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LEGALITY OF THE UNITED NATIONS
SECURITY COUNCIL (UNSC)**

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Abstract

The United Nations Security Council (UNSC) is, in many ways, a unique institution. It exercises legislative, judicial and executive powers; operates with few legally binding checks and balances and has even been described as being ‘unbound by law’. The UNSC represents one of the organs of the United Nations. The Council has broad powers to maintain international peace and security, most notably under Chapter VII of the UN Charter, and its decisions are binding on UN members. At the same time, some of the Council’s actions have been labelled as ultra vires and the lack of a binding, legal oversight mechanism to reign in Council action has been decried. Accepting that there is a difficulty in imposing legally binding checks and balances on the UNSC, this article argues that approaching the Council’s Chapter VII powers as a form of emergency powers may help to illuminate the role that non-legal restraints can play in curbing its power. In particular, this article uses Oren Gross’ ‘extra-legal measures model’ to show how the extra-legal measures model offers a descriptive account of UNSC action under Chapter VII and then builds on the gap in the application of the model to the Council to highlight areas for the development of better restraints. The first section provides a brief history of the United Nations as an International Institution; the second section sketches the United Nations Security Council and its powers under Chapters VI and VII of UN Charter; the third section looks at the Ultra Vires acts of the UNSC; the concluding section looked into various models and most especially “Oren Gross” model as an extra legal measure that would provide answer to the limits of legality of the UNSC. To achieve this, the work explored various relevant literatures and also using data and information retrieved from both the primary sources and secondary sources as reference bank.

Keywords: *United Nations Security Council, Policymaking, Powers of International Organizations and International Peace*

INTRODUCTION

The name "United Nations" was coined by United States President Franklin D. Roosevelt. It was first used in the Declaration by United Nations of 1 January 1942, during the Second World War, when representatives of 26 nations pledged their Governments to continue fighting together against the Axis Powers. The mainstream narrative of the United Nations has long been that its creation in 1945 was an almost revolutionary act that constituted a seminal answer to the atrocities of World War II and the Holocaust and must be seen as an unprecedented universal (even though U.S.-led) attempt to achieve world peace and guarantee human rights.¹ From this point of view, the well document narrative on the UN's history in recent years seem to be due to the "New World Order" proclaimed by former U.S. President George H.W. Bush and the intellectual reaction to George W. Bush's unilateralism in order to show that the UN does matter.

In August 1941, Franklin D. Roosevelt and Winston Churchill held a secret meeting where they discussed the possibility of starting an international peace effort. They came up with a declaration called the Atlantic Charter, which outlined ideal goals of war and paved the way for the development of the U.N. The United States joined the war in December 1941, and the title "United Nations" was first adopted to identify the countries that allied against Germany, Italy and Japan. Representatives from 26 Allied nations met in Washington, D.C. on January 1, 1942 to sign the Declaration of the United Nations, which essentially described the war objectives of the Allied powers. The United States, United Kingdom and Soviet Union (now Russia) led the onslaught. The main principles and structure of the United Nations Charter were determined by leaders at the United Nations Conference on International Organization (UNCIO) in San Francisco on April 25, 1945. After the war ended, the official United Nations Charter was ratified by 51 members on October 24, 1945.

The organisation's purpose and principles are outlined in the U.N. Charter. According to the document, the United Nations' four main purposes are to:

1. Maintain international peace and security;
2. Develop friendly relations among nations;
3. Achieve international cooperation in solving international problems; and
4. Be a centre for harmonizing the actions of nations in the attainment of these common ends.

The U.N. is divided into different bodies. Whilst the various bodies were be briefly summarised, the author shall be dwelling more on detailed analysis of the UNSC, the fulcrum around which work is centred on.

THE GENERAL ASSEMBLY (GA)

The General Assembly is the main deliberative, policymaking, and representative organ of the United Nations. Comprising all 193 Members of the United Nations, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by the Charter. According to the Charter, the General Assembly may consider any issue within the scope of the Charter but may not take decisions on international situations or disputes that the Security Council is considering. It may discuss the powers or functions of any UN organ established by the Charter

¹ S. Amrith, Sunil Sluga, G. *New Histories of the United Nations, Journal of World History* vol. 19, 2008.

and of any of the subsidiary bodies of the General Assembly. The body receives and discusses reports issued by the other principal organs established under the Charter as well as reports issued by its own subsidiary bodies. It also approves the budget of the UN and decides on the scales of assessment, i.e., each Member State's share of the budget. It elects and appoints its own officers, the members of the other principal organs, and members of some of its subsidiary bodies based on the recommendation of the Security Council.²

