

Fall 2008

Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency

Jared Schott

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njihr>

Recommended Citation

Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 NW. J. INT'L HUM. RTS. 24 (2008).
<http://scholarlycommons.law.northwestern.edu/njihr/vol6/iss1/2>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Human Rights by an authorized administrator of Northwestern University School of Law Scholarly Commons.

Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency

Jared Schott*

I. RE-CONCEPTUALIZING SECURITY COUNCIL POWERS

¶1 In April 2007, the Security Council met to discuss the security implications of global climate change. Framed by a British appeal for consideration of the item, deliberations focused on the “threat” to international peace and security posed by the cumulative (and widely publicized) effects of global warming.¹ In so doing, the Council treaded perilously close to the legally operative language of Article 39 of the Charter, despite the fact that the meeting was a largely political showing intended to raise the profile of climate change on the international agenda.² That such “ecological” matters might constitute a threat to peace and security had been asserted by the Council over a decade prior.³ Nevertheless, the discretionary absorption of an environmental item into the Council’s security domain provoked much consternation amongst the “downtrodden underclass” of the U.N.—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 U.N.’s other organs.⁴ The discussion highlighted growing unease with the U.N.’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.

¶2 Chapter VII confers upon the Security Council the “primary responsibility for the maintenance of international peace and security.”⁵ To this end, the Council may employ “such action...as may be necessary to maintain or restore” it.⁶ Such constitutional carte blanche, as

* Institute for International Law and Justice Scholar, New York University School of Law; Legal Advisor for the Permanent Mission of Palau to the United Nations; LL.M., 2007, New York University School of Law; J.D., 2006, New York University School of Law, BA, 1999, Stanford University. An incredible debt of gratitude is owed to Simon Chesterman, whose inspiration, wise counsel and good offices over the years have made my work possible. Thanks also to Benedict Kingsbury, Philip Alston, Thomas Franck and the entire IILJ community—particularly Liz Sepper and Emily Berman—for their insights and input.

¹ 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).

² 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).

³ 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”).

⁴ *First Climate Debate Divides UN*, BBC News, Apr. 18, 2007, http://news.bbc.co.uk/2/hi/uk_news/6562251.stm.

⁵ U.N. Charter art. 24, para. 1 (allocating authority “in order to ensure prompt and effective action by the United Nations.”).

⁶ U.N. Charter art. 42.

well as the Council's increasing invocation of Chapter VII to justify quasi-legislative and quasi-judicial actions, gives cause for concern to detractors wary of an unrepresentative Council whose powers continue to broaden in scope faster than do corresponding guarantors of accountability and legitimacy. South Africa has noted that, "[o]ften, the Council has 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."⁷

¶3 This encroachment has concerned 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?"⁸

¶4 "If angels were to govern men,"⁹ such inquiry would simply be academic exercise. However, the Council's generous interpretation of its powers has created a schism within the U.N. that has hindered the organization's effectiveness. What is more, 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.¹⁰ 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 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.

¶5 In order to scrutinize the Security Council's Chapter VII powers through the lens of emergency, this article conceives of emergency doctrine as a *regulative ideal* for the Council's invocation of Chapter VII. The term, a Kantian device,¹¹ is used to link Chapter VII practice and emergency powers both descriptively and normatively.¹² It concedes that the perfect superimposition of the doctrine of legitimate emergency onto Council practice is "essentially unrealizable," but nevertheless holds that such counterfactual criteria can and should guide our practice.¹³ Conceptualizing emergency powers as a regulative ideal facilitates exploring the paradigm of domestic emergency in order to explain the concept of Council power, and to use the ideal of emergency as a criterion by which we can assess, criticize and ultimately structure

⁷ U.N. SCOR, 62d Sess., 5615th mtg. at 17, U.N. Doc. S/PV.5615 (Jan. 8, 2007).

⁸ Questions 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*].

⁹ THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

¹⁰ At 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).

¹¹ See IMMANUEL KANT, THE CRITIQUE OF PURE REASON (Paul Guyer & Allen Wood trans., 1999).

¹² See, e.g., DOROTHY EMMET, THE ROLE OF THE UNREALISABLE: A STUDY IN REGULATIVE IDEALS (1994); see also Kenneth Abraham, *The Expectations Principle as a Regulative Ideal* 5 CONN. INS. L.J. 59 (1998).

¹³ See, e.g., Pablo de Greiff, *Deliberative Democracy and Punishment*, 5 BUFF. CRIM. L. REV. 373, 381-82 (2002); Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 298 (1985).

Chapter VII praxis. As this article will show, the construct of a regulative ideal for Council action based in emergency doctrine is neither arbitrary nor fanciful. Empirical parallels and congruent theoretical underpinnings suggest that the limiting principles of emergency doctrine *should* guide the invocation of and exercise of powers under Chapter VII.

¶6 The remainder of this article is divided into four sections. The remainder of Section I discusses the exceptional nature of Chapter VII and Emergency Doctrine, and explains why the doctrine of emergency is an appropriate prism through which to view and analyze the Security Council's Chapter VII powers. Section II analyzes the prerequisite determination of a threat to international peace and security under Article 39 of the Charter, applying the lexicon and jurisprudence of emergency declarations. The Section considers theoretical and empirical limitations on domestic declarations, and analogous constraints on the Security Council's vast discretion under Article 39.

¶7 Section III argues that boundaries are more suitable—and more likely to be enforced—in the exercise of the actual emergency powers themselves. Nevertheless, it notes a disturbing empirical trend in the exercise of Chapter VII powers, one which again mirrors a trend in domestic emergency regimes. Section IV looks at the exercise of Chapter VII powers outside of the Security Council where the vast majority of enforcement actions occur: namely, Council-authorized and -delegated action. It observes a number of derogations from international law, rationalized solely by the exceptional need to maintain and restore international peace and security. Finally, it argues that more must be done to confine Chapter VII exceptionalism and ensure that the powers it entrusts to other entities are not abused.

A. *The Exceptional Nature of Chapter VII and Emergency*

¶8 The doctrine of emergency is an appropriate construct by which to analyze the Security Council's Chapter VII powers for many reasons. The tension between law and security, exacerbated by the failure to define whether security is a primary or *exclusive* concern, pervades both the invocation and exercise of powers under Chapter VII and emergency alike. In both domestic emergency and Council resort to Chapter VII, the acting authority enjoys great discretion in determining that a threat to security exists, and implementing those measures deemed necessary to restore and maintain "normalcy." This discretion, rooted in the need for flexibility and decisive action in existential matters, assumes a partly political character as it transcends the rigid legal rules of the "normal" system. Yet both sets of powers have proven themselves vulnerable to unaccountable and illegitimate practice. Domestic emergency regimes tend to become normalized, as states of emergency extend beyond temporal and spatial divides and emergency powers become an ordinary technique of governance. In the process, substantive and procedural constitutional checks are bypassed, separations of power erode, and arbitrary governmental action becomes the norm, bolstered by judicial deference.

¶9 Similar phenomena are apparent in the evolution of Chapter VII of the U.N. Charter. The Council's inconsistent and ambiguous practice has eluded the imposition of any binding substantive or procedural constraints which can be gleaned from the Charter. What is more, against the backdrop of inadequate judicial review, the Council has broadly construed its powers under Chapter VII and expanded its jurisdiction from traditional matters of security to new spheres previously under the purview of other organs and non-U.N. entities. Likewise, the Council has over time assumed quasi-legislative and quasi-judicial functions under Chapter VII, straining conceptions of propriety and institutional competence. In so doing, it puts at risk the

constitutionalism and republicanism ingrained in the Charter, and compromises the accountability and legitimacy of the Council—if not the U.N. as a whole.¹⁴

¶10 Notwithstanding these indiscretions, neither emergency powers nor Chapter VII exist outside of the law. Although they transcend the rigidity of ordinary legal rules, they remain subject to broader constitutional standards. Within the domestic realm, these standards are actualized through the jurisprudence and doctrine of legitimate emergency; at the international level, the U.N. has yet to adequately effectuate the Charter's limiting principles, though an adherence to legalism permeates Council practice. With this in mind, this article argues that the theory and practice of emergency provide both a basis for assessing Council action, as well as limits by which to legitimize it. The architecture of emergency powers offers valuable descriptive and normative insights into the legal space in which the Security Council operates. By comparing it to relevant domestic empirical and jurisprudential practice, the article suggests reforms and mechanisms through which Council action can be executed accountably and efficaciously.

¶11 Second, the paradigm of emergency is an apt framework through which to view Chapter VII powers because it succeeds in capturing the complexities of the Council's place within the international legal system in ways that other frameworks cannot. Simplistically rigid legal approaches fail to adequately account for the Council's role in the creation of international law, as well as its ability to derogate from international law when acting to uphold or restore international peace and security.¹⁵ On the other hand, theories of a purely political Council fail to give proper weight to the distinct adherence to legalism permeating the Council's work, as well as the constitutional primacy of the Charter operating on the Council through both legal and accountability mechanisms. More "centrist" doctrines such as implied powers work well where necessity and the language of the Charter operate along the same vector¹⁶; however, where one is pitted against the other, as in the cases of human rights violations explored later, it presents an

¹⁴ The concept of accountability "implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met." Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005). Legitimacy, a similarly elastic concept, implicates an entity's credibility, sometimes as a function of the "fairness" with which it acts. See THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995). It is alternatively defined by Franck as "a property of a rule or rulemaking institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles;" with respect to international organizations and their organs, legitimacy typically requires "some combination of conformity to shared norms and to established law." THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990).

¹⁵ MARTEN ZWANENBURG, *ACCOUNTABILITY OF PEACE SUPPORT OPERATIONS* 156 (2005).

¹⁶ The rule of implied powers is perhaps best stated by the International Court of Justice in its *Reparations for Injuries Suffered in the Service of the United Nations* Advisory Opinion. There, in determining that the United Nations had the authority to bring a claim on behalf of its employees, the Court stated that an organization such as the United Nations "must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 182 (Apr. 11) [hereinafter *Reparations*]. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 52 (Jun. 21) [hereinafter *Legal Consequences*] ("the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII... [T]he Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security"). Consider also the minimalist "inherent powers" variation of the doctrine, seen in *Certain Expenses of the United Nations (Art. 17, para. 2, of the Charter)*, Advisory Opinion, 1962 I.C.J. 151, 168 (Jul. 20) ("when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization").

under-nuanced and insufficiently robust conceptualization of the fundamentally different nature of Chapter VII power.

¶12 Emergency provides a more accurate and comprehensive treatment in both its normative treatments and empirical realities.¹⁷ Though an “immanent tension between facticity and validity”¹⁸ marks the exception, emergency doctrine takes a constitutional approach where the primary benchmarks of legitimate emergency are not specific rules, but rather standards supported by secondary rules.¹⁹ This constitutionalism is no mere chimerical device; it is the dispositive link between the concepts of Chapter VII and emergency. As an organ of the U.N., the Council derives its authority from the Charter, an international compact delegating Member State authority and conferring the resulting enforcement power on the Council.²⁰ But the Charter is no mere treaty; it is king among all treaties.²¹ It is a constitution, “reflect[ing] constitutional principles . . . in force long before the Charter was drafted,” and incorporating them into a new legal order.²² As the Appeals Chamber of the ICTY has observed, this constitutionality has significant ramifications for the exercise of Council power:

The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).²³

From its inception, then, despite the Council’s jurisdiction over security and its license to respond essentially “as it sees fit,” juridical bounds have always existed, as the Charter has

¹⁷ For fuller treatises on the theory and history of emergency doctrine, see GIORGIO AGAMBEN, *THE STATE OF EXCEPTION* (Kevin Attell trans., 2005); CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP* (1948); OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 19 (2006); DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (2006); CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26 (George Schwab trans., 1976); see also JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* §§159-62 (1691) (on the prerogative).

¹⁸ JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 9 (William Rehg trans. 1996) [hereinafter *BETWEEN FACTS AND NORMS*]

¹⁹ See RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

²⁰ DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS* 26-27 (1999).

²¹ Under Article 103, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” U.N. Charter art. 103 (emphasis added).

²² BARDO FASSBENDER, *U.N. SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE* 99 (1998); see also *id.* at 27 (citing HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 124-25 (1945)). Beyond the “constitutional moment” of its postwar drafting and enactment, Thomas Franck distinguishes the Charter as a constitution along several other dimensions: its “pervasive *perpetuity*,” and universality; its *indelibility*, and entrenched provisions; its *primacy*, as ordained by Article 103; and its *institutional autochthony*, establishing parameters but ultimately engendering a self-perpetuating entity. Thomas Franck, *Is the U.N. Charter a Constitution?*, in *NEGOTIATING FOR PEACE: LIBER AMICORUM TONO EITEL* 95 (Jochen Abr. Frowein et al. eds., 2003).

²³ *Prosecutor v. Duško Tadic* Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Oct. 2, 1995).

provided standards to ensure—as opposed to rigidly dictate—legitimate and accountable Council action. In Chapter VII and elsewhere, protocols and standards exist to limit the otherwise free hand of the Council under Chapter VII.

¶13 The doctrine of emergency ably effectuates the limiting “superordinate legal principles”²⁴ 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 constitutionalized international law can be reconciled with the Security Council’s intrinsically political nature and prodigious powers. In the end, the propositions put forth by this article echo the theme of a contemporary international legal system “less coherent and reassuring than the old one,” “yet . . . several steps up the evolutionary ladder.”²⁵ Such a tradeoff is certainly a worthwhile venture if we are to perpetuate a constitutional, albeit uneasy, coexistence among Chapter VII, the provisions of the Charter, and international law generally.

II. DETERMINATION AS DECLARATION

¶14 Article 39 is the gatekeeper of Chapter VII, the threshold at which the Council changes from multilateral organ into global executive *sans pareil*. Under its terms,

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.²⁶

If the Security Council seeks to invoke the binding powers of Articles 41 and 42 to enforce its decisions, the plain language of the Charter dictates 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 Security Council employ a broad 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.”²⁷ 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.

¶15 Much as the Article 39 determination acts as formal requisite to the exercise of Chapter VII powers, so too does the declaration of emergency enable the appropriate domestic body to invoke hitherto proscribed authorities. In both systems, though the acting body has often been complicit in the expansion of exception beyond constitutional bounds, both theory and practice militate against overly rigid constraints. The remainder of this Section identifies and evaluates procedural and substantive restraints on domestic discretion in declaring emergency, as well as

²⁴ See JÜRGEN 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).

²⁵ Andrea Bianchi, *Ad-Hocism and the Rule of Law*, 13 *EUR. J. INT’L L.* 263, 269 (2002) (citing Georges Abi Saab, *Cours général de droit international public*, 207 *RdC* (1987-VII), at 460).

²⁶ U.N. Charter art. 39.

