be done in a peaceful manner but there is no obligation to engage in one or other kind of interaction. Or, more importantly, the lack thereof. It is not even a customary rule that states recognize each other or hold diplomatic links, let alone making legal promises between themselves.

1.2 North Korea's Withdrawal process

In March 1993 the DPRK issued the following document, which was also circulated to the IAEA:

Letter dated 12 March 1993 from the permanent representative of the Democratic People's Republic of Korea to the United Nations

Addressed to the President of the Security Council[24]

> *I would like, upon authorization, to inform the Security Council of the United Nations that the government of the Democratic People's Republic of Korea decided on 12 March 1993 to withdraw from the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), in accordance with paragraph 1 of Article X of the NPT, in connection with the extraordinary situation prevailing in the DPRK, which jeopardize its supreme interests.*

In this letter it is further stated that the decision was motivated by the carrying out of a joint military exercise between the US and South Korea (Team Spirit), which North Korea considers “a nuclear war rehearsal, threatening the DPRK”, and the passing of an IAEA resolution, at the behest of the USA, demanding stricter inspections to North Korean military sites, which the country considered “in violation to the IAEA Statute, the Safeguards Agreement and the agreement the IAEA had reached with the DPRK.”.

North Korea thus considered these events as threatening to its security and damaging to its national political order, and that they “jeopardiz[e] its supreme interests.”.

In answer to this notice the SC adopted Resolution 825/1993[25] where the Council “considered with concern” the letter quoted above and “calls upon the DPRK to reconsider the announcement”. It took no further action.

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[24] UN symbol S/25405.

[25] S/RES/825 (1993).

One day before the withdrawal would have come into effect (thus on 11 June 1993), the DPRK issued a joint statement with the United States[26] in which it "suspended" that announcement:

> The government of DPRK decided unilaterally to suspend as long as it considers necessary the effectuation of its withdrawal from the treaty on the non-proliferation of nuclear weapons.

This came after mutual assurances of non-aggression and a deal (finalized later) that would provide the DPRK with a light-water reactor in substitution to its plutonium based plants in Yongbyon, which would be shut down, and the delivery of crude oil for energy generation to offset the loss of the reactors.

In 2003 it then made the following announcement:

> **Letter dated 10 January 2003 from the Minister for Foreign Affairs of the Democratic People's Republic of Korea addressed to the President of the Security Council[27]**
>
> *Upon authorization, I inform the Security Council of the United Nations that the Government of the Democratic People's Republic of Korea decided on 10 January 2003 to revoke the "suspension" on the effectuation of its withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), according to which the DPRK's withdrawal from the NPT will come into effect.*

This followed further disputes, culminating in 2002, regarding its compliance with the NPT and IAEA Safeguards Agreements, including an IAEA resolution against the DPRK, on the one hand, and the escalating animosity with the US on the other, such as belligerent statements by then president George W. Bush and the resumption of military exercises with South Korea. All these events were named in the DPRK's letter as reasons for its decision, which it considered as a "legitimate self-defence measure".

Furthermore, the DPRK had in other occasions expressed its dissatisfaction with the NPT regime as a whole. Although this does not modify the DPRK's legal status *vis-a-vis* the treaty, it must be considered in the assessment of *opinio juris*. One particular case warrants mention.
As per art X.2 of the NPT a review and extension conference was held in 1995 to decide, *inter alia*, if the NPT would be extended indefinitely or by one or more fixed periods. Note that the treaty only offers these three alternatives. Choosing the singular form (period) would have given it a (supposedly) fixed lifetime of a further 25 years, and no more. Choosing the plural would have allowed for rolling extensions.
The review procedure is closely knit to the withdrawal clause itself, both being part of the system of checks and balances at the core of arms control regimes and acknowledged by the NPT drafters.[28]

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[26] 1993 DPRK-US Joint Statement.

[27] From S/2003/91, "Annex I to the letter dated 24 January 2003 from the Permanent Representative of the Democratic People's Republic of Korea to the United Nations addressed to the President of the Security Council".

[28] den Dekker and Coppen (2012) p 35.

The proceedings of the conference show that two main proposals, in the form of draft amendments, were offered: one that called for the indefinite extension of the treaty; another that called for it to be renewed in fixed rolling periods of 25 years, with comprehensive review conferences held at the end of each, in which it would also be decided to extend again **or not**, plus a number of other compliance control provisions. This latter proposal was sponsored by North Korea, among other states.
The former however was chosen by a majority in accordance with the procedure laid out in art. X.2.

The proceedings of the conference also include a letter dated 09/05/1995 from the North Korean representative in which he declares that the DPRK "[…]would not participate in taking decisions or documents at the conference", thus effectively abandoning the conference and abstaining in the taking of votes. Abstaining states were considered as non-voting by the conference's rules of procedure. The treaty was thus amended, but with the explicit objection of a signatory. This happened merely two years after the first "crisis" and notice of withdrawal and shows that North Korea did not consider its concerns with the regime properly addressed by the membership at the time. Its deeply-rooted dissatisfaction, which culminated in both withdrawal situations, was therefore by no means unpredictable.

1.3 Validity of the withdrawal and DPRK's status under the NPT

If we apply the substantial and procedural steps previously outlined to this case we can see that:

1- North Korea claimed, on both occasions, that certain events of an exceptional nature (military exercises, IAEA resolutions, official statements from the USA and breaches of agreements) jeopardized its supreme interests (self-defence and political self-determination), in connection to a subject matter of the NPT (development of nuclear technology and nuclear armament);
2- On both occasions, North Korea circulated the notice to most, but not all, states parties and to the UN Security Council, accompanied by its reasons. There is also the matter of the 3 month period.

As mentioned above there is no authoritative review of substantive reasons beyond a reasonableness test, and none shall be attempted here. They seem to be fulfilled clearly enough if read *in bona fide*. Since it does carry relevance, these reasons have indeed been the target of criticism by organizations and states, individually and jointly, all of which are very unpersuasive as is better explained elsewhere.[29]

By any standard the two-step route taken by the DPRK is unusual at best and might seem downright irregular, that is, procedurally flawed. The status of the DPRK is therefore one of procedural adequacy. Procedural flaws may, but do not necessarily invalidate an act. Again we must look at the underlying rationale of procedure, if the faults can be remedied[30] and what their results would be. The problem faced here is how to reconcile the

[29] Asada(2004) section 3.2.

[30] ICJ in Asada(2004) p 348.

procedural “flaws” with the intentions and rights of the parties, which are the supervening principles at play.

Consequently, it seems useful to explore all possibilities in this case and what their (legal) consequences would be. In order not to overextend our attention to this point, we shall follow the comprehensive analysis of Asada (2004), with some additional comments.

Regarding the few states which did not receive a notice individually, we remark that this requirement exists to ensure parties of multilateral treaties are aware of their obligations *inter se* in case of a modification. North Korea's notice could not have remained unknown to certain individual states since they had access to it in at least two official occasions: the circulation of the letters by the Security Council itself (to all UN member states) and by the IAEA (which was also notified) to its membership, which includes all NPT signatories. Furthermore they were made publicly. Thus an “easy remedy” surely exists.

The two-step withdrawal and waiting periods are more severe matters. According to the view of Prof. Asada, to which we subscribe, there are four logically possible scenarios in this case:

1- Only the first withdrawal of 1993 is valid, and not its suspension, so the DPRK has not been a party since 12 June 1993;
2- The 2003 withdrawal is valid but, unlike the DPRK claims, only 3 months after its notice (10 April);
3- The withdrawal is valid as issued by the DPRK, rendering it unbound by the NPT as per 11 January 2003;
4- The withdrawals are wholly irregular and the DPRK is still a party to the NPT.

While several states continue to abide by possibility 4, unsurprisingly there are none that follow 1. In fact the “suspension” of withdrawal, which indeed is not provided for in the NPT nor in customary law, was met with enthusiasm and relief by the international community, which promptly accepted it. It was also acknowledged in a number of official documents and statements.[31] The DPRK was considered and acted, *de facto* and *de jure,* as a state party for the ensuing 10 years.

That some states would find the unusual procedure so crippling as to negate the whole process seems more a matter of political rather than legal expediency; customary law does not require explicit or tacit acceptance or approval (by these states) of such sovereign decisions. It also invites the question of what remedy could be applied, since the unavoidable “obstacle” remains North Korea's desire to exercise its right to leave the NPT.