The General assembly meets in "regular annual sessions" and in "special sessions." Both consist of formal and informal meetings. All General Assembly sessions are numbered consecutively. The General Assembly created an Emergency Session in 1950. The GA created an exception to the prerogative of the Security Council in dealing with threats to peace and security. In resolution 377(V)-A, titled "Uniting for Peace" the GA decided that if the Security Council cannot come to a decision on an issue due to a veto (or the threat of a veto) by one of its permanent members (P-5), the GA may hold an emergency special session within twenty-four hours to consider the same matter.³ An emergency special session of the GA is convened in the same manner as a special session. An emergency special session is the only time the GA can take decisions on issues that are under the exclusive mandate of the Security Council. There have been ten emergency special sessions to date, six of them pertaining to the situation in the Middle East.⁴

ECONOMIC AND SOCIAL COUNCIL (ECOSOC)

The Economic and Social Council makes policies and recommendations regarding economic, social and environmental issues. It consists of 54 members who are elected by the General Assembly for three-year terms. The Council serves as the central forum for discussing international economic and social issues and formulating policy recommendations addressed to member states and the United Nations system.⁵ ECOSOC was established by the UN Charter (1945), which was amended in 1965 and 1974 to increase the number of members from 18 to 54. ECOSOC membership is based on geographic representation: 14 seats are allocated to Africa, 11 to Asia, 6 to Eastern Europe, 10 to Latin America and the Caribbean, and 13 to Western Europe and other areas. Members are elected for three-year terms by the General Assembly. Four of the five permanent members of the Security Council have been continuously re-elected because they provide funding for most of ECOSOC's budget, which is the largest of any UN subsidiary body. Decisions are taken by simple majority vote. The presidency of ECOSOC changes annually.⁶

The council was designed to be the UN's main venue for the discussion of international economic and social issues. ECOSOC conducts studies; formulates resolutions, recommendations, and

² "History of United Nations 1941 – 1950". United Nations. Archived from the original on 12 March 2015. Retrieved 12 March 2015. Accessed on the 10th July 2019.

³ <https://www.un.org/ga/sessions/emergency.shtml>, accessed on the 12th July 2019.

⁴ "Event: Special Session of the General Assembly on the Follow-Up to the Programme of Action of the ICPD | Sustainable Development Policy & Practice | IISD Reporting Services". *sd.iisd.org*. Retrieved 16 December 2015. Accessed on the 12th July 2019.

⁵ "General Assembly Elects 18 Members of Economic and Social Council to Terms Beginning 1 January 2019". *United Nations Meetings Coverage & Press Releases*. United Nations. 13 June 2018. Retrieved 13 July 2019

⁶ Organisation for Economic Co-operation and Development, States of Fragility 2018, Paris, 2018 Accessed on the 15th July 2019.

conventions for consideration by the General Assembly; and coordinates the activities of various UN organizations. Most of ECOSOC's work is performed in functional commissions on topics such as human rights, narcotics, population, social development, statistics, the status of women, and science and technology; the council also oversees regional commissions for Europe, Asia and the Pacific, Western Asia, Latin America, and Africa. The UN charter allows ECOSOC to grant consultative status to nongovernmental organizations (NGOs). Beginning in the mid-1990s, measures were taken to increase the participation of such NGOs, and by the early 21st century more than 2,500 NGOs had been granted consultative status.

TRUSTEESHIP COUNCIL

The Trusteeship Council was originally created to supervise the 11 Trust Territories that were placed under the management of seven member states. By 1994, all the territories had gained self-government or independence, and the body was suspended. But that same year, the Council decided to continue meeting occasionally, instead of annually

INTERNATIONAL COURT OF JUSTICE

This branch is responsible for settling legal disputes submitted by the states and answering questions in accordance with international law.

THE SECRETARIAT

The Secretariat is made up of the Secretary-General and thousands of U.N. staffers. Its members carry out the daily duties of the U.N. and work on international peacekeeping missions.

SECURITY COUNCIL

This 15-member council oversees measures that ensure the maintenance of international peace and security. The Security Council determines if a threat exists and encourages the parties involved to settle it peacefully. We shall turn to this heading in detail. Among the greatest achievements of the United Nations is the development of a body of international law—conventions, treaties and standards—central to promoting economic and social development, as well as to advancing international peace and security. Many of the treaties brought about by the United Nations form the basis of the law that governs relations among nations. While the work of the UN in this area does not always receive attention, it has a daily impact on the lives of people everywhere. The UNSC has traditionally redefined its mandate as covering only military security, though US Ambassador Richard Holbrooke controversially persuaded the body to pass a resolution on HIV/AIDS in Africa in 2000.⁷

Under Chapter VII, the Council has broader power to decide what measures are to be taken in situations involving "threats to the peace, breaches of the peace, or acts of aggression". In such situations, the Council is not limited to recommendations but may take action, including the use of armed force "to maintain or restore international peace and security". This was the legal basis for

⁷Fasulo, Linda (2004). *An Insider's Guide to the UN*. New Haven, Connecticut: Yale University Press. ISBN 978-0-300-10155-3.