²⁷ Mariano 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).

those placed upon Council discretion in the application of Article 39. It finds that the imposition of robust substantive constraints has frequently failed due to the inherently political nature of the determination, in concert with timid judicial review. Indeed, the architecture of domestic emergency systems suggests that legitimizing principles are best channeled through procedural limits. Though such procedural limits can rectify the most egregious infirmities in Council practice, they do not negate the need for more potent constraints. Rather, substantive limits are better applied to the exercise of Chapter VII (“emergency”) powers themselves.

A. *The Procedural Characteristics of Emergency Declaration*

¶16 Though unable to shape the content of the emergency state, procedural limits “beget legitimacy”²⁸ by ensuring that the commencement of emergency is transparent and predictable. By no means is the imposition of procedural constraints uniform across domestic systems, nor are constraints uniformly honored where in existence. Where honored, though, they act as emergency-specific secondary rules and proxy for less articulable constitutional precepts.

¶17 Two kinds of procedural requirements generally arise within the context of emergency powers. The first is an actual declaration; that is, the declarer must provide notice of the declaration with supporting details. In so providing, a government makes the argument that it is legally justified in departing from specified legal commitments, as opposed to simply stating that it is derogating as a matter of fact.²⁹

¶18 Domestically, where the requirement exists, declarations of a state of emergency are typically published in the official register,³⁰ though some countries require broadcast dissemination of the details.³¹ At the international level, major treaties require a dual-notice system of both domestic proclamation and international notification. The International Covenant on Civil and Political Rights (ICCPR) requires that states declaring an emergency, under which they intend to derogate from the provisions of the Covenant, commit themselves to official proclamation at home and immediate international notification containing “full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding [the country’s] law.”³² Even when treaties do not require domestic proclamation, courts have found that, regardless, some “formal and public act of derogation” is needed to avoid the sanction of nullity.³³ Other treaties similarly provide for international reporting, with a regional split as to whether the termination of measures should be

²⁸ BETWEEN FACTS AND NORMS, *supra* note 18, at 135.

²⁹ SUBRATA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY: THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY 11 (1989).

³⁰ In Israel, declarations are published in the Reshumot. *See* Basic Law: The Government, 2001, S.H. 158, ¶ 38(d). In Turkey, declarations are published in the Official Gazette. *See* State of Emergency Law art. 3(2) (Oct. 25, 1983), available at <http://www.qub.ac.uk/schools/SchoolofLaw/Research/HumanRightsCentre/Resources/html/Filetoupload,53211,en.htm>.

³¹ State of Emergency Law, *supra* note 30, at art. 3(4) (stating “[t]he reasons for the decision to declare a state of emergency, its duration and scope shall be broadcast on Turkish radio and television and, if the Council of Ministers deem it necessary, also disseminated through other media.”).

³² International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at arts. 4, 40, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, ¶ 17, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter *General Comment No. 29*].

³³ *See, e.g.*, American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 37 (1992).

provided for prospectively.³⁴ In practice though, short, over-generalized and justification-lacking reports plague the system,³⁵ with inconsistent judicial rebuke for such failures.³⁶

¶19 The second significant procedural check on declarations of emergency relates to the allocation of authority between branches of government, and determines the channels through which states may validly make such declarations. This allocation tends to reflect broader normative conceptions regarding separation of powers and legitimacy. For instance, German law historically required that the head of state issue such declarations, while the “dominant principle in the French tradition” has been that such power resides in parliament alone.³⁷ The Roman system left full discretion to the executive Consuls, although in practice the Senate proposed recommendations.³⁸ Where countries assign the power of declaration to the executive, some form of ratification, such as ministerial counter-signatures, parliamentary authorization or simply parliamentary notification, is often constitutionally required.³⁹ Other countries place declaratory powers primarily in the hands of the parliamentary body.⁴⁰ The existence of such provisions reflects both the need for legitimacy in the context of emergency declarations and the inadequacy of substantive checks on such a discretionary matter.

B. *The Substantive Criteria of the Emergency Declaration*

¶20 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.

¶21 Cognizant of the free hand given to the declaratory authority, academic approaches to establishing legitimizing constraints have focused on cabinining discretion within finite normative bounds as opposed to inflexible legal rules. Imminence is one such requirement. The U.N.-commissioned Questiaux report advises that a declaration of emergency is only justified by danger that is “extreme and imminent”; the International Law Association uses the phrase “actual or imminent.”⁴¹ A second criterion relates to the scope and gravity of the threat. The threat must be of such a magnitude, directed at “the organized existence of the community which

³⁴ See, e.g., ACHR, *supra* note 33, at art. 27.3 (requiring a prospective termination date); see also Richard B. Lillich, *Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency*, 85 AM. J. INT’L L. 716, 717 (1991) [hereinafter *Queensland Guidelines*]; cf. Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention*] (requiring only post hoc report on termination).

³⁵ ORAÁ, *supra* note 33, at 76-77.

³⁶ See *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. B) 72-73 (1960-61) (Report of the Commission) (holding that inadequate reporting could not in itself nullify Irish derogations); see also *Brogan & Others v. United Kingdom*, 145-B Eur. Ct. H.R. (ser. A) 16 (1988).

³⁷ AGAMBEN, *supra* note 17, at 12.

³⁸ GROSS & NÍ AOLÁIN, *supra* note 17, at 24.

³⁹ For a list of citations to such provisions, see *id.*, at 56.

⁴⁰ See, e.g., XIAN FA [Constitution] art. 67, § 20 (1982) (P.R.C.), available at http://english.gov.cn/2005-08/05/content_20813.htm; see also Basic Law: The Government, 2001, S.H. 158, ¶ 38(d) (delegating the power to determine and declare emergencies to the *Knesset*, as well as sole authority to ratify and renew Governmental declarations).

⁴¹ U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. Of Minorities, *Study of Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, ¶ 23, U.N. Doc. E/CN.4/Sub.2/1982/15 (Jul, 27, 1982) (prepared by Nicole Questiaux) [hereinafter Questiaux] (emphasis added); CHOWDHURY, *supra* note 29, at 11.

forms the basis of the State,”⁴² that a state of emergency is “indispensable to the preservation of the state and its constitutional order.”⁴³ Moreover, the “whole of the population or the whole population of the area to which the declaration applies” must be affected.⁴⁴ The threat must also be “temporary” in nature, with measures aimed to reinstate prior conditions as soon as possible.⁴⁵

¶22 Some of the principles promoted in these definitional criteria appear in the varying laws of domestic systems—at least formally. One such constraint is the stratification of emergency. Under constitutional systems, the level of emergency declared determines the methods of declaration, the duration of the state of emergency and the subsequent scope of powers.⁴⁶ In some cases, this simply reflects the unintended creep of emergency powers from matters of existential magnitude into non-security-related areas.⁴⁷ However, a practice common to Continental Europe provides for the more robust check of subdividing their security-related emergency provisions based on the gravity of the situation faced.⁴⁸ The plain text of the U.N. charter also offers a potentially comparable taxonomy that—between a threat to the peace, breach of the peace and act of aggression—has eluded consistent practice and formal criteria.

¶23 A second constitutional restraint involves the use of temporal and territorial limits. Sunset clauses provide for the automatic termination of states of emergency without an affirmative renewal or extension, typically by other legislative channels. Authorities charged with declaratory powers may also specify the applicability of the state of exception to the whole or parts of the country.⁴⁹ Such provisions allow for more narrowly tailored responses consistent with principles of necessity and proportionality. They have a darker side as well, however, imposing separate legal rights and duties on citizens of various regions, often according to ethnoreligious demography.

¶24 The final constitutional requirement noted here is imminence. The present French constitution requires that French institutions, independence or territorial integrity must be “seriously and immediately threatened”⁵⁰ in order for a state of emergency to be declared. Sri Lanka requires that the emergency in fact exist or be at least imminent.⁵¹ Under international law, states of emergency must respond to an actual or imminent crisis; those “of a preventive nature” are unlawful.⁵² Such provisions, if enforced, significantly cut back on the potentially infinite justifications available to the declaratory power.

⁴² Questiaux, *supra* note 41, at ¶ 23.

⁴³ ROSSITER, *supra* note 17, at 298-99.

⁴⁴ CHOWDHURY, *supra* note 29, at 11.

⁴⁵ ROSSITER, *supra* note 19, at 300.

⁴⁶ See GROSS & NÍ AOLÁIN, *supra* note 17, at 41-43.

⁴⁷ For instance, Turkey differentiates between violence/public order emergencies and those relating to natural disasters. See THE CONSTITUTION OF THE REPUBLIC OF TURKEY arts. 119-20 (1982) (Turk.). In Latin and South American countries nine different states of exception are provided for. GROSS & NÍ AOLÁIN, *supra* note 17, at 42.

⁴⁸ For instance, the Dutch Constitution distinguishes between a “state of siege,” “state of emergency” and “state of war.” GRONDWET [GW.] [Constitution] arts. 96, 103 (1815) (Neth.). Under the Portuguese Constitution, a state of “siege” may be declared where there exists “actual or imminent aggression by foreign forces, serious threat to or disturbance of the democratic constitutional order or public calamity.” A state of “emergency,” though, is applicable to circumstances “less serious” than those delineated above. CONSTITUTION OF THE PORTUGUESE REPUBLIC art. 19 (1976) (Port.), available at http://www.parlamento.pt/ingles/cons_leg/crp_ing/index.html; see also GRUNDGESETZ [GG] [Constitution] arts. 12, 80, 87, 91, 115 (1993) (F.R.G.).

⁴⁹ See, e.g., Public Security Ordinance, Ordinance No. 25, §5 (1947) (Sri Lanka), available at <http://www.tamilnation.org/srilankalaws/47publicsecurity.htm>.

⁵⁰ LA CONSTITUTION art. 16 (1958) (Fr.), available at <http://www.assemblee-nationale.fr/english/8ab.asp>.

⁵¹ Radhika Coomaraswamy & Charmaine de los Reyes, *Rule by Emergency: Sri Lanka's Postcolonial Constitutional Experience*, 2 INT'L J. CONST. L. 272, 275 (2004).

⁵² ORAÁ, *supra* note 33, at 27.

¶25 Still, many countries impose few if any restraints on the declaration of emergency. Sri Lanka’s Public Security Ordinance provides that the Governor-General may declare an emergency where he is “of the opinion that it is expedient to do” so, making such regulations appear “necessary *or expedient*” in the interests of public security.⁵³ Needless to say, such terms do not make for judicially enforceable standards. Even where unchecked political discretion is less blatant, it is not necessarily any more circumscribed, as the use of broad and malleable terms—“public order,” “security,” “liberal-democratic constitution”—provides little hindrance to government entities seeking to justify exceptional alterations in the power structure.

¶26 The major international human rights instruments provide a second legal check on declarations through built-in derogation provisions that simultaneously allow for this inevitability while establishing principled bounds. It is this international system that provides the *theoretical* contours for states of emergency. The United Kingdom, in a Commission on Human Rights Drafting Committee, first introduced the idea of a derogation provision, and thereby sparked a subsequent debate in the ICCPR drafting consultations about how broadly to construe the circumstances allowing for derogation.⁵⁴ Countries sought to limit the elasticity of the “emergency” term, and debated whether an explicit list of non-derogable provisions was the proper solution.⁵⁵ In the end, article 4(1) of the ICCPR provides that:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.⁵⁶

Subsequent interpretation by the Human Rights Committee further define the terms of Article 4, adding to the meaning of “strictly required” by noting that “the restoration of a state of normalcy...must be the predominant objective,” and the emergency must be limited by “duration, geographical coverage and material scope.”⁵⁷ The derogation provisions of the other major instruments are consonant with Article 4 of the ICCPR, differing primarily in terminology and the inclusion of an explicit nondiscrimination provision.⁵⁸ On the whole, these provisions provide firm and unambiguous limits on emergency *powers*, as well as seemingly justiciable procedural requirements and normative declaratory requirements. The force of these principled checks, however, has been blunted by inconsistent judicial review at the domestic and international levels.

⁵³ Public Security Ordinance, *supra* note 49, at § 5.

⁵⁴ See OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 816-17, U.N. Doc. HR/P/PT/9, U.N. Sales No. E.02.XIV.3 (2003), available at http://www.ohchr.org/english/about/publications/docs/CHAPTER_16.pdf.

⁵⁵ *Id.* at 818 (citing U.N. Doc. E/CN.4/SR.195 ¶ 69).

⁵⁶ ICCPR, *supra* note 32, at art. 4(1).

⁵⁷ *General Comment No. 29, supra* note 32, at ¶¶2, 4; see also U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. Of Minorities, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, Annex, U.N. Doc. E/CN.4/1984/4 (1984), available at <http://hei.unige.ch/~clapham/hrdoc/docs/siracusa.html>.

⁵⁸ ACHR, *supra* note 33, at art. 27; European Convention, *supra* note 34, at art. 15.

C. *Judicial Review of Declarations: An Unruly Margin of Appreciation?*

¶27 Within the domestic context, judicial review is particularly troublesome. Even where a strong and independent judiciary exists, the declaration of emergency is typically a decision made at the discretion of the executive or parliament. Typically, great deference is shown to the decisions of those bodies charged with jurisdiction over national security, and judges are hesitant to invalidate measures when doing so might put national security at risk.⁵⁹ Further, questions of justiciability emerge as judges struggle to locate “judicially discoverable and manageable standards”⁶⁰ in policy areas in which they have little expertise. A final infirmity of domestic judicial review lies in its enforceability. Even where judicial review does invalidate governmental action, the other branches of government typically respond quickly to change the laws so as to allow for actions they have hitherto deemed necessary for public security.⁶¹

¶28 Such judicial give-and-take is not a phenomenon unique to countries with traditionally underdeveloped judicial systems, nor those with commanding executive branches.⁶² It has often been up to supranational judicial systems to effectuate bona fide review, with inconsistent results.⁶³ The work of treaty bodies and international courts of review has not met the lofty *Queensland* aspirations, suggesting that the principles of legitimate emergency are less binding than ideal.⁶⁴ Lacking truly effective fact-finding mechanisms, international courts have been reluctant to question the discretion of national governments in determining that a state of emergency is justified.⁶⁵ For this reason and others, international courts have accorded a “wide margin of appreciation” to States party to international instruments in their declarations of emergency. Earlier European Court of Human Rights cases adhered to this “margin of appreciation” and deferred to government determinations despite serious questions about the existence of a public emergency.⁶⁶

¶29 Where courts have intervened, it is often due to politics. The European Commission was widely seen to be censuring Greece’s military government in finding that no emergency existed to justify repressive measures undertaken in the wake of the “National Revolution” in 1967.⁶⁷ In many ways, the case is a microcosm of European regional emergency jurisprudence, the

⁵⁹ See, e.g., *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1 (Austl.) (holding that the validity of the Communist Party Dissolution Act does not depend upon proof of the facts recited in the preamble as justification for the Act.).