The best way to harmonize the main overarching principles at play, that of respect for sovereign decisions and of the reasonable expectations of the other parties, is to consider the withdrawal process as valid but not exactly as intended by the DPRK; thus withdrawal was effective not on the 11th of January but rather on the 10th of April. In this manner the 2003 announcement, with its annexed statement of circumstances, may be considered as a new notice of withdrawal and a proper remedy. Since no major developments took place between these two dates (except for the unconfirmed re-activation of the Yongbyon reactor) it is hard to think of any objective way in which the parties were damaged and how

[31] Asada (2004) p 344.

to consider any other form of compensation. At the time it could certainly be expected to allow for some kind of information sharing regarding production, movement and quantities of nuclear materials, so as to give states a way to calculate risk and how close the DPRK could be of a nuclear device. On hindsight, however, the fact that it took more than three whole years for the DPRK to arrive at a working test device (and even one which reportedly might have failed) points to an incipient level of development; and thus of risk.

In conclusion, it can be confidently said that, at least as of 10 April 2003, the DPRK is not a party to the NPT and is not bound by any of its provisions.

Chapter 2 - The SC

Having established both the legal and factual backgrounds that prompted the adoption of the resolutions and exposed the standing of one of the actors (DPRK) we now turn to the second actor: the United Nations Security Council. In order to properly understand the significance and consequences of the resolutions it is essential to look at the body that issued them.

We recall at this point that the United Nations is an organization created by a treaty, the Charter, and its structure, as well as the form and function of its constituent parts (organs), are all set therein. The text of the Charter is the primary element to be used in the analysis of their functioning[32] and will receive our attention at this point.

We will look at the general framework of the SC and its explicit powers set in the Charter. This will prompt an analysis of implicit powers.
The so-called "mandate" of the SC will be portrayed in more detail, adding to the results above a detailed interpretation of arts. 24, 25 and 26 of the Charter, thus exposing the power relations between the SC and the UN member states in the specific area of arms control.
Third, we directly explore the issue of limits to the SC's powers and mandate, based on the Charter and international law *in totu*.
Fourth and last, a brief discussion on the roles of builder vs keeper of the peace is offered.

2.1 The Security Council's Mandate

In this part we will examine the SC's mandate, that is, the roles, functions and responsibilities assigned to it by the UN Charter, and more specifically how this relates to the area of arms control.
The first step will be to offer our direct interpretation of the primary source: the text. As a second step, the drafting and negotiating history of the Charter will be examined to further clarify our findings. Third, interpretations stemming from the ICJ and scholarly commentary will also be referred to.

The Security Council is created by art. 7 in Chapter III: "There are established as the principal organs of the United Nations: [...] a Security Council [...]". Art 23 in Chapter V provides for its structure, including the five permanent members, while art. 27 sets out the crucial issue of their veto power.

We will find the constitution of the SC under the heading "Functions and Powers" of Chapter V, comprising articles 24, 25 and 26.

The "mandate" of the Security Council properly speaking is set in art. 24.1, which is to have "primary responsibility for the maintenance of international peace and security". The form in which it is to do so is further described in art.24.2.

Art. 25 establishes the legally binding force between SC decisions and UN members.

[32] VCLT, ICJ art 38.

Art. 26 at last describes the role the SC is to have in the particular field of arms control.

Let us look at the dynamics here established between the UN members and the SC. The first important point to note is that these articles make reference to the member's authority to delegate powers and bind themselves legally. This is an expression of their state sovereignty, a concept inherent to the principle of sovereign equality recognized by art. 2.1. It is understood that the SC can do what the members (by the Charter) entitled it to do, not what the members entitled other organs to do, and not use powers they retained themselves by means of not laying them down in the Charter.

Navigating the provisions sentence by sentence will allow us to gain a better understanding of their meaning.

Interpreting art. 24

In order to ensure prompt and effective action by the United Nations

Two elements must be analysed here: prompt and effective. Prompt here means fast, without delay, timely. This reflects the time-sensitive nature of security threats, the desire to act without being lost in prolonged negotiations and not being bogged down by them. Effective picks up on this last line, in a desire to go beyond mere investigations and recommendations, declarations or diplomatic urgings, so that the UN Charter would not become hostage to the occasional whims of states but could be actually enforced. This is in fact one of the core innovations brought about by the post-WWII order, drawing from the failed experience with the toothless League of Nations.

… confer on the SC primary responsibility for the maintenance of international peace and security

The operatives words are “confer […] primary responsibility” and, in our context, “maintenance”. The first part acknowledges that peace and security are concerns and responsibilities of the whole international community, but its constituents (states) cannot address this individually or independently; thus a centralized entity, with state-like powers, becomes necessary. It further states that

… in carrying out its duties under this responsibility the Security Council acts on their [the member's] behalf.

Thus forming not only a centralized but a representative body. It also warrants note that this clause seals the delegation of powers, but at the same time limits representation to this specific field and no other.

Further, reading this in conjunction with arts. 2.3 and 2.7, the freedom of decision of states to pursue certain avenues is here delegated, even abrogated, and given to the SC. Unlike before, war-making is no longer within the sovereign sphere of statehood; it is in fact proscribed except in specific circumstances, one of them being by decision of the SC. Such decisions, when taken on security issues, take precedence over the member's choices. That is the meaning of “primary”. But it also means that the SC is not the only one bearing the burden of maintaining the peace; this remains within the competences of individual states;

the SC has "primary, but not necessarily exclusive, competence".[33] We would paraphrase this to say primary, but necessarily not exclusive competence.

The second part, "maintenance", must likewise be read in line of other Charter provisions, which phrase the formula as "maintain or restore international peace and security.".[34] Logically if anything is to be maintained or restored it must have been previously established. Both words imply action upon existing conditions which are to be preserved.

A qualification of this principal role is given in art. 24.2:

> *In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.*

Therefore in accordance with article 1 of the Charter, which starts thus:

> *The Purposes of the United Nations are:*
> *1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;*[emphasis added]

Interpreting art 25

Article 25 is phrased in an ambiguous way[35] which allows for different interpretations, all of which are grammatically correct, logically and legally acceptable. The options here presented follow the same basic shape as that given by Peters (in Simma), but differ in substance.

> *The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.*

The difficulty is in determining whether the phrase "…in accordance with the present Charter" is a relative clause and what it refers to (its head noun). There are mainly three possibilities. If we were to rephrase it in order to highlight these different readings, these would be the results:

1 *The Members of the United Nations agree to accept and carry out the decisions of the Security Council, in accordance with the present Charter.*

or equivalently

> *The Members of the United Nations agree, in accordance with the present Charter, to accept and carry out the decisions of the Security Council.*

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33 Simma p 767 quoting ICJ Wall advisory (n 19) para 26.

34 E.g. arts 39 and 42.

35 Frustratingly the same ambiguity is present in the Spanish and French versions of the Charter. The same reasoning exposed here applies to these languages. The author ignores whether this is valid for the Russian, Chinese or Arabic versions.

Which means merely that the obligation to accept decisions is something that is laid down in the Charter. This interpretation would make the clause merely declaratory and thus redundant: members are already supposed to act in accordance with the Charter and this article stipulates one way in which this must be done: by accepting the Council's will.

2 *The Members of the United Nations agree to accept and carry out, in accordance with the present Charter, the decisions of the Security Council.*

This interpretation qualifies the manner in which members are supposed to carry out decisions, namely, that in doing so they should not violate other provisions of the Charter. Contrary to what Peters suggests,[36] and in contrast to the above, this would not make the provision redundant, superfluous nor confusing. It establishes that a SC decision is not to be carried out **regardless of consequences**, or by "all means necessary", and that members are not completely free in their choice of how to give them effect. Given that the SC itself may, for example, deviate from practically any other (non-Charter) norm of international law this seems like a valid qualification.
The jurisprudence of the ICJ seems to favour this interpretation.[37]

3 *The Members of the United Nations agree to accept and carry out th[hose] decisions of the Security Council [which are] in accordance with the present Charter.*

This last interpretation, which finds support at least in a dissenting opinion of an ICJ judge,[38] treats the clause as restrictive, assigning it to the noun "decisions" and thus modifying it. Members are not supposed to carry out any and all SC decisions, but **only those that are harmonic with the rest of the Charter**.

Gill also points out that the SC is limited to acting within the Purposes and Principles.[39]

Note that there is a fundamental difference between 2 and 3. While 2 deals only with the means in which a decision is to be implemented, 3 puts the very decision into question.