UN armed action in Korea in 1950 during the Korean War and the use of coalition forces in Iraq and Kuwait in 1991 and Libya in 2011. Decisions taken under Chapter VII, such as economic sanctions, are binding on UN members; the Security Council is the only UN body with the authority to issue binding resolutions.

THE UN SECURITY COUNCIL AND ITS POWERS UNDER CHAPTER IV

The United Nations Security Council (UNSC) is a unique institution in variety of ways. It exercises legislative, judicial and executive powers. It operates with few legally binding oversight functions and has even been described as being 'unbound by law.'⁸ The Security Council maintain international peace and security in line with the principles and purposes of the United Nations. The body investigates any situation or dispute that might lead to international friction and also recommend methods of adjusting such disputes or the terms of settlement.⁹ UNSC recommends to the General Assembly the appointment of the Secretary-General and, together with the Assembly, to elect the Judges of the International Court of Justice.¹⁰ More so, the **Rome Statute** of the International Criminal Court recognises that the Security Council has authority to refer cases to the Court, where the Court could not otherwise exercise jurisdiction.¹¹ From the analysis of the literature, the UN Charter is a multilateral treaty. It is the constitutional document that distributes powers and functions among the various UN organs.

The Council has broad powers in maintaining international peace and security, most notably under Chapter VII of the UN Charter, and its decisions are binding on UN members.¹² Under Chapter VI of the Charter, "Pacific Settlement of Disputes", the Security Council "may investigate any dispute or any situation which might lead to international friction or give rise to a dispute". The Council may "recommend appropriate procedures or methods of adjustment" if it determines that the situation might endanger international peace and security.¹³ These recommendations are generally considered to not be binding, as they lack an enforcement mechanism.¹⁴ A minority of scholars, such as Stephen Zunes, have argued that resolutions made under Chapter VI are "still directives by the Security Council and differ only in that they do not have the same stringent enforcement options, such as the use of military force".¹⁵

⁸Oosthuizen, 'Playing the Devil's Advocate: the United Nations Security Council Is Unbound by Law', 12(3) *Leiden Journal of International Law* (LJIL) (1999) 549.

⁹Chapter VII of the United Nations Charter

¹⁰"Charter of the United Nations: Chapter V: The Security Council". United Nations.

<http://www.un.org/en/documents/charter/chapter5.shtml>. Retrieved 2012-06-09. Last accessed 15th July 2019.

¹¹Article 13 of the Rome Statute. Retrieved 14 March 2007. Last accessed 15th July 2019.

¹²Roberts, 'Second-Guessing the Security Council: The International Court of Justice and Its Power of Judicial Review', 7 *Pace International Law Review* (1995) 281,

¹³"Charter of the United Nations: Chapter VI: Pacific Settlement of Disputes". United Nations.

<https://www.un.org/en/documents/charter/chapter6.shtml> Retrieved 10 October 2019

¹⁴Fomer and, Jacques (2009). *The A to Z of the United Nations*. Lanham, Maryland: Scarecrow Press. ISBN 978-0-8108-5547-2.

¹⁵Zunes, Stephen (2004). "International Law, the UN and Middle Eastern Conflicts". *Peace Review: A Journal of Social Justice*. 16 (3): 285–292. doi:10.1080/1040265042000278513. ISSN 1040-2659.

Under Chapter VII, the UNSC has broader power to decide what measures are to be taken in situations involving "threats to the peace, breaches of the peace, or acts of aggression".¹⁶ In such situations, the Council is not limited to recommendations but may take action, including the use of armed force "to maintain or restore international peace and security". This was the legal basis for UN armed action in Korea in 1950 during the Korean War and the use of coalition forces in Iraq and Kuwait in 1991 and Libya in 2011.¹⁷ Decisions taken under Chapter VII, such as economic sanctions, are binding on UN members; the UN Security Council is the only UN body with the authority to issue binding resolutions.¹⁸

At the same time, some academic literatures have labelled some of the Security Council actions as ultra vires and decried the lack of a binding, legal oversight mechanism.¹⁹

Security Council sanctions have taken a number of different forms, in pursuit of a variety of goals. The measures have ranged from comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions. The Security Council has applied sanctions to support peaceful transitions, deter non-constitutional changes, constrain terrorism, protect human rights and promote non-proliferation.