⁶⁰ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

⁶¹ Following a Sri Lankan Supreme Court decision asserting powers of review over emergency declarations and measures, the government responded with a constitutional amendment prohibiting judicial review of emergency proclamations. See, e.g., *Joseph Perera v. Attorney General* [1992] 1 S.L.R. 199 (Sri Lanka); THE CONSTITUTION OF THE REPUBLIC OF SRI LANKA art. 154(J)(2) (1978), available at <http://www.priu.gov.lk/Cons/1978Constitution/1978ConstitutionWithoutAmendments.pdf>; see also Coomaraswamy & de los Reyes, *supra* note 51, at 287-88.

⁶² See, e.g., *A. v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 87 (appeal taken from Eng.) (U.K.) (calling for deference to determinations of emergency, even where government has conceded no attack is imminent).

⁶³ See GROSS & NÍ AOLÁIN, *supra* note 17, at 8-13.

⁶⁴ *Queensland Guidelines*, *supra* note 34, at 718 (arguing for an objective determination of whether a public emergency actually existed and whether proper procedures were followed).

⁶⁵ GROSS & NÍ AOLÁIN, *supra* note 17, at 267.

⁶⁶ See, e.g., *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) 56, 84 (1960-61) (Court decision); see also *Brannigan & McBride v. United Kingdom*, 258-B Eur. Ct. H.R. (ser. A) 34 (1993).

⁶⁷ *Greek Case*, 1969 Y.B. Eur. Conv. on H.R. 12, 186 (Eur. Comm’n on H.R.); see James Becket, *The Greek Case before the European Human Rights Commission*, 1 HUM. RTS. 91, 113 (1970); see also GROSS & NÍ AOLÁIN, *supra* note 17, at 275.

somewhat hollow assertion of judicial authority enervated by the supremacy of political considerations. The European experience speaks to the impressive discretion of the “declarer” and the ultimately political nature of the exercise. Though courts may rule on procedural matters and require *some* evidence supporting the validity of a determination, they have proven unwilling, if not unable, to hold governmental authorities to substantive requirements mandated by treaty and theory.

¶30 By contrast, the now-obsolete United Nations Human Rights Committee (HRC) undertook a more substantive approach to review, but was hampered by its advisory nature.⁶⁸ This “soft” global review, while nonbinding, evidenced a universal awareness of the abuse of emergency regimes, as well as a normative sentiment supporting accountability and transparency in invoking emergency. Nevertheless, deep and searching review of Member State reports by and large eluded the HRC, which frequently had to stop at procedural review focusing on insufficient evidence in the face of egregiously inadequate Member State reports.⁶⁹

¶31 The legal, political and practical challenges of using judicial review to counteract improper declarations of emergency, as well as the possible impropriety of doing so, suggest that substantive and legal constraints may more ably and effectively guide the exercise of emergency powers themselves, as opposed to the preceding declaration. Still, objective criteria and corresponding restraints have appeared at times within the system, and may well prove more applicable in the context of Article 39.

D. The Carte Blanche Determination of a Threat to the Peace...

¶32 It is only once an Article 39 determination is made that the Security Council can move beyond its “regular” fact-finding and recommendatory powers to the “exceptional” powers of Chapter VII.⁷⁰ Like a declaration of emergency, Article 39 acts as not simply precursor to, but also justification for, the exercise of such powers.

1. The Charter and the Council’s Lone Discretion...

¶33 Much as emergency declarations can be a primarily political act of discretion, the Article 39 determination is regarded as the central repository of Council discretion within the Charter. As initially presented at Dumbarton Oaks, Article 39 (at the time, Section VIII-B) consisted of a transition to enforcement measures in two paragraphs.⁷¹ The first, rejected as unnecessary, dealt with the specific instance of a failed dispute settlement as constituting a threat to international peace and security. The second contained the provisions that now constitute Article 39,

⁶⁸ Many States disregarded Committee requests and findings. *See, e.g.*, U.N. Human Rights Comm., *Report of the Human Rights Committee*, ¶ 108, *delivered to the General Assembly*, U.N. Doc. A/34/40 (Sept. 27, 1979); U.N. Human Rights Comm., *Report of the Human Rights Committee, delivered to the General Assembly*, U.N. Doc. A/39/40 (Sept. 20, 1984).

⁶⁹ *See* ORAA, *supra* note 33, at 21 (*citing* U.N. Human Rights Comm., *Report of the Human Rights Committee, Communication No. R. 2/11, Adoption of Views*, ¶¶ 14-16, *delivered to the General Assembly*, U.N. Doc. A/35/40 (Jul. 29, 1980); U.N. Human Rights Comm., *Report of the Human Rights Committee, Communication No. R. 8/34, Adoption of Views*, ¶¶ 8-9, *delivered to the General Assembly*, U.N. Doc. A/36/40 (Apr. 8, 1981)).

⁷⁰ *See* U.N. Charter art. 39 (*citing* that “[t]he Security Council *shall* determine the existence”); *see* SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 124-25 (2001); *see also* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 726 (Bruno Simma et al. eds., 2d ed. 2002).

⁷¹ RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945* 669 (1958).

authorizing a more general determination of the existence of *any* threat. Dumbarton was followed by six and a half weeks of intense diplomatic exchanges culminating in the February 1945 conference at Yalta, and two months later the San Francisco Founding Conference (April 25, 1945 – June 26, 1945). At San Francisco, the “over-nice distinctions,” which more clearly defined the different phases of a dispute and the particular measures which might apply, were done away with so that the “provision should be left as broad and flexible as possible.”⁷² The “evaluation of circumstances” was to be left entirely to the Council, imparting “wide latitude” of discretion to the Security Council in determining the existence of a threat to the peace.⁷³ This Council volition prompted the United States delegate to remark, “[I]f any single provision of the Charter has more substance than the others, it is surely this one sentence, in which are concentrated the most important powers of the Security Council.”⁷⁴

¶34 Other countries were less comfortable with such Council prerogative, and attempted to provide a counterbalance by explicitly defining the three states of exception contained in Article 39. Though it was accepted that Chapter VII required a situation of greater gravity than one “endangering the maintenance of international peace,”⁷⁵ no further criteria defining and distinguishing the three Article 39 states of exception were initially put in place. The term “threat to the peace” has subsequently eluded categorization, while a “breach of the peace” has come to mean hostilities between armed units.⁷⁶ Only an “act of aggression” has been even partially defined.⁷⁷

¶35 From the beginning, the use of the term “aggression” was a point of debate.⁷⁸ During the drafting process, various amendments seeking to make automatic the finding of an act of aggression, and require subsequent pre-defined responses, were rejected.⁷⁹ The Permanent Members of the Council resisted, arguing that anything constituting an act of aggression could legitimately be an act of self-defense under Article 51 depending on the circumstances.⁸⁰ Therefore, a flexible response was in order.

¶36 The issue was raised again in later sessions of the General Assembly, which—after much debate and several resolutions postponing a final decision—adopted a definition in 1974.⁸¹ Still, the years of General Assembly deliberation were in the end ineffectual, as the General Assembly definition is “neither intended nor able to limit the jurisdiction of the Security Council under Article 39.”⁸² While aggression is defined as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other

⁷² Secretary of State, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, The Secretary of State*, 90-91 (Jun. 26, 1945) (Dep’t. of State Publ. 2349) [hereinafter *Report to the President*].

⁷³ *Id.*; RUSSELL, *supra* note 71, at 670.

⁷⁴ *Report to the President*, *supra* note 72, at 90-91.

⁷⁵ U.N. Charter arts. 34, 37.

⁷⁶ THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 70, at 721. In the first 44 years of the UN, the Council made only three determinations of a “breach of the peace,” in Korea (1950), the Falkland Islands (1982), and Iran-Iraq (1987). CHESTERMAN (2001), *supra* note 70, at 114.

⁷⁷ G.A. Res. 3314 (XXII), Annexarts. 1-4, U.N. Doc. A/9619 (Dec. 14, 1974).

⁷⁸ The United States argued that it should be subsumed within the “breach of peace” language, while the USSR countered that it merited distinct mention. RUSSELL, *supra* note 71, at 464-65.

⁷⁹ For example, Colombia sought to put text in the Charter preamble stating that any “attempt on territorial integrity, sovereignty, or independence of any state would constitute an act of aggression,” and a Bolivian amendment sought to require the automatic application of sanctions in response. *Id.* at 670-73.

⁸⁰ *Id.*

⁸¹ See G.A. Res. 599 (VI) (Jan. 31, 1952); G.A. Res. 688 (VII) (Dec. 20, 1952); G.A. Res. 3314, *supra* note 77.

⁸² THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 70, at 722.

manner inconsistent with the Charter of the United Nations,” the resolution offers only a partial list of exemplary situations, and explicitly holds that the Council may consider “other relevant circumstances” in disregarding the resolution’s articles.⁸³ Even if this definition were strictly applied to Article 39, it would not affect those most momentous Council determinations occurring at the proverbial margins, where precedent ebbs and political discretion flows.

¶37 The Council has fiercely guarded—with great success—its birthright of sole and plenary discretion in such matters. Its permanent members have stood firm against more legalist conceptions of Article 39, and maintained their province relatively free of encroachment. Where the primacy of the Council in the maintenance of international peace and security is called into question, it is most often done so in response to Council inaction, in order to fill a perceived vacuum where the Council has expressed reticence in the invocation of its Chapter VII powers. In this respect, the parliamentary check posed by General Assembly action under the *Uniting for Peace* resolution, or the organizational substitute offered by regional peace operations, differ from their domestic analogues.

¶38 On multiple occasions, due to the Cold War paralysis of the Security Council, the General Assembly explicitly referenced Article 39 or utilized language in resolutions pertaining to specific situations that called for the imposition or strengthening of Chapter VII sanctions.⁸⁴ Wary of the possible intrusion into matters reserved specifically for the Council, several delegations made note that the division of competence between the two organs should be respected, and that the General Assembly should avoid making any “purported determinations” of the existence of a threat to peace and security. In discussions over the Question of Palestine, the Canadian delegation repeatedly stated that the Council “alone” had the mandate—in fact, the “prerogative”—to determine what constitutes a threat to international peace and security, and that the Assembly was not the appropriate body for such a discussion.⁸⁵

¶39 Following the end of the Cold War, the use of Article 39 lexicon in General Assembly resolutions has been disfavored, and General Assembly resolutions pertaining to matters exclusively within Council jurisdiction have heeded the earlier-voiced objections and subsequently refrained from using such terminology.⁸⁶ Though the Assembly has been willing to offer its perspective to rectify the failings of Council inaction, its awareness of exclusive Council domain over determinations regarding threats to the peace, in addition to the waning and arguably discredited use of Article 39 determination in Assembly resolutions, further suggest that the Council possesses a near-sovereign authority to determine international exceptions.

¶40 The Secretary-General represents a second influence, if not a “check,” on this authority. Under the Charter, the Secretary-General is to act as the “chief administrative officer” of the U.N., and is charged to perform functions entrusted to him by, amongst other organs, the

⁸³ G.A. Res. 3314, *supra* note 77, Annex arts. 1-4.

⁸⁴ *See, e.g.*, G.A. Res. 37/123, ¶¶ 2, 7-8, U.N. Doc. A/RES/37/123 (Dec. 20, 1982); G.A. Res. 36/226, preamble, ¶ 6, U.N. Doc. A/RES/36/226 (Dec. 17, 1981); G.A. Res. 39/146, ¶¶ 2, 7-8, U.N. Doc. A/RES/39/146 (Dec. 14, 1984). For a more complete list, *see Repertory of Practice of the United Nations Organs: Extracts Relating to Article 39 of the Charter of the United States, Supplement 6 (1979-1984)*, volume 3, at 17, available at http://www.untreaty.un.org/cod/repertory/art39/English/rep_supp6_vol3_art39_e.pdf (last visited Nov. 29, 2007).

⁸⁵ *Id.* at ¶ 26 (*citing* U.N. GAOR, 36th Sess., 93d plen. mtg. ¶ 130 (Canada); U.N. GAOR, ES-7, 30th mtg. at 54-55 (Canada)).

⁸⁶ *See, e.g.*, G.A. Res. 60/40, U.N. Doc. A/RES/60/40 (Dec. 1, 2005); G.A. Res 60/41, U.N. Doc. A/RES/60/41 (Dec. 1, 2005).

Security Council.⁸⁷ In this capacity, the Secretary-General has occasionally played a significant role in influencing Council Article 39 determinations.⁸⁸

¶41 The Secretary-General has also acted in matters of international peace and security without the invitation of the Security Council. Under Article 99, the Secretary-General may “bring to the attention” of the Council “any matter which *in his opinion* may threaten the maintenance of international peace and security.”⁸⁹ Under the stewardship of Trygve Lie, the Secretary-General established its right to offer unsolicited opinions to the Council, and engage in fact-finding under its Article 99 discretion.⁹⁰ In his first report to the Council on troop deployment in the Congo in 1960, Dag Hamarskjöld went even further, contending that the deteriorating situation in the country was “a threat to peace and security justifying United Nations intervention.”⁹¹ Notably, this “implied finding” comprised a “main element... from a legal point of view” for the argument for intervention.⁹² The Council had not yet made such a finding, and would not do so until nine months later, well after the General Assembly had already raised a peacekeeping force. It might appear that Hamarskjöld effectively usurped the Council’s authority in making this public, ostensibly objective finding of legal import.

¶42 Ultimately, though, such language proved to be rhetoric lacking legal consequence. In the face of the Council’s continuing inaction, the General Assembly did not invoke the use of force based on the Secretary-General’s “finding.”⁹³ Hamarskjöld himself later noted that the license provided by Article 99 is simply to “engage in informal diplomatic activity in regard to matters which may threaten international peace and security.”⁹⁴

¶43 The U.N.’s other organs have little in the way of legally-ordained recourse in checking Council action under Article 39. As such, the U.N. system is deprived of a useful check common to emergency systems. The resulting accountability gap suggests the need for heightened constraints through other channels. Though the Council has demonstrated an adherence to constitutionalism in its prior practice, its good faith is an inadequate guarantor.

2. Legalism Absent Justiciability

¶44 Amongst the international legal community, it is widely accepted that a Council determination or inaction under Article 39 (as opposed to the exercise of powers thereafter) is nonjusticiable. W. Michael Reisman has noted that the term “threat to the peace” has “prove[n] to be quite elastic in the hands of the Council,” making a judicial review function “somewhat

⁸⁷ U.N. Charter arts. 97-98.

⁸⁸ For instance, in Somalia, Boutros-Ghali’s reports persuaded the Council that an Article 39 determination was in order given the inadequacy of non-military measures and the “repercussions of the Somali conflict on the entire region.” U.N. Doc. S/24859 (Nov. 24, 1992); U.N. Doc. S/24868 (Nov. 29, 1992); S.C. Res. 794, ¶ 7, U.N. Doc. S/RES/794 (Dec. 3, 1992).

⁸⁹ U.N. Charter art. 99 (emphasis added); *see also* Kofi Annan, *Foreword, in* SECRETARY OR GENERAL? THE UN SECRETARY-GENERAL IN WORLD POLITICS xi (Simon Chesterman ed., 2007).