Even though 3 does authorize second-guessing the Council's best judgment and could lead to undermining its authority, there is absolutely nothing legally wrong with this idea. Bedjaoui (1994) for example, contends that members are free to interpret the Charter, and thus its products. The word "authority" doesn't even appear in the Charter. The SC has "responsibilities" and its relation to the members is not one of supervenience and subordination, but of representation; the SC "acts on their behalf" (art 24.1). Nor should the Charter necessarily or preferentially be (legally) interpreted according to any political principle.

It warrants suspicion to interpret art 24.2 as limiting the SC only to the "Purposes and Principles" of the UN (that is, only arts 1 and 2) in exclusion of the rest of the Charter. Since art 2.5 "restricts" the activity of the organization as a whole (including the SC) to what is mandated in the Charter that would be contradictory.

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36 Peters in Simma 807, mn 56.

37 Peters in Simma 807, fn 102.

38 Namibia (advisory opinion), in: Peters in Simma 807, mn 56.

39 Gill (1995) p 41.

Furthermore, art 24.2 establishes that the SC will discharge its duties using powers given in other parts of the Charter. Art 36, for example, while giving the SC power to make recommendations (36.1), also imposes on it to consider steps already taken by disputing parties (36.2).
It is moreover altogether incoherent that an organ created by an instrument be allowed to ignore parts of that very instrument that would apply to it.

Although the literature and our discussion talks of "different" interpretations, the judicious reader will have noticed they are not conflicting and much less contradictory. One of these interpretations does not exclude any of the others. While usually opting for one implies not opting for the alternatives, this doesn't have to be the case. In fact, we propose that all three interpretations are concomitantly correct; not, however, that they are all "possible", to be picked and chosen *ab libitum* depending on what one wants to squeeze out of the text! We rather put forth the idea that all of them must be taken at the same time. Thus art. 25, in one stroke, "reinforces" the member's commitment to the Charter, establishes a way in which they must act in a particular circumstance (in face of a decision) **and** qualifies in which cases they are bound to act.

It is not strange to the Charter to qualify the activity of its organs in this way. Imposing limits and qualifications are normal elements in Charter structure and finding which apply to the SC in particular is not extraneous. In art. 24 itself it is stated that the SC only acts on the behalf of member states "in carrying out its duties under this responsibility". This is clearly restrictive; if carrying out other activities (and other duties) the SC would not act as banner-bearer of all UN members and would not act in their stead, nor would members be bound by its decisions.

The same kind of qualification appears in art 94, which deals with the ICJ. It states that a member "undertakes to comply with" ICJ decisions "in any case to which it is a party". Thus not to all decisions absolutely.

The conclusion of this reasoning is that SC decisions are not to be followed to the letter in all circumstances. Absent a specific provision on interpretation, that act is left to the actors subject to the Charter: the member states. They must ascertain the legality of these decisions.

Art. 26 interpretation

> *[…]the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.*

Two elements stand out of art 26: a duty[40] and a limitation.

It gives the SC an obligation ("it shall" is imperative): to formulate plans "for the establishment of a system for the regulation of armaments"; an arms control regime, in current parlour.

Note however that the SC is to **submit** plans to the member states. This language is unequivocal: they who submit cannot impose nor decide.[41] In here we see a small kernel of

[40]Schütz in Simma, p 860 mn 13; Joyner (2007) p 495.

the oft-mentioned "legislative powers" of the SC. Indeed it seems that the drafters of the Charter gave the Council a semblance of legislature in the sense that it debates and proposes rules. Legislatures, though, have the power of actually choosing which rules it formulates. This power is absent here; there is no discretion in topics to legislate on. It is also absent from art. 24.2: the "specific powers granted to the SC" are in Chapters VI-VIII and XII; not in Chapter V! Thus art. 26 is rather unique in that it imposes a burden on the Council but does not further enlarge its capacities.
We propose that this is an intentional limitation on the competencies of the SC. In what regards the very establishment of an arms control regime the members themselves retain not only their competence but "their full sovereignty over decisions to enter into legal relationships in th[is] area[…]".[42] The Council has here a mere advisory role. This makes sense from the individual member's stance, who would be reluctant to give the P5 the legal power to restrict what and how many armaments they could have. Reading this in conformity with arts. 2.7 and 51 gives more grain to this proposition. Further, it gives shape to the concept of "primary, but not exclusive" responsibility in security matters, a distinction that would be vacuous if the SC had primacy in all cases. This complementarity is also found in art. 11.1 of the Charter, which specifically empowers the General Assembly to consider arms control issues.

The drafting history of the Charter makes clear that the SC was not to have determinative powers regarding levels or types of armaments. Although the number of troops and weapons was historically (and then) considered as a good objective measure of military capacity and aggressive intent (if not just potential) the prevailing view at the Dumbarton Oaks talks, carried over to the San Francisco conference, was that this would be too hard to control, too restrictive if put as an obligation and would not garner much support from smaller states who would fear Council abuse and encroachment on the right of self-defence.

This was considered in some length at the first conference. In fact the American proposals did envisage the Council as having the power to control armaments directly.[43] The "Big Three", though fundamentally agreeing, had dissonant views on how to empower the Council and whether this was indeed strictly necessary as an explicit power, the Soviets particularly giving more import to the creation of a mighty air force that "could enforce any mandate" and make big armies irrelevant. It was also discussed that smaller states would be suspicious of a Council having such a power and might not wish to join the organization and submit to the interests of the larger nations. The idea that free choice over one's own armaments was an inalienable sovereign right held sway as well.[44]

Because of this, arms regulation "received almost no attention" at the drafting of the UN Charter in San Francisco. Russell also argues that the very small knowledge about the atomic bomb at the time was not the cause; the situation would not have been different,

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41 The proposition of Kelsen (1953, pp 105-106), that the SC could submit such plans and rule any state that did not adopt them as a threat to the peace based on its art 39 powers seems, although interesting, utterly contradictory.

42 Joyner (2007) p 496.

43 Russell (1958) pp 266-267.

44 ibid p 672.

she says, had the delegations carefully considered the existence and power of nuclear weapons.[45]

So it came to pass that the role of the size and nature of armaments in the maintenance of peace and security was resolved in the form seen in the Charter: the SC would not control it directly but it would be within its realm of consideration (arts. 24, 34, 39 and 47.1); it would however propose measures to control it (art. 26 and 47.1); and it would be able to negate any advantage coming from a large or powerful army anyway by having an international air force at its disposal (art. 45).

Up to this day efforts to create a truly international, UN controlled military force has not come to fruition and even the Military Staff Committee has never been created. This part of the Charter has at least in practice evolved into the "Blue-Helmet" peacekeeping model and the authorization to use, rather than the requisition of, national military power to enforce decisions. This in itself hasn't yet acquired a stable structure.
The SC has adapted to the difficulty in implementing the Charter as envisioned by bypassing certain specific clauses and sticking to its broader, looser powers to fulfil its mandate. This is in fact a process of devolution of granted powers: instead of demanding to control forces as would be its due, the SC has allowed states to retain control of their enforcement contingents. Thus even while "deviating" from the Charter the Council remains within its confines. The sovereign trade-off that gave rise to the UN is also maintained.

It is natural to expect the same process in matters of disarmament. The Council, or at least the P5, has sponsored and encouraged conferences and treaty-drafting in the area of arms control and non-proliferation, likely in the spirit of art. 26, but efforts to act upon its provisions strictly speaking remain unknown since at least 1952, when the Commission for Conventional Armaments was dissolved. The SC has then fallen short of its actual responsibility to "formulate and propose" rules.

The exception to this general trend would be the case in point here. We shall return to this matter specifically when interpreting the resolutions in chapter 3.

2.2 The Security Council's powers in sight of the mandate

As we have seen above, the role assigned to the SC by the treaty signatories (the UN members, therefore) is laid down fully in Chapter V, particularly in arts 24, 25 and 26. The first states that the SC has, by the authority of the members, "primary responsibility for the maintenance of international peace and security", and that this duty is to be carried out in accordance with "the Purposes and Principles of the United Nations", via the use of "specific powers". Additionally, according to an early decision from the ICJ[46] and subsequent institutional and state practice, such powers as are needed to fulfill the "purposes and principles of the United Nations" are implied and organs may take and use them as they best see fit under the doctrine of *kompetenz-kompetenz*.

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45 ibid pp 685-7.

46 ICJ *Certain expenses*.

What are these “specific powers”? Art. 24 explicitly gives their address: they are to be found in Chapters VI, VII, VIII and XII. The latter two deal with areas not of our immediate interest (“Regional Arrangements” and “International Trusteeship System”, respectively) and will not be examined. The powers found in Chapter VI speak only of recommendations and considerations. Thus while the SC may by those means interfere with matters which are usually left to the wills of the involved parties, these parties are in no strict legal obligation to follow these recommendations.