The Rome Statute of the International Criminal Court recognizes that the Security Council has authority to refer cases to the Court in which the Court could not otherwise exercise jurisdiction.²⁰ The Council exercised this power for the first time in March 2005, when it referred to the Court "the situation prevailing in Darfur since 1 July 2002"; since Sudan is not a party to the Rome Statute, the Court could not otherwise have exercised jurisdiction.²¹ The Security Council made its second such referral in February 2011 when it asked the ICC to investigate the Libyan government's violent response to the Libyan Civil War.²²

Security Council Resolution 1674, adopted on 28 April 2006, "reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity".²³ The Security Council reaffirmed this responsibility to protect in Resolution 1706 on 31 August of that year.²⁴ These resolutions commit the Security Council

¹⁶"Charter of the United Nations: Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression". United Nations. Retrieved 11 October 2019

¹⁷Kennedy, Paul (2006). *The Parliament of Man: The Past, Present, and Future of the United Nations*. New York: Random House. ISBN 978-0-375-50165-4.

¹⁸Kennedy, Paul (2006). *The Parliament of Man: The Past, Present, and Future of the United Nations*. New York: Random House. ISBN 978-0-375-50165-4.

¹⁹Akande, J. Alvarez, 'Judging the Security Council', 90(1) *American Journal of International Law* (AJIL) (1996) 1, at 2-3

²⁰Article 13 of the Rome Statute. United Nations. Retrieved 13 October 2019

²¹Wadhams, Nick (2 April 2005). "Bush relents to allow UN vote on Sudan war crimes". *The Sydney Morning Herald*. Retrieved 14 September 2019

²²Gray-Block, Aaron and Greg Roumeliotis (27 February 2011). "Q+A: How will the world's war crimes court act on Libya?". Retrieved 26 Sept 2019.

²³"Resolution 1674 (2006)". UN Security Council via Refworld. Retrieved 20 sept 2019

²⁴Mikulaschek, Christoph (2010). "Report from the 39th International Peace Institute Vienna Seminar on Peacemaking and Peacekeeping". In Winkler, Hans; Rød-Larsen, Terje; Mikulaschek, Christoph (eds.). *The UN*

to take action to protect civilians in an armed conflict, including taking action against genocide, war crimes, ethnic cleansing, and crimes against humanity.²⁵

The interpretation of the above shows that within the framework of Chapter VI the Security Council has at its disposal an 'escalation ladder' composed of several 'rungs' of wielding influence on the conflicting parties in order to move them toward a pacific solution... however, the pressure exerted by the Council in the context of this Chapter is restricted to non-binding recommendations."²⁶ However, if the Security Council determines that the continuance of the dispute constitutes a threat to peace, or that the situation involves a breach of the peace or act of aggression it can take action under Chapter VII of the Charter. Chapter VII gives the Security Council the power to make decisions which are binding on member states, once it has determined the existence of a threat to the peace, breach of the peace, or act of aggression."

Under Article 39 of the UN Charter, it is the duty of Security Council to determine whether a threat to, or breach of, the peace, or act of aggression, exists that would justify its intervention under Chapter VII.²⁷ Once the Security Council has made such a determination, its options for action have been described as 'carte blanche.'²⁸ While Chapter VII does contain a hierarchy of actions that the Council may consider in dealing with situations, such as: (i) calling upon the parties to comply with provisional members,²⁹ (ii) implementing 'measures not involving the use of armed force'³⁰ and, ultimately, (iii) implementing measures involving the use of armed force,³¹ there is no need for the Council to 'adopt the measures ... in any particular order'.³² Rather the Council has broad discretion not only in relation to when it may act but also in relation to what types of action it can take.³³ Indeed, the only explicit UN Charter limitation on Council action is in Article 24(2), which states that 'the Security Council shall act in accordance with the Purposes and Principles of the United Nations'.³⁴ This provision has been central to many attempts to limit the Council's powers.

THE UN SECURITY COUNCIL'S ULTRA VIRES ACT

In its purest meaning, the notion of an ultra vires act refers to acts or actions of international organizations, which are taken outside the scope of their competence.³⁵ This notion is therefore intimately connected with the idea of entities possessing only some (limited) powers of action. By

Security Council and the Responsibility to Protect: Policy, Process, and Practice (PDF). Favorita Papers. Diplomatic Academy of Vienna. pp. 20–49. ISBN 978-3-902021-67-0. Retrieved 5 February 2019

²⁵*Ibid*, at page 58

²⁶Neuhold, Hanspeter. "The United Nations System for the Peaceful Settlement of International Disputes", in Cede, Franz & Sucharipa-Behrmann, Lilly. The United Nations, MartinusNijhoff Publishers, 1 Jan 2001, p. 66.