⁹⁰ *Provisional Rules of Procedure of the Security Council*, U.N. Doc. S/96/Rev.7, at 5 (Dec. 1982); *see also* Ian Johnstone, *The Role of the UN Secretary-General: The Power of Persuasion Based on Law*, 9 *Global Governance* 441, 443 (2003).

⁹¹ U.N. Doc. S/4389 (Jul. 18, 1960) (quoted in FRANCK (1995), *supra* note 14, at 226-27.)

⁹² *Id.*

⁹³ Hamarskjöld’s declaration in fact mentioned the “explicit request” of the Congolese government, suggesting that it was not any invocation of Chapter VII stemming from his statement, but rather this consent, that was dispositive in the matter. *Id.*

⁹⁴ Dag Hamarskjöld, *Lecture at Oxford University (30 May, 1961)*, in *SERVANT OF PEACE: A SELECTION OF THE SPEECHES AND STATEMENTS OF DAG HAMARSKJÖLD* 335 (William Foote ed., 1962).

difficult” in light of the absence of more manageable standards.⁹⁵ Legal scholars presume the Council decision to be a political judgment “not properly suited to judicial examination” and unanswerable by reference to international law, despite the ubiquitous constraints posed by the purposes and principles of the organization.⁹⁶ The International Criminal Tribunal for Rwanda (ICTR) affirmed this principle in the *Kanyabashi* case.⁹⁷

¶45 Despite these concessions, the Council has not jettisoned its sense of legalism. From the early consideration of the Franco regime to more recent attempts to characterize internal crises as international threats, the Council has evinced a juridical perception of its responsibilities and powers under Article 39. Yet the Council has at times been remiss in its adherence to standards established by its early practice, and has slowly moved away from those standards. Indeed, Council action under Article 39 has evolved both procedurally and substantively, shedding procedural rigor and precision at the expense of clarity and accountability.

i) *The Spanish Question*

¶46 The “primitive” practice of the Council contains evidence of a deliberative body aware of its unfettered discretion, yet faithful to an approach espousing procedural and substantive standards. In considering the Spanish Question in April 1946, the Security Council concluded that a determination under Article 39 constituted a “very sharp instrument” which must “not [be] blunted or used in any way which would strain the intentions of the Charter or which would not be applicable in all similar cases.”⁹⁸ In its seven months of consideration of whether the Franco regime represented a threat to international peace and security, the Council established several important principles in operationalizing Article 39. These principles can be summarized as internationality, viability and immediacy.

¶47 Seeking to sever diplomatic relations with the Franco regime multilaterally, Poland originally brought the matter to the Council under Article 35 with the support of France, Mexico and the USSR.⁹⁹ In supporting its claim that the regime constituted a threat to the peace, Poland argued that the threat was not only international (as opposed to “purely domestic”), but also ongoing and proximate, describing the technological advances and machinery of the Spanish army as well as its massing military forces near the French border.¹⁰⁰ In so arguing, two

⁹⁵ W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83, 92 (1993).

⁹⁶ See Peter Malanczuk, *Reconsidering the Relationship between the ICJ and the Security Council*, in INTERNATIONAL LAW AND THE HAGUE’S 75TH ANNIVERSARY 87, 98 (Wybo Heere ed., 1999); see Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INT’L & COMP. L.Q. 309, 338 (1997); see DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE 266 (2001).

⁹⁷ Prosecutor v. Joseph Kanyabashi, Case No. ICTR-96-15-T, Decision on Defense Motion, ¶ 20 (June 18, 1997) (noting that the Council “has a wide margin of discretion in deciding when and where there exists a threat to international peace and security,” a matter “not justiciable since [it] involve[s] the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively” by a court of law); see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Prov. Measures), 1993 I.C.J. 439 (1993) (separate opinion of Judge Lauterpacht) (the Court has no “right...to substitute its discretion for that of the Security Council”).

⁹⁸ *Report of the Sub-Committee on the Spanish Question Appointed by the Security Council on 29 April 1946*, U.N. Doc. S/75 at 11 (¶ 21) (June 1, 1946).

⁹⁹ To this end, Poland claimed that the fascist government in Spain presented not only a problem “of the past,” but also a “serious problem of the present” as it continued to “serve the purpose of the Axis” and act as a “centre of fascist infection.” U.N. SCOR, 1st Ser., 34th mtg. at 159 (1946).

¹⁰⁰ *Id.* at 159, 162.

substantive criteria implicitly emerged: that the threat be *international* in nature, and that it exist at the time of the determination.

¶48 The subsequent deliberations occurred in a litigative fashion, and revealed a keen awareness of constitutional limitations. Although Poland posed the question in the political sense—“the problem is...how shall we carry into action this desire...which...we all share?”¹⁰¹—the legal nature of the discussion cannot be disregarded. Australia, echoing similar sentiments, laid out the burden of proof in succinct fashion:

Prima facie, then, this question is one of domestic jurisdiction...First, is it a matter of international concern and not merely of domestic jurisdiction? Secondly, is the situation a cause of international friction? If the answer to that question is affirmative, the following question arises: Thirdly, is it endangering international peace and security? If the answer to these questions is negative, we can take no further action. If the answer is affirmative, then, and then only, can this Council decide what can and should be done.¹⁰²

¶49 Further statements by delegations, particularly the lengthy record offered by the USSR, belie a purely political entity, instead suggesting a very juridical nature to its operations.¹⁰³ When China demanded that the threat to the peace would have to be “positively established... beyond a doubt,”¹⁰⁴ it did so not as a political body, but as a Council member wary of the need for legality and process in determinations under Article 39.

¶50 Despite political support for the Polish draft resolution, the Council hesitated, and instead chose to “make further studies to determine whether the situation in Spain has led to international friction and does endanger international peace and security.”¹⁰⁵ Only if the appointed Sub-Committee returned with an affirmative answer would the Council then consider what “practical measures” to take. In its report, the Sub-Committee found “as a matter of fact” the fascist nature of the regime, its continued persecution of political opponents, and the “international friction” caused by its large army and closed border with France.¹⁰⁶ However, it found no evidence of preparations for aggression, and pointed out that moral condemnation, in and of itself, could not be equated with a threat to the peace.¹⁰⁷ The Council also found that any threat that Spain might pose was not immediate. After deciding that recourse to substantial powers could not be had without the justification of an imminent threat to the international order, the Council determined that no threat to the peace had been “establish[ed].”¹⁰⁸

¶51 In many respects, *not* making a determination under Article 39 best illuminates the Council’s constitutional intent. The Council took a legal approach in its deliberations, putting the burden of persuasion on those arguing for action under Article 39. It referenced substantive criteria, such as the immediacy and “international” character of the threat, and an “independent body” investigated the factual record to review the validity and force of the arguments. It also

¹⁰¹ *Id.* 37th mtg. at 228.

¹⁰² *Id.* 35th mtg. at 194-96.

¹⁰³ *Id.* at 185-92.

¹⁰⁴ *Id.* at 199.

¹⁰⁵ S.C. Res 4 (Apr. 29, 1946).

¹⁰⁶ *Report of the Sub-Committee on the Spanish Question Appointed by the Security Council on 29 April 1946* at 4, 7.

¹⁰⁷ *Id.* at 7-10.

¹⁰⁸ *Id.* at 12; U.N. SCOR 1st year, 1st ser., No. 2, 44th mtg. at 322 (June 6, 1946).

utilized a measured procedure in its deliberations, tending towards gradual consideration of an item, providing offending entities with notice and an opportunity to avoid facing exceptional Council measures. In its consideration of the Spanish Question, the Council created a promising mechanism for the accountable and principled determination of a threat to the peace.

ii) *Article 39 “Jurisprudence”: Limits and Process*

¶52 In the years that followed, Article 39 “jurisprudence” moved away from the self-limiting process first espoused by the Council. The Greek Frontier Incidents Question represents the first pivotal case in a vaunted history of Council efforts to avoid binding constraints on its Article 39 decision-making power. In discussing the matter, the Council again employed a fact-finding commission to report on the Greek complaint lodged in December 1946, but following a Soviet veto, failed to adopt its conclusion that the “support of armed bands” amounted to a threat to the peace.¹⁰⁹ This occurred even though the wording in the resolution was a compromise, with its sponsor’s emphatic asterisk that the language would not in any way bind the Council in the future.¹¹⁰ Such rewording was necessary in light of objections to the originally worded amended draft resolution, which drew the ire of Council members who felt that it in effect bound them to a particular definition of “threat to the peace.”¹¹¹

¶53 The Council continues to avoid limiting its discretion in a calculated fashion, though it now does so explicitly, most frequently in its resolutions, by highlighting the uniqueness or particularity of the circumstances.¹¹² This “ad hocism” prevents the emergence of precedent and allows the Council to avoid predetermined triggers. Nonetheless, the Council’s awareness of the precedential value of its words demonstrates its continuing attention to legalism. Indeed, as the admitted violation of customary law is widely considered the best evidence of the existence of that law, so too must the Council’s noted awareness of the legal effects of its resolutions suggest that its political discretion ultimately remains confined to a juridical system.

¶54 The Council response to the Sharpeville Massacre in South Africa provides further evidence of the “legality” of Article 39. Following the deaths of sixty-nine black protesters, twenty-nine African and Asian countries together brought the situation before the Council under Article 35. The preliminary discussion centered on whether the situation constituted a threat to the peace, echoing prior deliberations in its back-and-forth regarding the domesticity of the situation and Member State proffers to the contrary. Some Council members argued that the threat was not in the violent incident that had already taken place, but in the likelihood that continuing repression of human rights and violence would be met by African nationalism and violent responses across the continent.¹¹³ The Tunisian representative referred to the “precedent” set by the Council deliberations during the Spanish Question, noting that ostensibly internal affairs can amount to a threat to international peace.¹¹⁴

¹⁰⁹ U.N. Doc. S/486 (Aug. 12, 1947), *quoted in* LELAND GOODRICH & ANNE SIMONS, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY*, 355 (1977).

¹¹⁰ *See* U.N. SCOR, 2nd year, 147th mtg. at 1123-24 (U.S.); 158th mtg. at 1322-23 (Colo.m.); 164th mtg. at 1454-70.

¹¹¹ U.N. Doc. S/429 (July 22, 1947).

¹¹² Thus, the Council justified its Chapter VII authority in Haiti, Rwanda, Somalia, the Former Republic of Yugoslavia and elsewhere by preambular reference to “the unique and exceptional circumstances” prevailing in those countries. *See* S.C. Res. 841, U.N. Doc. S/RES/841 (June 16, 1993); S.C. Res. 917, U.N. Doc. S/RES/917 (May 6, 1994); S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994); S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992) (“recognizing the unique character of the present situation” in Somalia).

¹¹³ U.N. SCOR, 15th year, 852nd mtg., at 9, 15, 28, U.N. Doc. S/PV.852 (Mar. 30, 1960).

¹¹⁴ U.N. SCOR, 15th year, 851st mtg., at 22, U.N. Doc. S/PV.851 (Mar. 30, 1960) (Tunis.).

¶55 In summary, early 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.

iii) *Chinks in the Armor: Growing Incoherence in Council Practice*

¶56 The concern that political discretion does not beget political fiat also must extend to the Security Council. The political component of Council action cannot be disputed; the Council must inevitably take into account the Member States' willingness and ability to contribute, and it has acted more vociferously in response to greater *political* threats.¹¹⁵ Still, the Council has approached its task in a juristic fashion, with its Charter-imposed limits in mind. As demands on the Council have grown, though, more robust Council action alongside more deft political compromise have led to greater inconsistency and ambiguity in practice. Article 39 determinations made in under-determined form create the potential for the exercise of power by Council fiat, mirroring the slippery slope that many countries facing "permanent emergencies" have fallen down. As the Council faces threats "of a kind, or an order of magnitude, entirely different from those envisaged by the Charter's authors,"¹¹⁶ the "living" Charter must adapt as well.

¶57 The Council has long resisted endorsing binding criteria of any potency. This has stunted the uniformity of its practice, preventing both the development of objective triggers for invoking Article 39 and the categorical exclusion of specific situations from Article 39 qualification. Were such minimal objective triggers in place, the Council would have had difficulty finding that regime changes in Haiti¹¹⁷ and Sierra Leone¹¹⁸ constituted threats to the peace. This lack of consistent binding criteria has also led the Council to make Article 39 determinations that fail to conform to the principle that threats to international peace and security must be proximate, if not immediate.¹¹⁹ For example, the Council has made Article 39 determinations in seemingly retroactive fashion, as in the case of Libyan non-compliance with American and British requests for extradition of the suspected Pan-Am Flight 103 bombers.¹²⁰

¹¹⁵ CHESTERMAN (2001), *supra* note 70, at 153 (remarking on the Council response to the "political threat" posed by the Haitian crisis in 1993).

¹¹⁶ Thomas Franck, *Collective Security and UN Reform: Between the Necessary and the Possible*, 6 CHI. J. INT'L L. 597, 601 (2006).

¹¹⁷ S.C. Res. 841, U.N. Doc. S/RES/841 (June 16, 1993); S.C. Res. 917, U.N. Doc. S/RES/917 (May 6, 1994); S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

¹¹⁸ See, e.g., S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997); S.C. Res. 1270, U.N. Doc. S/RES/1270 (Oct. 22, 1999); S.C. Res. 1289, U.N. Doc. S/RES/1289 (Feb. 7, 2000).

¹¹⁹ Bernhard Graefrath, *Leave to the Court What Belongs to the Court: The Libyan Case*, 4 EUR. J. INT'L L. 184, 196 (1993) ("It remains absolutely unclear why or how the failure to renunciate terrorism ... or the failure to surrender suspects, or the refusal of compensation claims which are not established under any legal procedure, could constitute a threat to the peace.")

¹²⁰ Some academics, however, would champion certain Article 39 determinations that did not involve immediate threats. They propose that the Council adopt prospective criteria mandating an Article 39 determination. Of note is the acclaimed doctrine put forward by the International Commission on Intervention and State Sovereignty (ICISS) in *The Responsibility to Protect (R2P)*. Noted by former Secretary-General Kofi Annan with approval, *R2P* put forward several thresholds of "just cause" including the large scale loss of human life and large scale ethnic

¶58 More alarming Council positions are those that arise simply out of “diplomatic carelessness.” Consider, for instance, the reasoning behind Article 39 determinations offered in Council resolutions. Within domestic emergency systems, a common validating measure has been a notification regimen requiring justification given at both the international, and sometimes domestic, level. The Council, however, has not adopted this principle with any semblance of exactitude. Admittedly, some resolutions do more than others. In Resolution 1521 concerning Liberia, the Council went out of its way to determine that beyond the mere “situation,” “the proliferation of arms and armed non-State actors, including mercenaries, in the sub-region continue[s] to constitute a threat to international peace and security in West Africa, in particular to the peace process in Liberia.”¹²¹ In other resolutions, however, such as those establishing the United Nations Operation in Burundi (ONUB) and the U.N. Operation in Côte d’Ivoire (UNOCI), the Council has, following wide-ranging and unfocused preambles, quite laconically “determine[ed]” or “not[ed]” that the country “situation” constitutes a threat to international peace and security.¹²² This imprecision not only hinders the appropriate confinement of Chapter VII authority, but also indicates larger transparency deficits in Council practice.