Chapter VII powers are, however, binding. In connection with the language of art. 25, UN member states must implement measures taken under arts. 39-42. Their use thus creates legal obligations and modify the legal landscape in its totality; that is to say, the obligations owed by the parties individually, *inter se*, to third parties, to the international community at large, and to the organization itself.

We must now examine these powers in order to obtain a clearer image of what the SC can do. Since it must act within the principle of legality, powers must either be explicitly stated in the Charter or implied and exercised under *kompetenz-kompetenz*. Discussion will be restricted to arts. 39 and 41 since provisional measures as such (art. 40) and use of military force (art. 42) are not invoked in either resolution 1718 or 1874.

Art. 39: Defining threats to the peace

This determinative power is the foundation for SC action. The Charter empowers the SC to classify a situation per the danger it poses to international peace. This determination is of a factual nature and has legal implications; it could be compared to a judgment. Since the use of other powers are only allowed when situations reach these levels, it is the first element to be resolved.
Even a cursory scan through a myriad of SC resolutions invoking Chapter VII shows that they are always preceded by such a determination, usually in the preambular section. In some occasions it happened even before any Chapter VII powers were used, in separate resolutions. Thus practice proves both the temporal-historical and the logical precedence of art. 39 determinations.

Neither in the Charter nor elsewhere is any qualification of how this determination is to be performed. No direct reference is made to it, unlike for instance the method for the peaceful settlement of disputes in Chapter VI, where SC involvement is in fact regulated in detail, including by mentioning which elements the SC should consider (art. 36).

No such requirements exist for these Chapter VII determinations, as was the original intention. Put before the classical dilemma of strict regulation (precise but inflexible) versus broad guidelines (vague but versatile), the states at Dumbarton Oaks compromised on the latter. This was mostly given to the nature of security threats, which cannot be so well foreseen as to allow for a rigid legal structure.

This has prompted authors to interpret this power in rather extreme ways. We read, for instance, that “The Council's discretion to determine the existence of a threat to the peace is virtually unlimited.”[47] and that in any case the SC has a legitimate, wide margin of

[47] Gill 1995, p 42, citing Kelsen.

discretion.[48] Another example is of particular import in this case: "The Council has the power to characterize [...] (conceivably) the acquisition by a State of nuclear or other weapons of mass destruction,[49] as threats to the peace."[50]

Care should be taken not to confuse *discretionary* with *arbitrary*, nor "virtually unlimited" with "literally unlimited". Discretion is a faculty to be exercised within a framework, which in its turn might be explicit or implied, but nevertheless establishes boundaries. As we have shown above, these boundaries are laid down by the mandate.
The "virtual" character of this freedom to determine is due to the ability to encompass the largest set possible of threatening situations, including those that are not even conceivable now but might arise in the future; the very emergence of nuclear weapons and (most pungently) their means of delivery is a perfect historic example. Before 1905[51] (say) no one could have foreseen, even in very general and putative terms, that such threats could exist.

In any case this determinative power of the SC, albeit "virtually unlimited", was granted for specific purposes and under specific conditions and expectations from the UN membership.

First, there is the matter of fact correspondence: in an absurd scenario, the SC could not determine that cataloguing books in the Peace Palace Library by sorting them by size is a threat to the peace. It seems primary to argue that an art. 39 determination could escape the realm of the actual facts that, to the best judgment of a "reasonable person", contribute *in reality* to a security scenario.

Second, certain consensus exists around the basic idea that the SC's powers **are** limited[52] but is has shown difficult to obtain a clear idea on what they are exactly. The scholarly literature presents a wide range of positions on the matter. Kelsen notoriously held that the Security Council had unlimited discretion.[53] Often cited specific limits are *jus cogens*[54] norms and the Charter principles.[55] This also follows naturally from the preceding section;

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48 Bedjaoui 1994, p 52.

49 WMD is how three kinds of weapons are known collectively: *chemical* (usually gases and liquids that cause damage by chemically reacting to an object), *biological* (virii, bacteriae and other living pathogens) and *nuclear* (energy released by the fission or fusion of atomic nuclei). This is in opposition to so-called *conventional* weapons that cause damage by mechanical forces and/or regular combustion. The differentiation is not (nor meant to be) scientifically precise. See eg. WMDCommission (2006).

50 Gill 1995, p. 42-43.

51 The year in which the German physicist Albert Einstein first showed, among other things, how much energy is stored within all matter and could be released by a process of nuclear fusion or fission. The well known mass-energy equivalence follows from the theory of special relativity. For a detailed account of this and its historical importance see e.g., Pais (1982).

52 See e.g. Bedjaoui (1994) p 35, de Wet pp. 186-7 and Schweigman (2001) ch 4.

53 Kelsen (1953) p 294, in: de Wet (2004) p 185 fn 31.

54 de Wet (2004) pp 187-191.

55 de Wet (2004) 191-215 and Schweigman pp 169 seq.

the SC's mandate circumscribed its activity to the Charter and there are specific clauses in that treaty to give limits to the SC's exercise of its powers. As de Wet asserts "the implied powers do not, however, enable the Security Council to override specific limitations provided for in the Charter as such an open-ended power would effectively make every other Charter principle redundant".[56] It is a direct logical conclusion that art. 39 determinations are identically curtailed.

The ICJ has, likewise, taken the position that limits do exist, in at least two advisory opinions: Admission to UN Membership and Certain Expenses.[57] The ICTY has also denied that the SC is not subject to legal limits both generally,[58] and specifically under art. 39:

> But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.[59]

As we discussed above, it was early envisioned that the SC should be able to determine when a certain level of armaments became a "threat to the peace". This could naturally be assumed to go for certain kinds of weapons as well. But as we have shown, this was eventually abandoned and not even considered at the San Francisco conference, being left out of the Charter except in the form of art. 26.

Thus one clear limit stemming from the text and drafting history of the Charter is in the very area of arms control. Levels and types of armaments are out of bounds.

It shouldn't be forgotten that the "determination" is only the first part of the equation: it doesn't exist in and of itself, but as part of a reactive chain. Although it is conceivable to speak of the authoritative power of a determination alone, the SC does not use it for this purpose. It does so in order to trigger the application of binding measures, as opposed to the merely exhortative ones found in Chapter VI. The binding measures themselves, the actual "enforcement powers" of the SC, are the effective elements. To them we now direct our attention.

Art. 41: adopting peaceful measures

Art. 41 empowers the SC to decide on "measures not involving the use of armed force", which the member states will be "called upon" to apply. It lists several examples of coercive measures aimed at pressuring states, taken from the traditional repertoire of international relations used in isolating an adversary. The original rationale behind them was to create non-military difficulties for a belligerent nation and thus cause its submission, as well as dissuade it from violent actions, in the hope that this would render military action unnecessary.

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56 de Wet (2004) p 193.

57 Peters in Simma 809, MN 63-64.

58 Tadić para 28.

59 Tadić para 29.

But once more we must bear in mind that flexibility and the ability to effectively respond to new and even unusual situations is the overarching rationale of SC powers. The SC has been allowed room for "creativity" by construction, as already seen in our presentation of the *travaux preparatoire*. The language of the Charter also allows for this interpretation, and so has subsequent custom. One case in particular offers an interesting avenue to discuss this point.

The question of the SC's ability to create novel solutions was notoriously raised in the Tadić case before the ICTY.[60] It was there argued that the establishment of a tribunal was outside the SC's competencies because it was taken as measures under art. 41, which do not explicitly list this possibility and should be read as exhaustive, and could not be taken as a measure under Chapter VII anyway because the connection between peace and security on the one hand and (international) criminal justice on the other was doubted; an issue within the context of the factual correspondence mentioned above.

That the SC is restricted in its choice of means doesn't survive a reading of the language in its usual meaning. The enumeration in art. 41 is not exhaustive but exemplifying; this is clear by the phrase "may include". The usual way to restrict choices is to use terms such as "shall include", "only", "one of these" etc. Neither does it seem to follow from other Charter provisions that such a limitation exists. The ICTY Appeal's Chamber took this same view.[61]

Whether or not international criminal justice has a bearing on peace and security was not discussed in the merits. The ICTY took the view that it was within the SC's discretion to make for such a determination; that is, the SC's decision that both issues are factually linked was to be taken as a legitimate exercise of its power.

Are we then to conclude that the measures that could be taken under art. 41 are also "virtually unlimited"? Once more it is prudent to avoid this chimera. What general shape must an art. 41 measure have?