²⁷Schott, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency', 6(1) Northwestern Journal of International Human Rights (2008) 24, at 23

²⁸*Ibid*, page 24

²⁹ Art 40 Charter of the United Nations.

³⁰*Ibid* ., Art. 41.

³¹*Ibid* ., Art. 42.

³²*Ibid* ., Art. 184

³³ David S., The Authority of the Security Council under Chapter VII of the UN Charter (2001), at 202, 205.

³⁴*Ibid*., at page 205.

³⁵

their nature, international organizations are (only) endowed with those powers conferred on them by their member states through the founding treaty. It is precisely when international organizations act beyond their competences, stated expressly or implicitly in their constituent instrument, that they are deemed to act *ultra vires*.

By contrast, it is uncommon to apply the notion of an *ultra vires* act to measures or actions taken by UNSC.³⁶ To be sure, single organs of states can act beyond the scope of their competence. However, compliance by UNSC' organs with internal rules determining the scope of their competence is relevant internationally only in those limited cases in which international law refers to these domestic rules, and attaches consequences to their breach.³⁷ The idea that UNSC can act *ultra vires*, although not logically impossible, is much more controversial and it seems basically to be confined to those situations in which Council act on the basis of a competence conferred to by an international instrument. All in all, both these situations have particular features which suggest that they should be excluded from the scope of the present analysis.

The existence of limits to the powers of international organizations, drawn by the founding treaty, has the consequence that acts overstepping these limits are normally invalid. Since invalidity seems to be the consequence normally attached to action of international organizations acts wandering beyond the scope of their competence, the notion of *ultra vires* acts seems to derive plainly from the combination of these two notions. In its essence, a study on *ultra vires* acts is nothing more than the analysis of how the notion of competence combines with that of nullity, thereby establishing in which cases actions overstepping the limits of international organizations consequence must be deemed null and void.

"It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter."

The International Court of Justice took the position in the Namibia Advisory Opinion that Art. 25 of the Charter, according to which decisions of the Security Council have to be carried out, does not only apply in relation to chapter VII. Rather, the court is of the opinion that the language of a resolution should be carefully analysed before a conclusion can be drawn as to its binding effect. The Court even seems to assume that Art. 25 may have given special powers to the Security

³⁶Conforti, B. (1969), 'The Legal Effect of Non-Compliance with Rules of Procedure in the U.N.General Assembly and Security Council', *American Journal of International Law*, **63**,479–489

³⁷Fassbender, B. (2006), 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights. A Study Commissioned by the UN Office of Legal Affairs and Follow-up Action by the United Nations', *International Organizations Law Review*, 3, 437–485.

Council. The Court speaks of "the powers under Art 25". It is very doubtful, however, whether this position can be upheld. As Sir Gerald Fitzmaurice has pointed out in his dissenting opinion, "If under the relevant chapter or article of the Charter, the decision is *not* binding, Article 25 cannot make it so. If the effect of that Article were automatically to make *all* decisions of the Security Council binding, then the words 'in accordance with the present Charter' would be quite superfluous". In practice the Security Council does not act on the understanding that its decisions outside chapter VII are binding on the States concerned. Indeed, as the wording of chapter VI clearly shows, non-binding recommendations are the general rule here.³⁸

THE LIMITS OF LEGALITY OF THE UN SECURITY COUNCIL AND CONCLUSION

In concluding this work, it may be necessary to dwell on a little voyage and look at some events occasioned the limits of the legality of the UN Security Council. The UN Security Council scheduled to hold in April 2007. In that very meeting, the Council members met to discuss the security implications of global climate change. Motivated by An appeal from the UK for consideration of one particular item, deliberations focused on the "threat" to international peace and security posed by the cumulative effects of global warming.³⁹ In so doing, the UN Security Council treaded perilously close to the legally operative language of Article 39 of the UN Charter, despite the fact that the meeting was a largely political camouflage intended to drum the support of climate change on the international agenda.⁴⁰ That such ecological matter might constitute a threat to peace and security had been asserted by the Security Council over a decade or more.⁴¹ Nevertheless, the discretionary absorption of an environmental item into the Security Council's domain provoked much anger and consternation amongst the underprivileged class of the UN—those Member States not privileged to sit on the Council—who forcefully argued that the Council was not competent to consider such items and was concomitantly encroaching upon the province of the UN's other organs.⁴² The discussion highlighted growing unease with the UN's ability to limit a Security Council increasingly wont to exercise its impressive discretion by reference to security concerns, and its myriad powers through the invocation of Chapter VII.