¶59 Despite a slant in the Council’s Provisional Rules of Procedure towards publicity and transparency,¹²³ in recent years resolutions invoking Article 39 and Chapter VII more generally have been constructed outside of public purview in informal consultations, with formal meetings acting as “mere ceremonial events, typically of very short duration.”¹²⁴ W. Michael Reisman has referred to this phenomenon as a “parliamentary matryoshka (doll),” containing “ever-smaller ‘mini-Councils,’ each meeting behind closed doors without keeping records, and each taking decisions secretly.”¹²⁵ Such opacity only amplifies the disquietude caused by textually unreasoned Article 39 determinations.

¶60 The synergy of this “opacity effect” extends to the imprecise and inconsistent Article 39 terminology employed by the Council in its resolutions. In many cases, the Council utilizes the vernacular of Article 39 without explicit reference to Chapter VII. In such cases, a threat to the peace is determined, but it is unclear whether it has the legal effect of an Article 39 determination. For instance, the Council has, without reference to Chapter VII, expressed grave concern towards the situation in the Cyprus which “has led to a serious threat to international peace and security,”¹²⁶ as well as the situation in the Congo which “seriously imperil[s] peace and order...of the Congo, and threaten[s] international peace and security.”¹²⁷

cleansing. Though the restrictive nature of such malleable terms is limited absent further refinement, to some *R2P* poses the threat of binding Article 39 triggers; to others, it represents further license to take an expansive notion of Article 39 and in so doing disregard Article 2(7). In 2006, the Council for the first time endorsed the *R2P* standards, “reaffirming” paragraphs 138 and 139 of the World Summit Outcome Document which covered the topic, and later referenced this responsibility to protect (i.e., resolution 1674) in a Chapter VII resolution regarding Sudan. Whether *R2P* can be integrated into Council practice in a prospective fashion, or continues as a mere post hoc rationalization, remains to be seen. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, (2001), <http://www.iciss.ca/pdf/Commission-Report.pdf>; S.C. Res. 1674, ¶4, U.N. Doc. S/RES/1674 (Apr. 28, 2006); S.C. Res. 1706, ¶2, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

¹²¹ S.C. Res. 1521, U.N. Doc. S/RES/1521 (Dec. 21, 2003).

¹²² See, e.g., S.C. Res. 1545, U.N. Doc. S/RES/1545 (May 21, 2004); see also S.C. Res. 1528, U.N. Doc. S/RES/1528 (Feb. 27, 2004).

¹²³ See *Provisional Rules of Procedure of the Security Council*, *supra* note 90, at 9-10.

¹²⁴ James O.C. Jonah, *Differing State Perspectives on the United Nations in the Post-Cold War Perspective*, ACUNS Reports and papers No. 4, 11 (1993).

¹²⁵ Reisman, *supra* note 95, at 85-86.

¹²⁶ S.C. Res. 353, U.N. Doc. S/RES/353 (Jul. 20, 1974) (emphasis added).

¹²⁷ S.C. Res. 161, U.N. Doc. S/RES/161 (Feb. 21, 1961).

¶61 Conversely, the Council has also acted under Chapter VII without *any* reference to Article 39, or threats to international peace and security. Under Resolutions 1422 and 1487 granting peace operations personnel immunity from International Criminal Court (ICC) prosecution, the Council in the preambular paragraphs of the resolutions simply states that “it is *in the interests of* international peace and security to facilitate Member States’ ability to contribute” to U.N. peace operations.¹²⁸ As discussed in later Sections, these resolutions illustrate a blurring of the lines between normalcy and exception similar to that witnessed in domestic emergency systems, as the Council uses exceptional powers to legislate in non-exceptional circumstances and bypasses legitimating constitutional mechanisms.

¶62 The differences in language are not a simple matter of semantics. Resolution 660 following the Iraqi invasion of Kuwait included not only an explicit determination, but also specifically referenced Article 39 (as well as Article 40) as the basis for its actions.¹²⁹ Less than one year later, Resolution 688 noted that the flow of refugees across international borders threatened international peace and security, but omitted reference to Chapter VII.¹³⁰ Thus, it was unclear whether or not the “safe zones” established thereafter to allow for humanitarian access were legitimately created under the Council’s exceptional powers. Similarly, when Resolution 447 was passed to condemn South Africa’s sustained armed invasions of Angola launched from “illegally occupied” Namibia, it remained unclear whether in fact the resolution was adopted under Chapter VII.¹³¹

¶63 This problem emerges not only in the construction of the Article 39 determination, but also in its application to the operative paragraphs of the resolution. Article 39 determinations, and the subsequent “*Acting* under Chapter VII of the Charter...” tagline, are too often applied by the Council in blanket and under-determined form. When this occurs, the scope of the Chapter VII state of exception becomes unclear, and principles of proportionality and necessity are called into question.

¶64 In rare instances, the Council makes a concerted effort to draft a clear and refined resolution under Chapter VII.¹³² The Council has also specified its Chapter VII powers by compartmentalizing resolutions, dividing them broadly into a Chapter VI section and a Chapter VII section.¹³³ More commonly, Article 39 determinations and subsequent Chapter VII

¹²⁸ S.C. Res. 1422, U.N. Doc. S/RES/1422 (Jul. 12, 2002); S.C. Res. 1487, U.N. Doc. S/RES/1487 (Jun. 12, 2003) (emphasis added).

¹²⁹ S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990).

¹³⁰ S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991).

¹³¹ S.C. Res. 447, ¶1, U.N. Doc. S/RES/447 (Mar. 28, 1979) (stating that the actions as well as the Apartheid regime itself “constitute[d] ... a serious threat to international peace and security”). The British delegation emphasized that the operative paragraphs did not “constitut[e] determinations under the Charter,” while the Soviet delegation implicitly interpreted the resolution in the same way by lamenting the lack of decisive measures under Chapter VII. Though it has been suggested that, lacking circumstantial evidence of Chapter VII intent, such resolutions should be interpreted narrowly and not be regarded as a determination under Article 39. One must question whether interpretive canons like this will be embraced so universally as to constitute an authoritative judgment. U.N. SCOR, 34th year, 2139th mtg., at ¶¶34-38, 56 (Mar. 28, 1979); See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 70, at 727.

¹³² See, e.g., S.C. Res. 1493, ¶¶25-27, U.N. Doc. S/RES/1493 (July 28, 2003) (specifying different levels of enforcement power for MONUC in the Kivu and Ituri regions); ANNUAL REVIEW OF GLOBAL PEACE OPERATIONS 2006 75 (Ian Johnstone ed., 2006) [hereinafter *Annual Review 2006*].

¹³³ See, e.g., S.C. Res. 918, U.N. Doc. S/RES/918 (May 17, 1994) (referring to mission expansion in Part A and to the Chapter VII arms embargo in Part B); see also S.C. Res. 1564, U.N. Doc. S/RES/1564 (18 Sept. 2004) (applying Chapter VII only to that part of the MINUSTAH mandate covered in ¶7(I)); and S.C. Res. 814, U.N. Doc. S/RES/814 (March 26, 1993) (addressing humanitarian issues in Part A, and issues relating to the use of force in Part B).

authorizations are applied in blanket fashion to broad mandates. In Resolution 1545 regarding ONUB, only the preamble referenced Chapter VII explicitly, but paragraph 5 authorized ONUB to use “all necessary means” to carry out an incredibly broad mandate, including activities ranging from disarmament to civilian protection to elections. In so doing, it did not specify whether Chapter VII was applicable only to those “usual suspects” involving force, or if it similarly applied to the operation’s peacebuilding functions. The Council similarly offered a vague Chapter VII authorization for the unprecedented transitional administrations in Kosovo and East Timor. Under Resolution 1272, the United Nations Transitional Administration in East Timor (UNTAET) was established under a broad, unreasoned preambular Chapter VII authorization.¹³⁴ In Kosovo, Resolution 1244, adopted under Chapter VII, proceeded without further refinement to describe both a military and civilian component to the multilateral intervention, under different flags (NATO and the UN) and with sharply divergent tasks. No guidance was offered in ascertaining how and to which functions Chapter VII would apply.¹³⁵ Such directives erode the boundary between Chapters VI and VII.

E. Blurring the Lines

1. Domestically

¶65 As governments disregard the rationale behind exception and opportunistically resort to emergency powers instead of the regular channels of action conforming to more exacting liberal standards, the distinction between emergency and regular governance is obscured. Where this occurs and procedural mechanisms become mere formalities, states of emergency become permanent and little more than an excuse to forgo the niceties of constitutional checks on governmental action. Distinct governmental allocations of jurisdiction are encroached upon, and the legislative process is devitalized. More often than not, the “insidious outcome” of this situation “is the tendency to slide into a new conception of normality that takes vastly extended controls for granted, and thinks of freedom in smaller and smaller dimensions.”¹³⁶

¶66 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*. Egypt, for example, has been under emergency rule since 1958 under Emergency Law No. 162.¹³⁷ In Swaziland, a state of emergency has persisted for over thirty years; in Malaysia, for thirty-seven, and in Syria, over forty.¹³⁸ Limiting mechanisms have often proven ineffective in the face of executive will. In Malaysia, a

¹³⁴ S.C. Res. 1272, ¶2, U.N. Doc. S/RES/1272 (Oct 25, 1999) (granting an “all necessary means” allowance to carry out functions as varied as “law and order,” “sustainable development” and “humanitarian assistance”).

¹³⁵ S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

¹³⁶ HAROLD LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 29 (1950).

¹³⁷ Human 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).

¹³⁸ See John 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 March 22, 2007); David Lesch, *Countries at the Crossroads 2005, Country Report: Syria*, FREEDOM HOUSE, [HTTP://www.freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?edition=2&ccrpage=8&ccrcountry=106](http://www.freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?edition=2&ccrpage=8&ccrcountry=106) (last visited Feb. 21, 2007); Sahr Muhammed Ally, *Convicted Before trial: Indefinite Detention under Malaysia’s Emergency Ordinance*, <http://hrw.org/reports/2006/malaysia0806/index.htm> (last visited March 22, 2007).

government-appointed Royal Commission stated in 2005 that the emergency law “ha[d] outlived its purpose” and was continuing simply to “[facilitate] the abuse of fundamental liberties.”¹³⁹ Still, no change has occurred, as the Malaysian constitution bars judicial review of proclamations of emergency and their continuation.¹⁴⁰ Elsewhere, though judicial review is nominally available, scrutiny of the duration of emergency has been a rarity, with courts instead “regarding each derogation case as a singular exception.”¹⁴¹ Insulated and objective judicial review has not been replaced by political willpower.

¶67 The invocation of emergency in the face of less-than-dire circumstances has also confused its boundaries. The notion of emergency has spread from an initially security-oriented concept to an economic one, devaluing the term. It is the task of the law to ensure that the exceptional powers of emergency do not become a means by which authorities attempt to cut corners of governance. Chapter VII presents a similar challenge.

2. When, to What, and Where Does an Article 39 Determination Apply?

¶68 The normalization and expansion of exception can be seen on the international plane as well. Chapter VII has kept pace with, if not outpaced, the general increase in Council action across the board. In the first forty-four years of the Council’s existence, “[twenty-four] Security Council resolutions cited or used the terms of Chapter VII; by 1993 it was adopting that many such resolutions every year.”¹⁴² In 2005 this number rose to thirty-nine. In 2006, no fewer than forty-two Council resolutions cited Chapter VII.

¶69 Such expansion has increasingly blurred the lines between the traditional pacific dispute settlement functions of Chapter VI and the enforcement actions of Chapter VII, euphemistically captured in the term “Chapter Six and a Half.”¹⁴³ While during the Cold War a sharp line was drawn between traditional peacekeeping under Chapter VI and enforcement action under Chapter VII, the nature and complexity of post-Cold War peace operations has often required a hybrid form of peace enforcement, despite Secretary General Boutros Boutros-Ghali’s recognition that “to blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel.”¹⁴⁴ Boutros-Ghali did attempt to reinforce the distinction and depict the Chapters as “alternative techniques and not as adjacent points on a continuum,”¹⁴⁵ but that attempt was undermined by the Brahimi Report, which suggested the distinction between the two was misleading and emphasized the need “to project credible force.”¹⁴⁶ Where the terminology of Article 39 and Chapter VII is interchangeably used and omitted from resolutions, the U.N. extracts its arguable deterrent effect at the expense of constitutional validity.

¶70 Moreover, inconsistent language in drafting leaves even Council members wondering whether Chapter VII has actually been invoked. In 1992, China abstained from voting for

¹³⁹ *Id.*

¹⁴⁰ Constitution of Malaysia, Part XI, art. 8(b) (1963).

¹⁴¹ See GROSS & NÍ AOLÁIN, *supra* note 17, at 282-84; see also Aksoy v. Turkey, 23 Eur. H.R. Rep. 553, 587 (1996).

¹⁴² CHESTERMAN (2001), *supra* note 70, at 121.

¹⁴³ A term first coined by Dag Hamarskjöld. Kofi Annan, *UN Peacekeeping Operations and Cooperation with Nato* <http://www.nato.int/docu/review/1993/9305-1.htm> (last visited Nov. 13, 2007).

¹⁴⁴ Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, U.N. Doc. A/50/60—S/1995/1, ¶¶35-36 (Jan. 3, 1995).

¹⁴⁵ *Id.* at ¶36.

¹⁴⁶ A phrase itself emblematic of the blurred distinction between force and non-force. Annual Review 2006, *supra* note 132, at 10-11 (citing *Report of the Panel on United Nations Peace Operations*, ¶¶ 21,48, 50-51, delivered to the General Assembly, U.N. Doc. A/55/305 (Aug. 21, 2000)).

Resolution 776, which sought to provide the U.N. Protection Force (UNPROFOR) with the capacity to secure the delivery of humanitarian aid. Though no explicit language appeared, China, preferring a traditional Chapter VI peacekeeping mission, believed that the resolution implicitly invoked Chapter VII through its reference back to the prior Chapter VII Resolution 770.¹⁴⁷ Where uncertainty ascends to the highest veto-holding Council members, the resolutions surely cannot be said to conform to the principle of notice central to emergency systems.