First we look at the inter-textual requirements: they must not involve the use of armed force and are to be employed to give effect the Council's decisions. They may (or may not) involve UN members in its application, though in line with the above interpretation of the term "may" this is not prescriptive.
Second, we contend that these measures must also be kept within the confines of the Charter. Consequently an art. 41 measure cannot itself be a violation of the Purposes and Principles (weak limit), nor of any other specific Charter provisions (strong limit).

The Tadić case also gives us a glimpse into this problem, since the SC seemingly encroached within an area "traditionally" held exclusively by states: the exercise of criminal jurisdiction. This was also raised before the ICTY as an illegitimate attack on Yugoslavia's sovereignty.

But the SC did not restrict Yugoslavia's capacity to render justice; merely abridged it in relation to certain persons, but even then respecting the principle of complementarity. The establishment of the ICTY did not prevent any country from the former Yugoslavia to take

[60] Tadić.

[61] Tadić paras 35-36.

action in that same field; they could and did create laws and courts to adjudicate on the same subject matter, and in fact even on the same persons.
It could even be argued that had those states exercised their jurisdiction in a manner consistent with international law the SC would not need to act and would have found scarce reasons if it decided to do it anyway. Serbia, for instance, could not have chosen not to prosecute at all any alleged war criminals; its choices were restricted by law in general. The principle of non-impunity is *jus cogens* and of a customary nature. Its only choices were to have properly prosecuted and either acquitted or convicted the accused persons. This being said, the UN Charter does not otherwise address the issue of international criminal justice and thus there is no constitutional barrier to the SC acting in this area.

The same is not true of other fields of international law and relations. Our discussion on the limits imposed by the mandate are here equally valid. Thus in taking decisions on enforcement measures short of military action, the SC must still be kept within the boundaries of the Charter.

2.3 The Security Council as an emergency actor: keeping the peace vs building the peace - That the SC was meant and designed to act on emergencies (only).

In complement to the arguments presented above it seems useful to discuss in more detail the role of the SC as "maintainer" of international peace. A simple dictionary definition of "maintenance" is "the process of preserving a condition or situation". This means that a certain given scenario must be kept as is.

A question that may occur at this point is how these conditions came to be and which actors are responsible for their establishment in the first place. In specific terms, what is "international peace" and who creates it.

Peace is defined negatively as the state of absence of conflict. Nations actively interact with each other and find themselves in competition and disagreement, which can be and has historically been resolved through violent means. Consequently, a peaceful environment requires not only a passive element (refraining from violence) but also an active one: setting in place conditions to minimize the use of force.

There are naturally several ways in which this can be achieved and has been used throughout history. These can be unilateral or reciprocal. In the former, an action is taken individually by a party that prevents it from being subject to an attack, for example by means of defence, deterrence or even physical elimination of an adversary. In the latter, parties mutually take measures in concert to prevent the outbreak of hostilities between themselves; this may involve a dominance/submission relationship (such as vassalage), scaling down their offensive capacities, signing commercial agreements or mutual legal assurances on behaviour.

Regardless of which particular method is used, we can see this in general as the process of **peace building**. That is any modification of conditions that cause a state of non-violence to be present.

The UN Charter has legally imposed a world-wide state of peace as the paramount condition in international relations. Art. 2.3 and 2.4 impose, respectively:

1. All Members shall settle their international disputes by peaceful means;
2. All Members shall refrain in their international relations from the threat or use of force.

Thus nations have given each other a mutual legal agreement that no violence will be resorted to in the pursuit of their international policies. This is however insufficient, since legal agreements do not in themselves alter the objective conditions that define a state of peace. Thus concrete actions and behaviours must be present to effectuate this legal commitment.

These commitments and behaviours are established between the same kinds of actors: states. The decisions and objective actions taken by states is what defines the general conditions in which peace takes place.

As stated above, these conditions come about through a myriad of interactions: mercantile, economic, cooperation in scientific and artistic fields, information sharing on military activities etc. This is what occurs in practice. But there is no general rule or principle in international law mandating a choice for one or the other, nor the form in which any must be executed. Rules that do exist are put in place by mutual legal agreements, which are themselves within the discretion of states to accept or not.

Arguably the most important legal agreement currently in force, the United Nations Charter provides for no specific rules on choices or methods of establishing peaceful relations. Art. 1.2 speaks vaguely of "develop[ing] friendly relations" and "tak[ing] other appropriate measures to strengthen universal peace". In other words, the Charter is not a Legal Code for peace building. The UN itself is but a forum for meeting, discussion and cooperation, or in the language of art. 1.4: "a centre for harmonizing the actions of nations in the attainment of [...] common ends". Whatever comes out of it depends on the freely exercised sovereignty of its member states. This derives from the fact that the "output" of UN organs is not legally binding, except those of the SC under the terms already exposed.

But more to the point, it is said nowhere in the Charter that the Security Council has authority, power or even representation in the positive establishment of these peaceful relations. Its role is of an altogether different nature:

> "The Council's wide mandate is primarily directed at preventing the outbreak or spread of threats to international order and stability and in suppressing any unacceptable use of force by a combination of diplomatic, economic and military coercive measures" - Gill 1995 p.46

We recall here the unambiguous phrasing of art. 26, which speaks of "submitting plans for the reduction of armaments". This sole positive role is thus by construction not law-giving.

The SC has no reason to act or even to exist in a stable peaceful environment. Its existence is justified by the unstable nature of a universal peace, which can be disrupted even by a single small agent quite quickly. Therefore the logic behind the SC is not that of permanence, but of emergency. It was designed to forestall imminent conflicts and only because of this, to act exceptionally and, if needed, against international law.

As an emergency actor, the SC is given extraordinary powers because it must act in extraordinary situations, but it must be restricted to them. It is the nature of emergency

powers that they must be overwhelming; this guarantees effectivity. It is equally important that they be not of continuous and unrestrained application either in scope or in time. When an arms embargo was imposed in Yugoslavia by the SC with Resolution 713 (1991), it was "until the Council decides otherwise following consultations [...]", further stating it would remain seized of the matter "until a peaceful solution is achieved".
The logic of emergency calls for the suspension of "normality rules", since these have been already breached anyway by the emergency itself. If those rules were enough to contain it, it would not have appeared. Hence the concept of emergency powers, which are those that can and should in one step restrain the emergency and in the following step restore normality. The SC is often compared to a "world's police" exactly because national police forces in the post-WWII world assumed the role of emergency actors, possessing extraordinary powers and acting under a restrictive regime that only allows for the use of such powers in a particular (albeit fuzzy) range of ab-normal, exceptional situations.

The rationale of emergency demands that powers be restricted in time. Since it is aimed at the restoration of a certain normality, the continuation of its application would substitute the emergency regime for the desired previous condition. Even a very long-lasting emergency is expected to eventually cease and not to become the new norm. For this reason alone the SC could not be a world legislator, much less so in the area of arms control. Arms control is a manner of peace **building**, and not of peace **keeping**. Only in the latter is primacy given to the SC. In the former it doesn't have any powers at all.

It stands to reason that the best way to keep a peace is to build a lasting one. The SC has indeed been criticised for acting only on the 11th hour, or not at all, and by using only its most extreme powers (art. 42) contributing to a more conflicting world.[62]
The wedge must still be driven in. There is a fundamentally different manner of decision-making involved when parties pursue a lasting interest, which is borne into the choice of means and tools.
The SC has indeed a positive role to play in this very process, within the bounds of the Charter. In fact it has been mandated by the Charter to do so, under art 26.

Note however that the role given to the SC under art. 26 is to **promote** the establishment and maintenance of international peace. It is meant to **aid** the members in creating this peace. The members must establish the peace that the SC is to protect. That is one of the purposes of, for example, the complete freedom of choice in the pacific settlement of disputes, in which the Council is in fact proscribed from interfering.

Although it may be laudable, the intention was never that the SC would itself impose any sort of regime having in view the creation of a peaceful environment. The principle of sovereign equality means that international law and international order remain exclusively in the hands of the international community as a whole, as opposed to being in the hands of the privileged Powers sitting in the SC. They must create a peaceful environment, regardless of the shape or form it takes. It was only intended that the Council should determine if certain present circumstances threatened, breached or violated this

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62 See for a recent example the letter of the Kingdom of Saudi Arabia refusing to take a seat in the Council after being elected thereto by the GA: UN A/68/599. Interesting to note that the letter states that the SC is "[...] according to the Charter of the Organization, the **sole agency** responsible for preserving world peace and security[...]" [emphases added]. It remains unclear whether this is a piece of diplomatic sarcasm, mistake in translation, interpretative blunder or innovation.

environment. It can **only then** act to prevent hostilities from commencing, from escalating, or to cease them altogether. The right and duty to build a lasting peace in their own freely chosen terms is retained by the sovereign states.