³⁸ Frowein, Jochen Abr. Völkerrecht – Menschenrechte – Verfassungsfragen Deutschlands und Europas, Springer, 2004, ISBN 3-540-23023-8, p. 58

³⁹ The Permanent Representative of the United Kingdom of Great Britain and Northern Ireland, Letter dated 5 April 2007 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2007/186 (Apr. 5, 2007)

⁴⁰ The Permanent Representative of the United Kingdom of Great Britain and Northern Ireland, Annex to the letter dated 5 April 2007 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, 2, U.N. Doc. S/2007/186 (Apr. 5, 2007).

⁴¹ See President of the Security Council, Note by the President of the Security Council, at 3, delivered to the Security Council, U.N. Doc. S/23500 (Jan. 31, 1992) ("[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security")

⁴² First Climate Debate Divides UN, BBC News, Apr. 18, 2007, http://news.bbc.co.uk/2/hi/uk_news/6562251.stm. Last accessed 18th October 2019.

As previously indicated, the Chapter VII of the UN Charter confers upon the Security Council the “primary responsibility for the maintenance of international peace and security.”⁴³ To this end, the Council may employ “such action...as may be necessary to maintain or restore” it.⁴⁴ Such constitutional carte blanche, as well as the Council’s increasing invocation of Chapter VII to justify quasi-legislative and quasi-judicial actions, threatens the contours of legality of the UN Security Council whose powers continue to broaden in scope faster than corresponding guarantors of accountability and legitimacy. One of the countries that confronted the Council’s Chapter VII powers is South Africa. It argued that the Council has “often resorted to Chapter VII of the Charter as an umbrella for addressing issues that may not necessarily pose a threat to international peace and security, when it could have opted for alternative provisions of the Charter to respond more appropriately, utilizing other provisions of the same Charter”⁴⁵

This expansionist action of the UN Security Council has become worrisome to both diplomats and academics alike. The academic literature examining this phenomenon reveals a struggle to adequately grasp the limits of Security Council authority, alternating uncomfortably between Council-as-political-body, Council-as-judicial-body and Council-as-anachronism. As Judge Shahabuddeen has inquired (and perhaps implicitly lamented), “Are there any limits to the Council’s power of appreciation If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?”⁴⁶ In their book titled “If Angels Were to Govern,”⁴⁷ Martin and Elizabeth submitted that such inquiry would simply be academic exercise.

However, the Council’s generous interpretation of its powers has created much problems within the U.N. that has hindered the organization’s effectiveness. To worsen the matter, the Council has conspicuously justified practices violative of fundamental precepts of human rights law by reference to the exceptional nature of its Chapter VII authority. At the same time, the Council’s inconsistent and ad hoc use of its vast discretionary powers has frustrated the development of a robust framework—be it legal, institutional or normative—to contain such powers.⁴⁸ With this in mind, this article aims to better define the Security Council’s powers under Chapter VII, as well any constraints thereon, from both a positive and normative perspective. It contends that there is indeed a juridical framework which holds the promise of limits and coherence for Council Chapter

⁴³U.N. Charter art. 42.

⁴⁴U.N. Charter art.24, para.1 (allocating authority “in order to ensure prompt and effective action by the United Nations.”)

⁴⁵U.N. SCOR, 62d Sess., 5615th mtg. at 17, U.N. Doc. S/PV.5615 (Jan. 8, 2007).

⁴⁶Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. US), 1992 I.C.J. 114, 142 (Apr. 14) (separate opinion of Judge Shahabuddeen) [hereinafter *Lockerbie*]

⁴⁷ Martin H. Redish and Elizabeth J. Cisar, “If Angels Were to Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory. *DukeLaw Journal* Vol. 41, No 3, Constitutional Perspectives (Dec., 1991), pages 449 – 506.

⁴⁸At the very least, the emergence of authoritative interpretations and customary law by means of subsequent practice is made exceedingly difficult, and norm creation is compromised. See MARGARET KARNS & KAREN MINGST, *INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE* 51 (2004)

VII action. In brief, it conceptualizes the nature of and constraints on Security Council power through the instructive application of emergency doctrine to Chapter VII action.