¶71 Mandate resolutions are especially prone to inconsistent drafting. Though some resolutions clarify the contours of the situation—for instance, by enumerating and affirming prior resolutions “except as expressly changed” within the resolution in question¹⁴⁸—many resolutions, particularly relating to mandate evolution, fail in this respect. Missions go through several iterations of title, command structure and authorization, ostensibly reflecting the evolving situation on the ground. While resolutions authorizing a new mandate theoretically serve to tailor response measures so that they remain proportional to and necessary in light of the relevant threat, often such resolutions do not properly signal the cessation of Chapter VII status; they thereby create a situation in which mandate evolution does more to obscure the status of operations than to define it. The inconsistency and ambiguity of “re-hatting” resolutions in restating the applicability of Chapter VII raises the question of whether such authorizations continue on or are eventually annulled tacitly, subject to revocation by some form of desuetude. Though the threat of the “reverse veto,” blocking the termination of a Chapter VII authorization,¹⁴⁹ has impacted this practice considerably, it cannot explain the capricious, if not incoherent, way in which the Council has denoted an operation’s level of authorization.

¶72 As an example, Resolution 1706, expanding the U.N. Mission in Sudan (UNMIS), explicitly restates the Article 39 determination and its Chapter VII authorization, while relegating the latter to a subset of the mandate.¹⁵⁰ Similarly, in Côte d’Ivoire, the resolution establishing the U.N. operation (UNOCI) and allocating authority between it and existing French and ECOWAS forces restates the Chapter VII invocation. It also expressly limits, for a matter of months, the force authorization given to these partners.¹⁵¹ In contrast, resolutions regarding UN activities in Sierra Leone do not maintain consistent authorization language. After one resolution explicitly invoked Chapter VII authority in revising the mandate of the UNAMSIL mission in Sierra Leone, later resolutions extending the UNAMSIL mandate made no mention of Chapter VII until its final extension.¹⁵² At the same time, resolutions pertaining to the Special Court in Sierra Leone and conflict diamonds included an explicit Chapter VII authorization, raising the question of Chapter VII’s continuing applicability to the broad UNAMSIL mandate.¹⁵³

¹⁴⁷ S.C. Res. 776, U.N. Doc. S/RES/776 (Sept. 14, 1992); *see also* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 218 (2d ed., 2004).

¹⁴⁸ *See, e.g.*, S.C. Res. 687, ¶1, U.N. Doc. S/RES/687 (Apr. 3, 1991).

¹⁴⁹ David Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552, 577 (1993).

¹⁵⁰ S.C. Res. 1706, ¶12, U.N. Doc. S/RES/1706 (Aug. 31, 2006); *see also* S.C. Res. 1590, U.N. Doc. S/RES/1590 (Mar. 24, 2005) (establishing UNMIS).

¹⁵¹ S.C. Res. 1528, ¶8, U.N. Doc. S/RES/1528 (Feb. 27, 2004); *see also* S.C. Res. 1464, U.N. Doc. S/RES/1464 (Feb. 4, 2003) (authorizing ECOWAS and French forces under Chapter VII to “take the necessary steps to guarantee” security and freedom of movement for their forces and civilians).

¹⁵² S.C. Res. 1270, U.N. Doc. S/RES/1270 (Oct. 22, 1999) (establishing UNAMSIL); S.C. Res. 1289, ¶10, U.N. Doc. S/RES/1289 (Feb. 7, 2000) (modifying mandate); S.C. Res. 1306, U.N. Doc. S/RES/1306 (July 5, 2000) (extending mandate with no Chapter VII reference); *see also* S.C. Res. 1334, U.N. Doc. S/RES/1334 (Dec. 22, 2000); S.C. Res. 1346, U.N. Doc. S/RES/1346 (March 30, 2001); S.C. Res. 1400, U.N. Doc. S/RES/1400 (March 28, 2002).

¹⁵³ *See, e.g.*, S.C. Res. 1385, U.N. Doc. S/RES/1385 (Dec. 19, 2001) (Chapter VII resolution on conflict diamonds);

¶73 Whether the status of a resolution can be determined solely by explicit reference to Chapter VII, or if reference back to prior Chapter VII resolutions suffices, is a contested point. This opacity in practice, in turn, leaves actors with little certainty as to whether Chapter VII is still in force. Such uncertainty creates room for the unnecessary extension of Chapter VII authority, which, in light of the normative exceptionalism it engenders and the *prima facie* legitimacy it endows (discussed further in following Sections), can facilitate unaccountable and illegitimate action on behalf of the Council and Council-authorized actors. This is particularly the case as peace operations trend towards longer tenures with enduring authorizations that recognize the propensity of post-conflict regions to relapse.¹⁵⁴

¶74 Carelessness in this respect can provide actors with a specious legal argument for later action under Chapter VII, as was the case in Iraq. Following the Iraqi acceptance of ceasefire terms after the “Gulf War,” the Council invoked Chapter VII in Resolution 687, declaring the ceasefire effective while extending sanctions and establishing a body to supervise the destruction of proscribed weapons (UNSCOM).¹⁵⁵ As discontent with Iraqi compliance reached a tipping point over ten years later, the Council passed Resolution 1441 under Chapter VII, referencing the earlier resolutions in a manner suggestive of an ongoing and continuous Chapter VII authorization and deciding that Iraq remained in “material breach” of its obligations, primarily under Resolution 687.¹⁵⁶ In light of Council practice, the question of whether the invocation of Chapter VII, or the authorization to use force there under, had become entrenched is uncertain.¹⁵⁷ The matter remained on the Council agenda under the same title through 2005, and intervening resolutions invoked Chapter VII referencing their relation to earlier Chapter VII resolutions, particularly 687.¹⁵⁸ Absent clearer and more consistent practice, the lingering import of Chapter VII in the situation is at best uncertain.

¶75 The case of Iraq demonstrates the very real dangers inherent in the Council’s calculated negligence. Without clearer temporal limits to the invocation of Chapter VII, as well as predictable (if not legally operative) practice, the resulting uncertainty can transcend the realm of semantics. In Iraq, it led to the loss of Council control, and provided the legal foundation necessary to galvanize a “Coalition of the Willing.”

¶76 A cursory glance at the Council agenda further emphasizes the tendency towards entrenchment of situations in which Chapter VII has been invoked. In remaining actively seized of a matter, the Council can stay apprised of a situation and act quickly when necessary; it can also prevent the General Assembly from acting on the matter.¹⁵⁹ This logic is analogous to that of the domestic emergency, wherein the emergency is prolonged to centralize authority in the acting body, typically the executive. Though the Council *has* explicitly “concluded its consideration” of an item and removed it from the list of matters of which the Council is seized,¹⁶⁰ it has done so infrequently, and matters have remained on the Council’s agenda for extended periods of time.¹⁶¹

S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (Chapter VII resolution pertaining to the Special Court).

¹⁵⁴ Roughly half of all countries emerging from conflict relapse into violence within five years. See United Nations Department of Public Information, *2005 World Summit: Securing a Dangerous World*, available at <http://www.un.org/summit2005/presskit/Peace.pdf>.

¹⁵⁵ S.C. Res. 687, U.N. Doc. S/REC/687 (Apr. 3, 1991).

¹⁵⁶ S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

¹⁵⁷ S.C. Res. 687, *supra* note 157, ¶ 34 (concluding the Council would “remain seized” of the matter and take “further steps” to “secure peace and security in the region”).

¹⁵⁸ See, e.g., S.C. Res. 1154, ¶¶3-4, U.N. Doc. S/RES/1154 (Mar. 2, 1998); S.C. Res. 1284, U.N. Doc. S/RES/1284 (Dec. 17, 1999).

¹⁵⁹ U.N. Charter art. 11; Certain Expenses, *supra* note 116, at 176-77.

¹⁶⁰ S.C. Res. 1506 ¶ 3, U.N. Doc. S/RES/1506 (Sept. 12, 2003) (concluding consideration of the Libyan situation,

¶77 Perhaps with an eye towards eliminating such agenda stalwarts, the current working methods of the Council provide for the “automatic” deletion of matters from the agenda which have not been considered in the preceding five years, unless a Council member contests the deletion—in which case the matter must be renewed annually.¹⁶² A period of five years, though, is a nontrivial amount of time. What is more, the rule does not address the Council’s injudicious use of nomenclature. Though Kuwait was quickly liberated from the Iraqi invasion in 1991 and largely irrelevant to later arms control issues, the Council continued to consider developments in Iraq under the general title “the situation between Iraq and Kuwait” until 2005, when it finally held informal consultations addressing the obsolete title.¹⁶³ Such negligence contributes to the lack of clarity in assessing both the purpose and endpoint of Council responses to threats to the peace, and allows for the routinization of exception.

F. Apportioning Limits

¶78 Six decades of work has demonstrated that the Council will not be defined by its political nature. Through its words and actions, it is evident that the Council acts in a juridical fashion, particularly when contemplating the determination of a threat to international peace and security. Still, by themselves the textual limits of the Charter have failed to ensure the valid invocation of Chapter VII. Discordant Council practice has resulted in a blurring of the lines between the ordinary powers and functions allotted to the Council and those extraordinary powers reserved for situations constituting, at a minimum, threats to international peace and security. The failure to use established criteria, the blanket and under-determined form in which Chapter VII is invoked, and the lack of transparency all cast doubt on whether contemporary Council resolutions provide a valid and constitutional basis for derogations from the ordinary.

¶79 In pursuing the ideals of exception, domestic experience offers several insights. The first advises against constructing a series of bulwarks to address the problem. Political discretion is an integral component of the decision to enter into a state of exception. Because of this, explicit substantive rules are rare in constitutional and statutory schemes, and judicial oversight has been deferential, with judges loathe to substitute their policy wisdom for that of the declaratory authority’s in the absence of more manageable standards.

¶80 The domestic experience has shown that procedural limits on declaration are the more effective tool, acting as secondary rules to enforce higher constitutional standards. With respect to constitutionalizing the unsound practice of the Council, several such checks stand out as potentially valuable safeguards. The first is the need for the Council to provide actual notice of Article 39 determinations, and develop a factual record supporting those determinations in a manner inspired by the reporting requirements of the major international human rights instruments’ derogation clauses. Determinations are now largely influenced or made within the closed confines of Council caucus meetings, and resolutions frequently fail to provide the

dating back to Dec. 1991). *See also* S.C. Res. 10 U.N. Doc. S/RES/10 (Nov. 4, 1946) (taking the Spanish Question off of the Council’s list).

¹⁶¹ SYDNEY D. BAILEY, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 351 (1975) (listing several outdated matters).

¹⁶² President of the Security Council, *Handbook on the Working Methods of the Security Council* ¶50 (Dec. 2006), *annexed to* U.N. Doc. S/2006/507 (July 19, 2006).

¹⁶³ The Council decided that “the situation between Iraq and Kuwait” would apply to issues relating to the return of Kuwaiti property, repatriation/return of Kuwaiti and third-country nationals (and their remains), and the U.N. Compensation Commission. Other issues would be considered under the agenda item “The situation concerning Iraq.” President of the Security Council, *Note*, U.N. S/2005/251 (Apr. 18, 2005).

reasoning behind an Article 39 determination. This occurs despite the more thorough precedent set by the Council in its consideration of the Spanish Question, providing both a lengthy, publicly available deliberation of the issue, as well as a record in the form of the appointed Sub-Committee's report. Full employment of the Council's fact-finding powers under Article 34 through the established use of commissions of inquiry *before* an Article 39 determination is made would satisfy these principles. These commissions would provide an objective assessment of the situation, and additionally allow the Council to proffer a factual record for its decision. The greater use of commissions would also answer a pivotal question of institutional competence: how the Council can wield such discretion without an independent intelligence capacity. Use of these independent commissions would, at least on an *ad hoc* basis, ensure accountable and objective factual bases for Council deliberation.

¶81 The domestic experience in emergency also highlights the essential role clarity and transparency play in guaranteeing accountable action. Perhaps the most significant procedural reform that may be gleaned from that experience is the consistent use of language regarding threats to, and breaches of, international peace and security. With the normative implications of "Chapter Six and a half" now long established, calculated ambiguity no longer serves a purpose as applied to the terms of Article 39. The vagaries of diplomatic compromise should not encroach on what is ultimately a binary decision—Chapter Six or Chapter Seven—but rather, if unavoidable, should be confined to the mandate proper.

¶82 Clarity here is a multi-faceted proposition involving several changes. The lexicon of Article 39 should be standardized, through resolution, Presidential Statement or amendment to the Rules of Procedure. To be of legal effect, Article 39 determinations would have to explicitly reference either a threat to international peace and security, a breach thereof, or an act of aggression. Any linguistic mimicry, such as "friction," "endangers" or "continuance in time," would have no legal effect, but could still prove useful in creating a gradual system of notice. To further elucidate Council intent, resolutions should also specifically describe in a concise preambular statement the reasoning behind the Article 39 determination. Further, the relevant body paragraphs of a resolution should explicitly invoke Chapter VII authorization and specify the provisions it applies to as well as the territorial or temporal limits to be observed. These standardized practices would not infringe on the discretion of the Council, which would still be able to craft broad authorizations and powers. Confinement to uniform terminology of legal effect would, however, highlight Council intentions and clarify the legal impact of resolutions, thereby augmenting the transparency and accountability of Council decisions.

¶83 Clarity and consistency are similarly essential in resolutions pertaining to mandate evolution and termination. Necessity and proportionality demand that the Council dynamically tailor its response to a situation as it unfolds to prevent Chapter VII from becoming a permanent fixture. While there is certainly an incentive to lessen the length of operations in light of the paucity of resources at the macro-level, once an operation is established the operational flexibility and authority provided by Chapter VII authority has a "narcotic effect."

¶84 Recent Council experience with "smart sanctions" provides a model for clearer and more narrowly tailored practice. Arising as a result of criticisms of the collateral damage to populations of targeted countries, attentive consideration of the problem has resulted in sanctions designed "in accordance with strict and objective criteria," including "time frames, clear and precise objectives, accountability, periodic review and timely and objective assessment of the

effects of sanctions.”¹⁶⁴ In addition to developing more narrowly tailored sanctions, the Council has *affirmatively* terminated or suspended sanctions measures using explicit language.¹⁶⁵

¶85 Involvement of the Secretary-General as an “objective trigger” for termination represents a second means through which to rein in Council discretion and limit the invocation of Chapter VII. This approach has been previously used in both sanctions measures and peace operations.¹⁶⁶ In utilizing an objective trigger in a manner consistent with the Charter, the Council would avoid the intransigence and entrenchment associated with the threat of the reverse veto. Such triggers would not only bind the Council to a pre-determined limit, but place the decision-making authority in an independent, objective and (ostensibly) politically-insulated body. Moreover, increased use of objective and independent triggers could provide bright-line endpoints, both with respect to the termination of Chapter VII measures as well as the invocation more generally.

¶86 Finally, the Council’s past successes in drafting clear and compartmentalized mandates could serve as templates for future drafting. One such mandate endowed MONUC, operating in a complex environment, with a Chapter VII authorization in 2003.¹⁶⁷ The mission had the typical blanket Chapter VII authority for the entire mandate, but under paragraphs 25 and 26 of the resolution, was endowed with full enforcement power in the region of Ituri, and more limited enforcement power “within its capabilities” in North and South Kivu, as well as for the protection of civilians.¹⁶⁸ Resolution 1493 therefore presents a prime example of the ability of the Council to narrowly tailor a mandate to ensure the proportionality of its force authorizations through territorial limits.