Peters (in Simma) argues on the contrary that "[...] a proactive (and not just a reactive or remedial) dimension is inherent in the mandate of the Council".[63] This interpretation is not borne out of a textual or historical interpretation of the Charter, as was demonstrated before. It can only be considered "inherent in the mandate" by already assuming the Council is a global legislator; a feature that Peters herself proceeds to deny to the SC,[64] contending (correctly) that this kind of action would violate the principles of sovereignty and consent. Further, it seems to flow from the application of an axiological principle, which appears to us unwarranted.
Even the "virtually unlimited" discretion of the SC to apply its powers cannot be interpreted in this manner:

> "By not delineating the Council's powers more strictly, the members have not foregone their right to protest against novel types of decision-making. They have not given a blank cheque to the Council."

Peters also points that "it is the GA that is entrusted with the 'progressive development of international law'(art 13.1.a) and not the Council.".[65] Judge Bedjaoui also contends that states retained the "exclusive right" to make "new international law".[66] We can thus draw two conclusions: the SC was denied the power to impose any sort of regime; member states retained their sovereign right to choose which regime they would adopt. This goes for the particular case of an arms control regime as well.

Both of these conclusions are corroborated by international practice. Arms control, such as it exists, is and has been effected by means of treaty negotiation, not by SC action or resolutions, let alone of other kinds of organs and organizations. These have indeed played a crucial role in promoting and facilitating this process, the clearest examples of which are the International Committee of the Red Cross and the IAEA. Nothing concluded in this setting however is done without explicit accord between states and these organizations.

This concludes our discussion of the Security Council. The preceding sections provided a comprehensive picture of its roles and powers derived from primary, secondary and historic sources. We must now take this framework and place it on the concrete case at hand.

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63 Simma, pg. 748 mn 71.

64 Simma pg. 784-5 mn 73-74.

65 Simma pg. 784 mn 72.

66 Bedjaoui pg. 32.

Chapter 3 – Resolutions 1718 and 1874

We have now thoroughly discussed the relevant legal statuses of the two main actors in the situation under scope: the UN Security Council and the state of North Korea. The factual elements have also been presented.

We can at last turn to the analysis of the problematic resolutions themselves. The results found and proposed above will be used in their legal interpretation.

To start, some general remarks will be given on the interpretation of resolutions and the way in which we will carry it out.
Then, the text of resolutions 1718 and 1874 will be scrutinized per paragraph, leaving aside those not of immediate interest to this discussion.
At last, the legal consequences of the findings will be presented.

3.1 General interpretation of SC resolutions

The purpose of SC resolutions is to give effect to SC decisions which, as we have seen in part 2, ultimately aim to maintain and restore international peace and security. Resolutions are, in practice, drafted by one or more SC members (called "sponsors") and put to a vote. Since any permanent member can veto a resolution on substantive issues, this draft is often carefully negotiated and written so as to secure their concurring votes. This is a diplomatic process relying on concessions in substance and phraseology. The resulting legal document is invariably dependent on auxiliary rules of interpretation.

How exactly to interpret them is, again, a point of scholarly contention. In the realm of arms control, Fry[67] for instance proposes to treat the resolutions themselves as treaties and then apply the VCLT. His proposal seems to be tentative and rough, often confusing, leading to contradictions. It would require that VCLT provisions be re-written *mutatis mutandis* which is not as simple as it first seems.[68] For example, a resolution doesn't have an "object and purpose" in the same sense a treaty does. Neither does it have "parties"; who would they be, the members of the SC, the UN membership as a whole, the latter and the former taken collectively? The fact that resolutions rarely make reference to legal provisions and are not written in a usual legally prescriptive form (like treaties always are) makes reference to VCLT interpretation rules very improper; they were designed to interpret a completely different sort of document.

Resolutions do not bear much resemblance to treaties. They are instead orders, supposed to be followed as strictly as possible. Assuming it is a valid order to begin with then a principle of maximal effect applies, also called *effet utile*. SC resolutions, as a general rule, must be read as to maximize their effectiveness in light of the mandate.[69] Its internal structure must be construed as coherently as possible and restrictive interpretations

67 Fry (2014).

68 Wood (2008) p 95 item c.

69 Wood (2008) p 95 item a.

should only apply to specific operative *dicta* to ensure they do not violate other necessary legal tenets.
It should be considered attentively that resolutions carry phrases that are supposed to be orders or decisions (to be followed to the maximum effect) and others that may be recommendations or exhortations (to be left to anyone's discretion), a distinction which would be levelled were a "maximalist" or effectiveness principle be used throughout. Their very carefully chosen words are the result of a diplomatic, not a legal, effort, so this distinction itself is particularly sensitive to interpretation. Therefore the legal character of each element in a resolution has to receive a proper legal "tag".

Seeing as they are the product of the organ of an international organization (so-called secondary law), the first interpretative step must be to relate its contents to the provisions of the original instrument defining the organ (the primary law), which in this case is obviously the UN Charter. As we have exposed in detail above what the roles, powers and limits of the SC are, these are to be our main interpretative guidelines.

This means that resolutions will be interpreted in light of the circumstances giving rise to them (factual correspondence) and the intention of the Council, both of which must be considered as laid out in their preambular section (which might also mention other resolutions or documents, such as reports by the Secretary-General), pre- and post-vote declarations of delegates;[70] with a view to conforming to the Charter, international law and *jus cogens* norms as much as possible and applicable; and regarding the operative binding clauses strictly and effectively, since they are meant to enforce decisions and modify concrete situations on the ground, as it were.

It is of course necessary to clarify these matters because the Charter does not offer methods of interpretation. There is a clear gap, but one that cannot be filled with satisfaction by taking the position that resolutions are to be followed to the letter in any case; they are neither clear enough nor simple enough for this.

3.2 Interpreting Resolutions 1718 and 1874

We will now apply the guidelines described above and the results presented and found in the preceding chapters to interpret Resolutions 1718 and 1874. This will be done by analysing the relevant paragraphs one by one and outlining the internal structure of the resolutions, that is, how the provisions are related to each other. The powers (explicit and implied) used by the SC in them will then become clear.

First we note that a determination regarding a threat to peace, breach of the peace or act of aggression was made, as per art. 39. It has in fact two parts, to be found in the preambular section, §§ 2 and 9 :[71]

> Reaffirming *that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security,*[...]

[70] Wood (2008) pp 93-94.

[71] See Annex 1, Table 1 for the correspondence between paragraphs in both resolutions. Where they differ, the order found in Res. 1718 will be preferred.

Expressing *profound concern that the test claimed by the DPRK has generated increased tension in the region and beyond,* determining *therefore that there is a clear threat to international peace and security,*[…]

The second part is unproblematic, as it makes reference to a factual circumstance of general public recognition. The first should be looked at in more detail.

Why does it start with "reaffirming"? This was in fact not the first time the SC addressed the issue of proliferation in a general way. But in this occasion it did not consider the case in its particulars, rather applying a previous pronouncement in which a quite novel approach was taken and will be here briefly exposed.

In 31 January 1992[72] the president of the SC, speaking on behalf of "the members of the Security Council",[73] meeting for the first time at the level of Heads of State and Government, issued a note which, among several other security-related issues, contains the following:

> "**The proliferation of all weapons of mass destruction constitutes a threat to international peace and security**. The members of the Council commit themselves to working to prevent the spread of technology related to the research for or production of such weapons and to take appropriate action to that end."[emphasis added]

This statement *per se* is not a SC official resolution[74] but more an expression of the views of their individual members at that point in time in their capacity as individual states. It carries no obligations and is not in itself legally binding, not even to those members or to the SC as an organ. Its import lies in the political declaration of a new policy, a sort of forewarning to how the SC will decide matters. This is however a secondary problem; were the SC to have issued the same statement within one or more resolutions it would have the same force, since the fact of the matter is that it adopted this view in resolutions 1718 and 1874 (among others).

The substance of it carries much more importance. It is a blanket decision, made to be applied to any and all circumstances and not related to any specific security conjecture. It is in fact clearly phrased as to be context-independent; any proliferation whatsoever is banned. And not only the spread of the weapons themselves, but also of technologies related to their research!

There is therefore a clear link made by the Council between an arms control issue and its use of art. 39 powers to the concrete case.