The doctrine of emergency ably effectuates the limiting “superordinate legal principles”⁴⁹ of the Charter. It provides the contours for mechanisms of governance and exercises of power fundamentally congruent to those of Chapter VII. It confines executive discretion within the bounds of genuine exception while protecting against arbitrary and illegitimate uses of emergency power. Perhaps most importantly, it offers a valuable paradigm through which aspirations towards a constitutionalised international law can be reconciled with the UN Security Council’s intrinsically political nature and prodigious power. In analysing the powers under Chapter VII, Article 39 of the UN charter is the power house of Chapter VII, the threshold at which the Council mutates from multilateral organ into global executive *sans pareil* (without equal). Art. 39 states that,

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.⁵⁰ If the UN Security Council decides to invoke the binding powers of Articles 41 and 42 to enforce its decisions, the ordinary language of the Charter recommends that it must make a determination of any:

- (1) threat to the peace,
- (2) breach of the peace, or
- (3) act of aggression. Only then may the UN Security Council employ galvanise array of powers, including the use of force and coercive measures, making such determination “a caveat which bestows upon the Security Council a power of appreciation not easily subject to control.”⁵¹ Notably, the provisions of Article 39 itself are seemingly the only component of Chapter VII less given to limitation than the myriad offspring powers, a point evidenced by the ambiguous text of Article 39 and subsequent practice.

In summary, early UN Security Council practice was a mixed bag. It offered glimpses of process and procedural mechanisms, and established certain very basic substantive criteria. At the same time, any comprehensive system within the matters involving Article 39 is hard to locate, and Council aversion to binding criteria has only perpetuated inconsistent practice. Still, the legalism with which the Council approached Article 39 must be noted. Far from any realist perceptions of a political sovereign acting outside of the law, Council deliberations and actions depict a salient appreciation of the legal space in which the Council operated, even as Chapter VII nears and tangible rules dissipate.

⁴⁹JÜRGEN HABERMAS, THE DIVIDED WEST (Ciaran Cronin ed., trans., 2006); see also JÜRGEN HABERMAS, Kant’s Idea of Perpetual Peace: At Two Hundred Years’ Historical Remove, in THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 165 (Ciaran Cronin & Pablo de Greiff eds., 2000).

⁵⁰U.N. Charter art. 39

⁵¹Mariano J. Aznar-Gómez, A Decade of Human Rights Protection by the U.N. Security Council: A Sketch of Deregulation?, 13 EUR. J. INT’L. L. 223, 234 (2002).

Central to any proper consideration of a declaration of emergency is whether the turmoil underlying the declared state qualifies as a genuine emergency. Here, theory diverges from practice, and formal law is divorced from its enforceability. This is not to say that formal substantive requirements for a declaration of emergency are particularly demanding; in fact, more often than not the majority of the exercise is left to the discretion of the declarer. The erosion of boundaries transpires in several interconnected ways. Emergencies can become entrenched in a temporal sense, as renewal and extension mechanisms are often less procedurally rigorous, both *de jure* and *de facto*. The government of Egypt, for example, has been under emergency rule since 1958 under Emergency Law No. 162.⁵² Again, in Swaziland, a state of emergency has persisted for over thirty years; the same in Malaysia which lasted for thirty-seven years, and in Syria, over forty years.⁵³

This Article has proposed a model of reform that targets on improving the Council's decision-making practices through the adoption of three new procedural duties. One of these models is known as the "Oren Gross" model. To understand the Oren Gross extra-legal model, it may necessary to look at its' foundation theory. Professor Oren Gross proceeded with an imagination of a state secret service known as the Canadian Security Intelligence Service (CSIS). According to this theory, the CSIS has detained an individual, and they're totally confident he or she has planted a bomb containing weaponized anthrax in the Eaton's Centre. The bomb may detonate at any minute potentially exposing tens of thousands of people to the virus. The detainee is the only lead CSIS has to locate the bomb, and they're absolutely certain that the detainee will reveal the correct location of the bomb if he or she is tortured.

In this hypothetical scenario, CSIS would be forced to make a "tragic choice" between two mutually exclusive courses of action, each of which would lead to injustice. If CSIS decided not to torture the detainee, innocent people would face grave illness and/or death as result of exposure to anthrax. If CSIS decided to torture the detainee, they would have risked criminal sanction because they violated the laws prohibiting torture. Consequently, in this scenario CSIS agents would be torn between two conflicting demands: they would be morally obliged to obey the law in a context where strict obedience would also be immoral. They would be compelled to torture the detainee by prudential considerations that oblige them to "promote the greatest good for the greatest number of people" and deterred from torturing the detainee by the law understood as an internalised self-regulating norm which obliges them "to value observing [legal] norms and be wary of norm-violating conduct."