¶87 The Council has also specified its Chapter VII powers by compartmentalizing resolutions, dividing them broadly into a Chapter VI section and a Chapter VII section. Thus, in Resolution 918 regarding the situation in Rwanda, part “A” referred to the expansion of the U.N. Assistance Mission for Rwanda (UNAMIR) without a Chapter VII authorization, while part “B” included an Article 39 determination in calling for the imposition of an arms embargo.¹⁶⁹ In Resolution 814 addressing humanitarian issues and mandate expansion in Somalia, part “A” once more outlined

¹⁶⁴ *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization* ¶23, U.N. Doc. A/61/33 (supp.) (Jan. 1, 2006). See also President of the Security Council, *Statement by the President of the Security Council*, U.N. Doc. S/PRST/2006/28 (June 22, 2006).

¹⁶⁵ See, e.g., S.C. Res. 1074 ¶2, U.N. Doc. S/RES/1074 (Oct. 1, 1996). In lifting the sanctions against Libya arising from the Lockerbie incident, Resolution 1506 first recounted the steps taken to ostensibly eliminate the threat to the peace and subsequently enumerated the specific measures to be terminated “with immediate effect.” It also explicitly dissolved the related sanctions committee and “concluded its consideration of the item,” thereby “remov[ing] [it] from the list of matters of which the Council is seized.” S.C. Res. 1506, *supra* note 160, ¶¶ 1-3.

¹⁶⁶ An arms embargo against Eritrea and Ethiopia included both a sunset clause and a termination trigger should the Secretary-General report that a “peaceful definitive settlement of the conflict has been concluded.” S.C. Res. 1298 ¶¶16-17, U.N. Doc. S/RES/1298 (May 17, 2000). In Haiti, embargo provisions would come into effect at a pre-determined time unless the Secretary-General reported that their imposition was “not warranted” in light of negotiations; the measures would be lifted upon the Secretary-General finding that “the de facto authorities in Haiti have signed and have begun implementing in good faith an agreement to reinstate the legitimate government.” S.C. Res. 841, ¶¶3, 16, U.N. Doc. S/RES/841 (June 16, 1993). The French operation in Rwanda, *Opération Turquoise*, was also authorized for a limited period of time (two months), but this authorization could be terminated earlier if the Secretary-General determined that the expanded UNAMIR operation was “able to carry out its mandate.” S.C. Res. 929, ¶4, U.N. Doc. S/RES/929 (Jun. 22, 1994).

¹⁶⁷ S.C. Res. 1493, U.N. Doc. S/RES/1493 (Jul. 28, 2003).

¹⁶⁸ *Id.* at ¶¶25-27; *Annual Review 2006*, *supra* note 132, at 75.

¹⁶⁹ S.C. Res. 918, U.N. Doc. S/RES/918 (May 17, 1994). See also S.C. Res. 1564 (June 1, 2004) (applying Chapter VII only to that part of the MINUSTAH mandate covered in ¶7).

humanitarian measures to which the Article 39 determination would not apply, while part “B” expounded on issues relating to the use of force and mandate expansion.¹⁷⁰

¶88 The domestic experience provides one further procedural mechanism of note—intra-governmental checks. In such systems, where the powers to both declare an emergency and act during it reside in the same entity, typically the executive, a secondary power is entrusted to the parliamentary body to ratify, reject or extend the declaration. Within the U.N., the General Assembly has a recognized residual power in matters of international peace and security, but it cannot make determinations of legal effect, nor can it act at all if the Council is seized of a matter. Ratification of Article 39 determinations and the invocation of Chapter VII by a majority of the General Assembly would not unduly delay Council action. It would, however, legitimate Council decisions through “democratic” process, and give voice to Troop Contributing Countries that make Chapter VII operations possible.¹⁷¹ It would also provide a substitute for review by requiring the Council to draft clearer resolutions, under threat of rejection. To be fully enforceable, the new practice would likely require an amendment to the Charter—perhaps, as a compromise, in lieu of Council membership reform—but revision of rules of procedure and subsequent practice could institutionalize the mechanism, at least informally.

¶89 Investigation of Article 39 is, ultimately, just a small portion of the equation. Council exercise of Chapter VII powers, and the concrete manifestation of those powers in Council-authorized action, not only impact the constitutional framework of the organization, but also directly relate to the phenomenon of legal derogations. Not surprisingly, the same issues of justiciability and limits emerge again in both of these areas.

III. THE BOUNDS OF COUNCIL POWER

¶90 The inexhaustive language of the Charter has prompted some to contend that the freedom of the Council “to decide when to apply coercive measures is matched by an equal discretion as to what measures may be taken.”¹⁷² Following an Article 39 determination, Article 41 permits the Council to move beyond provisional measures and “effect its decisions” through “measures not involving the use of armed force,” including but not limited to the “complete or partial interruption” of economic and diplomatic relations.¹⁷³ If such measures are deemed “inadequate,” Article 42 grants the Council the authority to take action by “air, sea or land forces” and again offers an inexhaustive list of such operations.¹⁷⁴ The binding effect of Council decisions and the thrust of its powers are cemented in Articles 25 and 49, which assure that Member States “agree and accept to carry out the decisions of the Council” and “*shall* join in affording mutual assistance in carrying out the measures” decided upon.¹⁷⁵

¶91 Guidance from the Charter in defining the nature of and constraints on Chapter VII authority is imprecise and in many ways lacking. Offering few finite enumerations or rules, it establishes a system of exceptions and corresponding powers that suggests—but does not

¹⁷⁰ S.C. Res. 814, U.N. Doc. S/RES/814 (Mar. 26, 1993).

¹⁷¹ Operational enhancements may help in reducing the arbitrary impact of politics on Council action. The soon-to-be operational Standing Police Capacity initiative, and the more theoretical Rapid Reaction Force, would allow for Article 39 determinations and corresponding mandates to be developed in a more “ideal” sense, without having to compromise to account for commitment gaps.

¹⁷² Grayson Kirk, *The Enforcement of Security*, 55 YALE L.J. 1081, 1089 (1946).

¹⁷³ U.N. Charter arts. 40, 41.

¹⁷⁴ *Id.* at art. 42.

¹⁷⁵ *Id.* at arts. 25, 49.

dictate—that Chapter VII power, though broad, is often met by countervailing considerations that may limit its exercise. When Chapter VII is conceptualized by reference to the regulative ideals of emergency, these considerations are underscored, and the corresponding limits distilled. Before exploring these limits, however, it is worthwhile to investigate what the Council *can* do, as opposed to what it cannot.

A. *The Power Afforded by Chapter VII...*

1. To Validly Derogate

¶92 As in the context of emergency, Chapter VII power is important not simply for its affirmative grant of positive powers, but also for the provided legal (as opposed to moral) authority to validly derogate from deep-seated provisions of international law. Foremost under Chapter VII is the Council’s authority to enforce its decisions through the use of force, suspending the application of Article 2(4)’s fundamental prohibition. A prohibition on the threat or use of force is generally accepted to be not merely treaty nor customary law, but a peremptory norm having the character of *jus cogens*.¹⁷⁶ Yet, the Charter has established a system providing for its temporary suspension vis-à-vis the Security Council during certain states of exception. This authority has not solely rested with the Council, but has been extended to authorized actors through Council delegation.¹⁷⁷ Thus, the Charter carves out a powerful foundation for concrete Council action, as well as a truly exceptional power in its own right.

¶93 The invocation of Chapter VII also entails an exception to Article 2(7).¹⁷⁸ Here, however, the Council is not temporarily derogating from the norm of non-intervention in domestic affairs; Article 2(7) remains in force throughout. In declaring a situation an act of aggression, a threat to or a breach of *international* peace, a determination under Article 39 inherently adjudicates the matter to be non-domestic in nature and within the purview of Council jurisdiction.¹⁷⁹ Still, the power to decide on the applicability of Article 2(7) is an exceptional and controversial prerogative. For Member States, Article 2(7) represents a codified safeguard of the venerable, albeit timeworn, concept of sovereignty in its full Westphalian regalia, protecting the exclusive control by a State of its territory and internal affairs.¹⁸⁰ Frequently championed by Member States and referenced by the General Assembly, Article 2(7) is a primary safeguard of Member State’s rights against U.N. infringement. Still, as in the emergency context where the government may derogate from certain human rights safeguards to address a national threat, so too may the Council intervene without consent in the ostensibly domestic matters of its constituent units where they are deemed to threaten the greater international good.

¶94 Once clear of the proscriptions of Article 2 and their practical effects, the Council has construed its powers under Chapter VII broadly. Article 42’s examples of military actions

¹⁷⁶ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, at 353, 356 (June 27). *See also* G.A. Res. 2625 (Oct. 24, 1970).

¹⁷⁷ In addition to Article 42’s use of force provisions, other measures contemplating a suspension of Article 2(4) include self-defense (individual or collective) under the provisions of Article 51, and regional action under Article 53. U.N. Charter arts. 2 (4), 42, 51, 53.

¹⁷⁸ *Id.* at art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...but this principle shall not prejudice the application of enforcement measures under Chapter VII.”).

¹⁷⁹ FRANCK, *supra* note 14, at 222.

¹⁸⁰ *See, e.g., Military and Paramilitary Activities, supra* note 178 at 356; *see also* DAN SAROOSHI, *INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS* 9 (Ian Brownlie ed., Oxford Univ. Press) (2005).

available to the Council were inserted at the request of the Soviet Union as a consolation for its failure to insert a more exhaustive provision.¹⁸¹ Owing at least in part to these partial declarations of power provided in Articles 41 and 42, courts have acknowledged the myriad implied powers nevertheless possessed by the Council.¹⁸² Through this judicial creation of implied powers, the courts have bolstered the Council's far-reaching interpretation of its capabilities. More importantly, the *kompetenz-kompetenz* of the Council has flourished as the international community has struggled to determine the authority of courts, particularly the ICJ, to review Council resolutions. Given this judicial backdrop, the Council has taken liberties in construing its Chapter VII *vires*.

2. The Breadth of Chapter VII Powers as Determined by the Council's Kompetenz-Kompetenz

¶95 The expansion of Chapter VII powers over the years has been a two-fold practice, involving both more frequent resort to "typical" Chapter VII exercises and affixing the Chapter VII label to a broader range of enterprises. With respect to "peacekeeping," Chapter VII authority was previously invoked in enforcement missions designed to induce one or more parties to adhere to peace arrangements.¹⁸³ That authority has now been extended to many new operations more accurately described as complex peace operations involving variants of peacemaking, peacekeeping and peacebuilding. Additionally, the Council's frequent use of the blanket "all necessary means" mandate has expanded the discretionary use of Chapter VII within such missions.

¶96 Today, the exercise of Chapter VII power is not simply more eclectic but also more profound. Chapter VII resolutions often demand change from economic, legal and constitutional systems both at the international and domestic level. This was evident in Kosovo, where the U.N. not only redefined the system of government, but spearheaded the privatization of the economy as well. It is also apparent in the U.N. operation in Cote d'Ivoire, where—much to the chagrin of the Ivorian President¹⁸⁴—Resolution 1721 gave the Prime Minister full authority to carry out the peace process, effectively re-allocating many functions of a sovereign government between its branches.

¶97 This expansion of Chapter VII is nowhere more apparent than in the area of international criminal law. Though its ability to modify standards of immunity in Chapter VII operations has long been recognized,¹⁸⁵ the Council has assumed new prominence in the international judicial

¹⁸¹ Indeed, throughout the drafting process, efforts to add to Article 42's list were rejected as implying the exclusion of other actions, thus "restricting the range of measures available to the" Council. CHESTERMAN, *supra* note 70, at 751.

¹⁸² For example, in the *Tadic* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) concluded that "the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures." *Tadic*, Case No. IT-94-1-I, ¶35. The International Court of Justice's (ICJ) Advisory Opinion in the *Namibia* case held that "the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII . . . the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council resolution 276 (1970), Advisory Opinion, 1971 I.C.J. ¶ 110; *see also* U.N. Charter art. 24 (on the functions and powers of the Security Council).

¹⁸³ TREVOR FINDLAY, *THE USE OF FORCE IN UN PEACE OPERATIONS* 5 (Oxford Univ. Press) (2002).

¹⁸⁴ S.C. Res. 1721, U.N. Doc. S/RES/1721 (Nov. 1, 2006); BBC News, *PM Signals New Ivorian Stand-Off*, Nov. 8, 2006, <http://news.bbc.co.uk/2/hi/africa/6130248.stm>.

¹⁸⁵ *See* Convention on the Privileges and Immunities of the United Nations, art. V, Feb. 13 1946, 1 U.N.T.S. 15; *see also* Frederick Rawski, *To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L. L. 103, 104 (2002).

system in the past decade. Under Chapter VII pretenses, the Council has created a system of criminal justice tribunals that has perhaps extemporaneously helped overcome, or circumvent, the procedural and jurisdictional shortcomings of the ICJ and the International Criminal Court (ICC).

¶98 In domestic systems, establishing such dual-court systems is a far-reaching but not infrequent exercise of emergency power. It is also a power subject to executive abuse and lacking constitutional constraints.¹⁸⁶ Though the Security Council has not abused its powers in creating special tribunals, its exercise of exceptional power is similar in using decree or resolution to overcome the limitations of the existing system in exceptional matters pertaining to transitional justice and security. In Resolution 1315, for example, the Council acted under its Chapter VII authority to solidify agreement on a Special Court for Sierra Leone to try those responsible for crimes against humanity and other serious violations of international humanitarian law.¹⁸⁷ More famously, under Resolutions 827 and 955 the Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), respectively.¹⁸⁸ Whether the Courts' establishment was *ultra vires*, or grounded in the Council's implied powers or authority to establish subsidiary organs, was the subject of considerable debate.¹⁸⁹ When presented with the question, the Appellate Chamber of the ICTY determined that the Security Council was competent to create a judicial tribunal based on its powers under Article 41.¹⁹⁰

¶99 In these cases, the Council utilized its Chapter VII powers stemming from exceptional post-conflict situations to establish a new tier of courts designed to handle cases particularly linked to international security. Though these special tribunals are not entirely analogous to domestic security courts insofar as they often operate where foundational judicial systems are lacking, a parallel is worth noting. In each, the Council sought to overcome the procedural and jurisdictional limitations of existing venues, while creating a forum prone to acting more reliably and predictably in a manner consistent with Council interests. In so doing, Council action parallels that of domestic regimes in seeking to take particularly important security interests out of the hands of the "unsatisfactory" regular courts. However, asserting this greater executive role in judicial affairs compromises the independence of the judicial branch, and corrodes the distinction between governmental functions.