Moving further on the preambular section, we read that the SC is

[…]recalling *that the DPRK cannot have the status of a nuclear-weapon state in accordance with the Treaty on the Non-Proliferation of Nuclear Weapons…*

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72 1992 statement.

73 The non-permanent members were: Austria, Belgium, Cape Verde, Ecuador, Hungary, India, Japan, Morocco, Venezuela, Zimbabwe.

74 Not having been adopted by an art. 27 procedure.

Expressing *the gravest concern at the claim by the Democratic People's Republic of Korea (DPRK) that it has conducted a test of a nuclear weapon on 9 October 2006, and at the challenge such a test constitutes to the Treaty on the Non-Proliferation of Nuclear Weapons* [...] [emphasis added]

It is thus basing its decision on articles of treaty law, applying specific treaty obligations to the DPRK. Here the SC acts as interpreter of the NPT; the latter statement makes this clear by linking the nuclear weapon test to a violation of the treaty. Since general treaty interpretation is not a competence given to the SC in the Charter, and since the NPT does not name the SC its interpreting authority, it must be assumed it is implying this power.

As mentioned above, preambular statements are useful to determine the intentions of the Council and establish a sort of "object and purpose" of the resolutions. These are the reasons used to adopt the operative decisions, and to them we now turn.

After the art. 39 determination, the texts state:

Acting *under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41,*

§ 3. Demands *that the DPRK immediately retract its announcement of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons;*

§ 4. Demands *further that the DPRK return to the Treaty on the Non-Proliferation of Nuclear Weapons[...];*

§ 6. Decides *that the DPRK shall abandon all nuclear weapons and existing nuclear programmes[...];*

§ 7. Decides *also that the DPRK shall abandon all other existing weapons of mass destruction and ballistic missile programme[...];*

As a preliminary question, the divergence in language should be addressed: some paragraphs say "demands" and the others say "decides". This difference is not due to a stylistic avoidance of repetition; the term "decides" appears further six times on Res 1718 alone.[75]

In usual language a demand is an imposed condition without any reservations or concessions. It could then be read as part and parcel of the SC's binding measures to keep the peace. On the other hand it is being counter-poised to "decides". Art. 25 clearly states that UN members "agree to accept and carry out the decisions of the Security Council", not its demands.
This would generate two possible outcomes: either both "demands" and "decides" create binding obligations, or just "decides". Therefore it is only the "demanding" paragraphs that need to be qualified. But we need not resolve this issue definitely at this point. If "demands" does not create a binding legal obligation on the DPRK then it is devoid of any legal force and is merely political; the points made here are then moot. Conversely if it is binding, the present discussion applies.

By directly invoking Chapter VII the intention of the Council is to make the resolutions legally binding. The specific reference to art. 41 obviates the peaceful nature of the enforcement action being taken, excluding the possibility of resorting to military force to

75 Wood (1998) however recommends not giving too much attention to the "minutiae of language" due to the manner in which SC resolutions are drafted. Consistency and legal precision are not often considered. See p 95 item d.

comply with its contents. It barely warrants mention that these are powers explicitly given by the UN's constitutional document.

In addition to those quoted above, operative paragraphs 3 and 4 are also linked to this part of the preamble:

> *Deploring* the DPRK's announcement of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons and its pursuit of nuclear weapons

And are consequently an attempt to address this particular situation by ordering the DPRK to sign a specific treaty. This is yet another power the SC is exercising which is not explicitly provided for in the Charter. We also recall that the lapse of time between the last announcement of withdrawal and the first resolution is that of three years. In 2003 the SC issued no words at all regarding the DPRK's notice.
It could also be seen as an attempt to review the withdrawal in the manner which we have discussed in section 1.1.
The treaty this state is being commanded to sign, as we recall from section 1.2, is now of indefinite duration. Since no temporal window is provided elsewhere in the resolutions this specific measure has a putatively permanent character.

The following operative paragraphs of interest, 6 and 7, are anchored in the preambular statements that the DPRK cannot, in the SC's view, legally possess nuclear weapons. This is the only source of the impediment; the SC does not at any point state that the DPRK having these weapons is *ipso facto* a threat to the peace. It does indeed declare the nuclear tests as such; and then demands in operative paragraph 2 that North Korea "not conduct any further nuclear test", thus completing the circle.
We remarked above that the SC acted as interpreter of the NPT; now it is also acting as its enforcer. This is not a power being implied under the general responsibility to maintain peace and security: the explicit reference to the provisions of the NPT make this very clear.

These *dicta* also apply to a concrete case the general policy of "any proliferation as a threat to the peace" discussed previously in this section. The 1992 presidential statement is thus also a source for the taking of these decisions.

Finally, the order to dispossess a state of a whole class of weapons that it has demonstrably acquired marks the decisions as measures in the control of armaments. Once more we note that no term is given; the order is not of a temporary, remedial or provisional nature but in both letter and spirit intended as a definitive solution.

To summarize, we have here shown that by adopting resolutions 1718 and 1874 the Security Council has made use of the following implied powers:

1. Interpret, review and enforce the NPT;
2. Apply treaty-law law as such to a state;
3. Order a state to sign a treaty, which is furthermore in the area of arms control;
4. Adopt a rule of general application, also in the realm of arms control, and apply this rule to a concrete case;
5. Impose a specific measure of arms control (of disarmament, in fact) on a state and;
6. Use these powers with permanent effect.

In Chapter 2 we contended that the capacity to imply powers by the SC is limited by several legal factors, chiefly the provisions of the UN Charter, its object and purpose and *jus cogens* norms of international law. To be legal, Council decisions using such powers must rest within these limits. Now it is time to see if this holds.

1. Interpret, review and enforce the NPT;
2. Apply treaty-law as such to a state;

The power of a body to authoritatively interpret a treaty must derive from the treaty itself; this is a logical consequence of the basic principle of state consent, which is part of *jus cogens*. The SC may imply powers from the UN Charter but not from any other treaty. The NPT does not elect the SC as its interpreter, nor is the SC itself a party or even subject to the NPT.
In section 1.2 we also demonstrated that no review power exists to an art. X withdrawal. The NPT equally does not include any enforcement clauses. NPT signatories did not consent to having the treaty enforced by any organ.
Doing so thus violates the most fundamental principle of treaty law, which the SC is not allowed to deviate from under art. 103 of the Charter.

This would have been enough to settle the issue, but even if the contrary position is taken there remains a more pressing impediment: a treaty may only be interpreted or enforced in relation to a state party. Chapter 1 however decisively showed that the DPRK was not, when of the adoption of the resolutions, a state party to the NPT. Clauses from that treaty cannot therefore be applied to it in any way, under peril of breaking the *jus cogens* principle of state consent. The fact that the DPRK withdrew from the treaty is even more relevant since there wasn't merely an absence of express consent but the explicit presence of a denial to be bound. This is a manifestation of sovereign will embodied in the Charter, as such must also be respected.

These related powers are therefore used *ultra vires* the Council.

3. Order a state to sign a treaty, which is furthermore in the area of arms control;

The preceding reasoning can be applied here *ipsis literis*. A state may only be considered bound by a treaty by its express will.
However the fact that this particular treaty regulates armaments puts the decision in direct opposition to the responsibility of the SC under art. 26 of the Charter. The interpretation of this provision in section 2.1 demonstrated that the Council is forbidden to impose arms control regimes since it was the intention of the drafters that UN member states retain their sovereign right to decide on their own armaments and that any plan of this sort would be submitted to the membership for approval and adoption. Imposing them directly violates this provision and the object and purpose of the Charter.
This power cannot be legally implied by the Council.

4. Adopt a rule of general application, also in the realm of arms control, and apply this rule to a concrete case;
5. Impose a specific measure of arms control (of disarmament, in fact) on a state;

The SC, as has been shown in Chapter 2, is entirely proscribed to "legislate": it cannot enact rules of general application without involvement of the General Assembly, that is, of the entire membership of the UN. The use of this power in other resolutions has often been

considered illegal for this reason. Moreover, it violates art. 26 in a much more blatant manner since the general rule is to be precisely identified with the "plans" referred thereto. The Council cannot decide that any and all instance of "proliferation", which is the acquisition of a weapon by a state, is a threat to the peace.

Granting the SC the power to actually control armaments, whether in general or related to the choices of individual states, was proposed and **rejected** when drafting the UN Charter,[76] not merely forgotten or overlooked. There is no room to allow for an "implicit power" interpretation, and it cannot then be said that the Council acts within the Principles and Purposes of the UN when it tries to assign that competence to itself.