The import of Gross' extra-legal model is that it prescribes "extra-legal action" in exceptional situations and argued that extra-legal action should advance the public good as it subjects extra-legal action to some form of retrospective review, and conceptualises the exceptional situation. It has also proposed a framework that highlights the Council's central role and emphasizes the need for engaging in such reform from within. The focus on decision making, rather than on any one

⁵²Human Rights Watch, *In the Name of Counterterrorism: Human Rights Abuses Worldwide* (2003) <http://hrw.org/un/chr59/counter-terrorism-bck.htm> (briefing paper for the 59th session of the U.N. Commission on Human Rights)

⁵³John Daniel, *Countries at the Crossroads 2005*, Country Report: Swaziland, FREEDOM HOUSE, <http://www.freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?edition=2&ccrpage=8&ccrcountry=98> (last visited October 22, 2019)

area of substantive reform, presents a novel approach whose aim is to strengthen the UNSC's ability to build consensus and, therefore, to increase its overall capacity to ensure peace and security. Engaging in a process-based approach to reform does not preclude or supersede reforms aimed at substantive change. In fact, it serves as a supportive corollary for achieving many of the same ends through different, and more viable, means.

However, the reform of the UN Security Council rests on a central normative question. Is the UNSC willing to assume primary responsibility for ensuring collective peace and security in today's world? During the negotiations that led to the creation of the U.N., it was the view of then-U.S. Secretary of State Hull that the UNSC's purpose was to inaugurate a system of general security "with a view to joint action on behalf of the community of nations"⁵⁴ From the growing debate, many U.N. members assume that the Security Council is concerned with regional security, civil wars and other threats to the peace that did not fall within the scope of situations envisioned in Article 39 at the end of Second World War. Such expectations are based on the presumption that the Security Council is responsible for collective peace and security globally. Other statements by both Council and non-Council members discussed the importance of the UNSC's role in building capacity for conflict prevention and peace building. Yet, when there is difficulty at the Council in reaching consensus, when no action is taken in a given crises, national interests take precedence over collective interests.²³⁹ Russia's statements at the Open Debate about the importance of respecting sovereignty go to this point.

The Council cannot ignore this political reality. But if the UNSC is not going to be the locus for collective peace and security then we may be entering an era where other organizations such as NATO and individual nations will intervene into armed conflicts in the Council's absence.⁵⁵ Such fragmentation in authority and action may benefit some, but will arguably cause harm to many more, destabilizing the U.N. system along the way. Thus, the Council must confirm, and define, its responsibility for global peace and security. The approach for engaging in procedural reform proposed in this Article provides a starting point. However, it is not a substitute for the necessary normative discourse about the meaning and purpose of peace and security that the Council, and all those concerned about global stability, must have.

Given this, it is time to revisit the first principle of peace. In today's world, peace is everyone's responsibility. As Kelsen and Franck have identified, we have shifted from a world in which peace had to be secured between states to one in which peace must be secured within the state, between peoples.⁵⁶ Peace promotion must be led from within but supported from the outside.⁵⁷ This requires integrating the preferences of those making decisions about peace at the UNSC with those responsible for ensuring long-term peace at the local level. Promoting peace today requires problem-solving, participatory decision-making, and collaboration.⁵⁸ As the President of the U.N.

⁵⁴RUSSELL & MUTHER, *supra* note 29, at 135

⁵⁵*Ibid*, at pages 62 -64

⁵⁶Hans Kelsen, *PEACE THROUGH LAW* (1944); FRANCK, *supra* note 207

⁵⁷BUILDING PEACE, Hanne Fjelde & Kristine Hoglund eds., (2011) (discussing the challenges in modern peacebuilding where attempts create conflict)

⁵⁸Eric De Brabandere, *The Responsibility of Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept*, 43 VAND. J. TRANSNAT'L L. 119 (2010);

General Assembly, Nassir Al-Nasser, in discussing the crises in Libya and Syria, said: “We should allow more room for mediation before conflicts erupt or situations worsen.”⁵⁹ Given these changing circumstances, should peace, as Kelsen posited, be the Grundnorm of international law that binds all other norms together?⁶⁰ Paramount questions such as this about the relationship between peace and law spawned the development of our international legal system and of the U.N. That such questions remain should bolster, not preclude, our every effort to seek their answers.

⁵⁹General Assembly President Calls for Early Conflict Mediation to Avoid Violence, U.N. NEWS SERVICE, Feb. 28, 2012, available at <http://www.un.org/app/news/printnews.asp?nid=41375>. Last accessed 19th October, 2019

⁶⁰Hans Kelsen, Pure Theory Of Law (Max Knight Trans., 1967