In both the immediately preceding cases the SC has thus encroached upon powers that it does not possess and which it was never meant to possess. Bluntly speaking, that simply wasn't the deal.

Had the SC resorted to other justifications for its decision the case might have been different. If the Council considered, for instance, that the DPRK would launch an imminent attack or could do so given particular circumstances, an arms control measure would be perfectly legal to tackle that particular threat. The DPRK is indeed often accused of posing this danger by "sabre-rattling" and "brinksmanship", but curiously enough these are not offered as official legal positions by states. Pre- and post-vote declarations of states voting for the resolutions make no mention of this at all, except for the USA and Japan which merely hinted at it in a rather vague manner.[77] Being not mentioned in the text of this or other related resolutions, it cannot be considered in good faith as a legitimate reason for the adoption of these measures.

That arms control is beyond the competences of the SC has also been pointed out by at least two states. Having been subject to the application of the same rule,[78] both India and Pakistan in 1998 challenged its legality. The former sent a letter[79] prior to the adoption of Res 1172, in which it asks, *inter alia*:

> "If indeed the Charter of the United Nations envisaged any role for the Security Council on non-proliferation issues, which is doubtful,[...]"[emphasis added]

... further on drawing a more clear conclusion:

> "(k) On what basis can the Secretary-General report to the Council on the steps taken by the countries addressed by this resolution, when most of its provisions are ultra vires or at variance with international law and infringe on the sovereign prerogatives of Member States?" [emphasis added]

The representative of Pakistan, speaking after the adoption during session 3890,[80] was somewhat more concise:

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[76] Schütz in Simma, pp 858-9 mn 11.

[77] Meeting records of session 5551 adopting resolution 1718. UN document S/PV.5551.

[78] Res 1172 (1998).

[79] LETTER DATED 4 JUNE 1998 FROM THE PERMANENT REPRESENTATIVE OF INDIA TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL, S/1998/464.

[80] UN document S/PV.3890.

"The approach that the Security Council has adopted is again devoid not only of realism but also of legality and morality." [emphasis added]

That these states would speak against a resolution directed against them is not noteworthy; that they offered such arguments is, for it constitutes *opinio juris*.
To date, neither India nor Pakistan have heeded the SC's will in Resolution 1172. As the above statements clearly indicate, they did not consider it legally binding; not for any lack of reference to Chapter VII (as could be argued), but because of it being *ultra vires*.

6. Use these powers with permanent effect.

All the difficulties already covered are made worse by the fact that the SC purported the measures in the resolutions to be the final word in the security situation in the Korean peninsula. The decisions we discussed here are permanent and atemporal, strongly suggesting they do not mean to eliminate one particular threat to the peace or prevent a concrete conflict from erupting. It is at odds with the Council's mandate as an emergency operator and violates the logic of emergency action and emergency powers. The SC did not treat the DPRK's withdrawal from the NPT as an emergency; else it wouldn't have taken three years to act upon them.
A security concern may, naturally, span a long period of time. This does not take away its urgent character. However, any emergency measure taken to approach it must have a clear temporal element, else it is substituting a normality for another. That is not the role assigned to the Council, which must act promptly in emergencies only and leave the more perennial measures of peace building to the states themselves.

In conclusion, we have shown that all key powers used in the adoption of resolutions 1718 and 1874 were implied outside the Security Council's mandate.

The final chapter will discuss the consequences of this finding.

Conclusion - Legal consequences of the Res 1718 and 1874 being *ultra vires*

It was shown above that the resolutions were taken beyond the SC's powers. It was also shown that only those decisions of the SC that conform to the Charter need to be followed by member states; falling outside it renders them in absolute nullity and do not generate a legal obligation.[81]

The conclusion is that Resolutions 1718 and 1874 contain several elements not in constitutional conformity to the UN Charter and other tenets of international law. These elements, the pertinent operative clauses, as well as the preambular blanket determination of threats to the peace are illegal and therefore not binding. Because the resolutions can be considered null and void the DPRK does not need to comply with them. This could be seen as a valid countermeasure to the organization's illegal act.[82] Consequently, the DPRK has no legal obligation to (re-)sign the NPT, to get rid of its current nuclear weapons and means of delivery, nor to dismantle its nuclear and ballistic missile programmes.

Since they were taken *ultra vires*, the resolutions constitute an internationally wrongful act by the UNSC. This could eventually lead to the international responsibility of the UN as a whole: "A Council decision infringing the applicable international law constitutes an internationally wrongful act by the UN."[83]

It is not surprising that SC determinations that certain states halt or give up their nuclear-weapons programmes have gone unreservedly unheeded. Thus not only DPRK but also India and Pakistan, subject to Res. 1172 (1998) still retain and keep developing their nuclear arsenals, showing absolutely no intention to give them up. North Korea has violated other provisions of both resolutions with its 2013 nuclear test, and although India and Pakistan have a self-imposed moratorium on live tests this by no means imply a halt in development. Tests are now done as computer simulations (for which live tests provide the data necessary for extrapolation) in much more controlled, safe and secret manner, though costs are very high since simulations require a large number of advanced computers and time from highly trained professionals.

This lack of compliance can't be reduced to mere political taunting. States act on what they consider to be the more legal way more often than not, as this forms part of the legitimating power they hold both in the eyes of the international community and their internal populations. It has even been said that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time".[84] States do deviate, sometimes willingly, and tactics aimed at illegal purposes are by no means rare. The DPRK could be considered as "hedging" up to and including 2003, but the fact that they took a further three years to perform a test (one that, at the time, could not even be independently confirmed and is even postulated to have been a fluke) is a strong

[81] ICJ Certain Expenses para 222; Joyner (2007) p 515.
[82] Simma, p 848 mn 192.
[83] Simma, p 847, mn 189.
[84] Louis Henkin , in: M. Bothe, 'Compliance'[§3], in R Wolfrum (ed), The Max Planck Encyclopedia of Public International Law, Oxford University Press, 2008, online edition [www.mpepil.com].

indicator that their programme was not, as of then, in an advanced stage. The alleged "confession" that the DPRK had a nuclear programme as early as October 2002 does not carry much weight given that it had but one denouncer and was met with official denial. It is impossible to verify in any meaningful way and it is very likely that even if the denouncing party acted on good faith (which is in itself not a given) it could have been borne out of a linguistic misunderstanding.

It is hoped that the conclusions and comments found herein both on matters of fact and of law might be used on the criticism of the current policies of the international community on matters of nuclear proliferation, arms control and security stability. Present practices are proven to be ineffective in key, dramatic cases and there is an urgent need to review and modify them. A stricter adherence to the principles of the UN Charter, notably those of legality, sovereign equality and the prohibition of the threat of the use of force, should be the guiding line of this process. International law can only play a positive role if it is universally and uniformly applied to all its subjects; its selective and opportunistic invocation leads to undermining its value and authority, which is gravely deleterious to international order and security.

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Annex 1 – Table of equivalence

Table 1: correspondence of provisions in Resolutions 1718 and 1874		
Text	**1718**	**1874**
Reaffirming that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security[…]	Preambular §2	Preambular §2
Expressing its firm conviction that the international regime on the non-proliferation of nuclear weapons should be maintained and recalling that the DPRK cannot have the status of a nuclear-weapon state in accordance with the Treaty on the Non-Proliferation of Nuclear Weapons	Preambular §4	-
Stressing its collective support for the NPT and commitment to strengthen the Treaty in all its aspects, and global efforts towards nuclear non-proliferation and nuclear disarmament, and *recalling* that the DPRK cannot have the status of a nuclear-weapon state in accordance with the NPT in any case	-	Preambular §4
Deploring the DPRK's announcement of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons and its pursuit of nuclear weapons	Preambular §5	Preambular §5
Demands that the DPRK immediately retract its announcement of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons;	Operative §3	Operative §5
Demands further that the DPRK return to the Treaty on the Non-Proliferation of Nuclear Weapons and International Atomic Energy Agency (IAEA) safeguards, and *underlines* the need for all States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to continue to comply with their Treaty obligations;	Operative §4	Operative §6
Decides that the DPRK shall abandon all nuclear weapons and existing nuclear programs in a complete, verifiable and irreversible manner and immediately cease all related activities, shall act strictly in	-	Operative §8

accordance with the obligations applicable to parties under the NPT and the terms and conditions of the IAEA Safeguards Agreement (IAEA INFCIRC/403) and shall provide the IAEA transparency measures extending beyond these requirements, including such access to individuals, documentation, equipment and facilities as may be required and deemed necessary by the IAEA;		