B. *The Melding Together of Governance Functions under Chapter VII*

¶100 Domestic emergency powers have a tendency to creep into non-emergency spheres and thereby weaken republican and constitutional safeguards in these areas. Historically, governments have proven altogether too susceptible to the "narcotic effect" of the less-burdensome governance mechanism.¹⁹¹ In Italy, for example, a constitutional provision allowing

¹⁸⁶ Denis J. Sullivan, *Countries at the Crossroads 2005, Country Report: Egypt*, FREEDOM HOUSE, <http://www.freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?edition=2&ccrpage=8&ccrcountry=84> (last visited Feb. 21, 2007); *see also* Lesch, *supra* note 138.

¹⁸⁷ S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

¹⁸⁸ S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, U.N. Doc.S/RES/955 (Nov. 8, 1994).

¹⁸⁹ *See, e.g.,* Alex Marschik, *The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power*, INST. FOR INT'L. L. & JUST. Working Paper 2005/18 11 (2005) <http://www.iilj.org/papers/documents/2005.18Marschik.pdf>.

¹⁹⁰ *Tadic*, Case No. IT-94-1-I, ¶¶ 28-38.

¹⁹¹ GROSS AND NÍ AOLÁIN, *supra* note 17, at 233 (citing Mordechai Mironi, *Back to Work Emergency Orders: Government Intervention in Labor Disputes in Essential Services*, 15 *Mishpatim* 350, 380-86 (1986)).

the government to adopt “provisional measures having the force of law” in situations of “necessity and emergency” has since blossomed into a customary practice of “executive legislation by law-decrees.” No longer contained within the emergency, these law decrees are now the “normal form of legislation.”¹⁹²

¶101 Under the auspices of Chapter VII, the Security Council has extended its jurisdiction well beyond the traditional realm of the executive branch, and asserted its competence to legislate and occasionally act in a quasi-judicial fashion. In addition to its aforementioned willingness to establish new judicial fora, the Council has also shown a propensity to use Chapter VII resolutions to make determinations regarding legality on its own. In this manner, it effectively bypasses the international legal system entirely.

¶102 Admittedly, the Council has long made legal determinations in resolutions that have not invoked Chapter VII. In 1965, the Council condemned the regime in Southern Rhodesia and found its declaration of independence to have “no legal validity.”¹⁹³ Three years later, the Council condemned an Israeli strike against the Beirut Airport as a “flagrant violation of the United Nations Charter and [prior] cease-fire resolutions.”¹⁹⁴ Later, it determined by resolution that the Israeli practice of establishing settlements in occupied territories had no legal validity; it also notably found that the presence of South Africa in Namibia was “illegal and that consequently all acts taken by the Government on behalf of or concerning Namibia after the termination of the Mandate [would be] illegal.”¹⁹⁵ Though certainly possessing judicial language, without the legally binding force of Chapter VII, such declarations were at worst political and at best advisory.¹⁹⁶

¶103 More recently, however, the Council has made legal determinations under Chapter VII authority. Following a non-Chapter VII determination that the annexation of Kuwait had “no legal validity” and was to be “considered null and void,”¹⁹⁷ the Council acting under Chapter VII in Resolution 670 commented that Iraq had “committed grave breaches” of the Geneva Convention.¹⁹⁸ Subsequently, in Resolution 687 the Council determined that Iraq “[was] liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.”¹⁹⁹ It further determined that Iraqi statements repudiating foreign debt “were null and void.”²⁰⁰ Supported by the binding force of Chapter VII, as well as Council-created enforcement mechanisms (in this case, a Compensation Commission), such determinations represent the Council’s assumption of judicial functions, albeit with little augmentation of corresponding fact-finding, intelligence or procedural checks.

¹⁹² AGAMBEN, *supra* note 17, at 17-18.

¹⁹³ S.C. Res. 217, ¶ 3, U.N. Doc. S/RES/217 (Nov. 20, 1965).

¹⁹⁴ S.C. Res. 248, ¶ 2, U.N. Doc. S/RES/248 (March 24, 1968).

¹⁹⁵ S.C. Res. 446, ¶ 1, U.N. Doc. S/RES/446 (March 22, 1979); S.C. Res. 276, ¶ 2, U.N. Doc. S/RES/276 (Jan. 30, 1970).

¹⁹⁶ In the case of the Namibian resolution, the Finnish representative proposed that the Council subsequently ask the International Court of Justice for an advisory opinion on the “legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276.” The Soviet Union and Poland abstained, preferring the earlier political declaration to a genuine legal opinion, but the Council nevertheless adopted the proposal and referred the question to the Court. BAILEY, *supra* note 163, at 244-45. The Council’s determination was, by this tacit admission, a political one; to give it legal weight, a judgment by the International Court of Justice was still needed.

¹⁹⁷ S.C. Res. 662, ¶ 1, U.N. Doc. S/RES/662 (Aug. 9, 1990).

¹⁹⁸ S.C. Res. 670, ¶ 13, U.N. Doc. S/RES/670 (Sept. 25, 1990).

¹⁹⁹ S.C. Res. 687, ¶ 16, U.N. Doc. S/RES/687 (Apr. 3, 1991).

²⁰⁰ *Id.* ¶ 17.

¶104 The Security Council has also used Chapter VII to justify its assumption of legislative competences.²⁰¹ Wary that “the suppression of international terrorism is essential for the maintenance of international peace and security,” the Council in 1999 enacted Resolution 1267, imposing sanctions—most notably, the freezing of funds—against designated members of the Taliban so as to deter and prevent their support for suspected terrorists.²⁰² In the process, it created a body to oversee state implementation. Subsequent to the 9/11 attacks in the United States, the Security Council directly targeted actors directly responsible for terrorism. Resolution 1373 again invoked Chapter VII, defining terrorism as a threat to international peace and security, and obliging Member States to prevent and suppress the financing of terrorism, criminalize the willful provision or collection of funds to and from a terrorist group, and freeze the funds of individuals and entities facilitating terrorist acts.²⁰³ It further established the Counter-Terrorism Committee to monitor implementation of the measures laid out.²⁰⁴

¶105 Though this counterterrorism regime has successfully frozen hundreds of millions of dollars in assets of entities and individuals tied to terrorist networks,²⁰⁵ it is more notable here for its establishment of a prospective regime of some permanence. Whereas Chapter VII has traditionally provided for post-hoc enforcement measures, the Council has used its exceptional powers to criminalize certain activities as well as to create forward-looking bodies. In the process, questions of propriety and institutional competence arise. Moreover, the needed clarity of legislation-by-resolution is called into question by the linguistic vagaries of diplomatic compromise. The Councils’ legislative acts have not gone unnoticed. India expressed concern “at the increasing tendency of the Security Council in recent years to assume legislative and treaty-making powers on behalf of the international community, binding on all States.”²⁰⁶ Nepal cautioned that the Council “should work within its mandate” and “resist the temptation of acting as a world legislature, a world administration and a world court rolled into one.”²⁰⁷ Several other countries noted that although legislation was beyond its competence, the Council could so act but only under exceptional circumstances when faced with an urgent threat.²⁰⁸

¶106 Even if Chapter VII did grant legislative authority to the Council, the Council still would have improperly extended that authority, as the urgency of the threat addressed by Chapter VII legislation is not always apparent. As mentioned in Section II, the Council has acted multiple times under Chapter VII “in the interests of international peace and security” to immunize peace operations personnel of contributing States not parties to the Rome Statute.²⁰⁹ It has even done so in operations where it has referred other crimes to the International Criminal Court’s

²⁰¹ Legislation is here used to refer to broadly applicable, prospective measures not restricted to the immediate situation from which they arose, nor limited to named entities nor by time. Stefan Talmon, *The Security Council as World Legislature*, 99 Am. J. Int’l L. 175, 177 (2005).

²⁰² See S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998); see also S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

²⁰³ S.C. Res. 1373, ¶ 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

²⁰⁴ *Id.* ¶ 6. Later resolutions imposed travel restrictions as well. S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005). See also S.C. Res. 1540, U.N. Doc. S/RES/1540 (April 28, 2004); S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

²⁰⁵ Press Release, United States Department of Treasury, Treasury Report on Progress in the War on Terrorist Financing (Sept. 11, 2003), <http://www.ustreas.gov/press/releases/reports/js721.pdf>.

²⁰⁶ The Permanent Representative of India, *Letter to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2004/329 (Apr. 28, 2004).

²⁰⁷ U.N. SCOR, 59th Sess., 4950th mtg. at 14, U.N. Doc. S/PV.4950 (Apr. 22, 2004).

²⁰⁸ *Id.* at 5, 28; U.N. SCOR, 59th Sess., 4956th mtg. at 3, UN Doc. S/PV.4956 (Apr. 28, 2004).

²⁰⁹ S.C. Res. 1422, ¶ 1, U.N. Doc. S/RES/1422 (July 12, 2002); S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003).

jurisdiction.²¹⁰ In granting immunity and changing the burden of prosecution to prove that the alleged act was not “arising out of or related to the operation,” the Council has effectively legislated on a noticeably “normal” matter traditionally decided by convention and treaty. In so doing, it has taken advantage of the less cumbersome processes required for Chapter VII action and abused the notion of exception inherent in Chapter VII’s constitutional and normative basis.

¶107 The entrenchment and creep of Chapter VII powers into spheres previously outside of the Chapter VII jurisdiction is an evolution reminiscent of emergency powers that further suggests the merit of a common juridical approach to the two powers.

C. *The Limits of Emergency Powers*

¶108 In many emergency situations, limits on governmental power are difficult to discern. Blanket authorizations providing for variants of “all necessary measures” imply a political space for decision closed to legal intervention. Yet even where authorizations are broad and malleable, domestic and international courts alike have found discernable substantive limits to such authorizations. Fundamental rights and corresponding judicial guarantees, such as habeus corpus and *amparo*, have been treated as beyond the reach of emergency powers,²¹¹ and form the backbone of a burgeoning system of checks on the exercise of emergency powers. These constraints fall into two broad categories—*ex ante* and *ex post*.

1. Ex Ante Limits

¶109 The first locus of limits on emergency power lies within the basic law, typically a constitution—the traditional bulwark against the arbitrary exercise of government power. Certain constitutions include threadbare “all necessary measures” provisions without further guidance, such as the infamous Article 48 of the Weimar Constitution; other constitutions specify the scope of emergency powers more explicitly. Some delineate those rights that are not subject to restriction or modification,²¹² while others enumerate provisions and rights that *can* be suspended through the use of emergency powers.²¹³ In either case, constitutional limits provide *ex ante* limits to the exercise of exceptional power and form an important basis for judicial review. Statutory restraints similarly codify limits to governmental discretion, but prove more pliable and less enduring in practice. The Turkish experience, for example, illustrates the weakness of statutory limits, as emergency decrees there have expanded the theoretically “fixed” list of permissible actions on several occasions.²¹⁴

¶110 A final *ex ante* domestic limit, the sunset clause, appears in both constitutional and statutory schemes. Sunset clauses provide notice to all parties that actions taken under emergency justification will expire after a finite period of time, and secure, at least formally, the temporary nature of emergency powers.

²¹⁰ See S.C. Res. 1593, ¶¶ 4, 6, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

²¹¹ See Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency* (Arts 27(2), 25 and 8 American Convention on Human Rights), Inter-Am. C.H.R., OAS/Ser.L/III.19, doc.13 (1988).

²¹² See, e.g., PORT. CONST. art. 19(6); Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 56(3) (Russ.); S. AFR. CONST. 1996 art. 37.

²¹³ See, e.g., Constitución [Constitution] art. 55 (C.E. 1978) (Span.); FIJI CONST. art. 187(3) (1997); PAN. CONST. art. 51 (2004); EL SAL. CONST. art. 29 (1983).

²¹⁴ State of Emergency Law, arts. 9, 11 (1983) (Turk.).

¶111 In concert with these domestic constraints, the non-derogable provisions in international human rights instruments provide a tangible set of standards guiding valid exercise of emergency powers. Still, the impact of these *ex ante* limits depends on effective enforcement mechanisms.

2. Ex Post: Review

¶112 It has been the province of courts of general review and international courts of human rights to secure the proper exercise of emergency power.²¹⁵ Nonetheless, many domestic and international courts have failed to do so. Domestically, where judicial review is not barred by constitutional or legislative provision, judges have frequently proven unwilling to rule against the government where information is incomplete and decisions may in fact come at a “subsequent cost” to national security.²¹⁶ Because of these concerns, judicial review has been inconsistent in many countries.²¹⁷

¶113 International courts have likewise struggled with the concept of emergency review, often extending the “margin of appreciation” doctrine to account for their limitations. As in the domestic setting, incomplete information and difficult standards of review complicate the task of international courts, as does their limited fact-finding capabilities. Reports compiled under provisions such as Article 40 of the ICCPR fail as substitutes, as they are largely “unfocused, subject to substantial delays, and unequipped either to produce or test the veracity of relevant information.”²¹⁸ Paucity of information is only one challenge facing international courts; another is applying the evidence to a legal framework. Here, the political nature of the question continues to hinder judicial review.²¹⁹ In spite of these infirmities, substantive judicial review has developed and been supplemented if not sustained by international courts. Though inconsistent rulings have often reflected political rather than legal principles,²²⁰ an emergency jurisprudence of at least some coherence has emerged. Those court decisions challenging governmental action have revolved primarily around fundamental principles of necessity and proportionality, although some cases have been decided on reasonableness grounds as well.²²¹

¶114 The emergency doctrine’s requirement that measures not exceed the extent warranted can appear *ex ante* in domestic law,²²² and has been inferred by reviewing courts as a corollary to the “strictly required” derogation provisions of the international human rights instruments.²²³ Under

²¹⁵ While some countries have established special tribunals mandated to review appeals relating to particular regulations, they are prone to executive abuse and contain lesser procedural safeguards.

²¹⁶ David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2566 (2003).

²¹⁷ As an example, consider Israel, where for over forty years no emergency regulation was invalidated as “unreasonable.” MENACHEM HOFNUNG, *DEMOCRACY, LAW AND NATIONAL SECURITY IN ISRAEL* 64 (Dartmouth Publishing 1996).

²¹⁸ Joan Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT’L L. J. 1, 41 (1981).

²¹⁹ See, e.g., *A. v. Sec’y of State for the Home Dep’t.*, (2004) QB 335 at 110, 151 (holding that the decision as to which powers were to be employed was a political matter, on which judicial judgment could not be made); see also, DYZENHAUS, *supra* note 17, at 177.

²²⁰ GROSS AND NÍ AOLÁIN, *supra* note 17, at 274-75 (analyzing the European Court’s strong stance in *The Greek Case* and concluding that “where ostensibly democratic states have engaged in the suspension of certain rights guaranteed under the convention, the commission and court have been less exacting in their requirements”).

²²¹ In *Karunathilaka and Another v. Dayananda Dissanayake, Comm’r of Election and Others Case No. 1*, 1 Sri L.R. 157, 179-81 (1999), the Sri Lankan Supreme Court invalidated an emergency measure suspending a local election poll date as having no reasonable nexus to the national emergency.

²²² See, e.g., Basic Law: The Government, art. 38(e) (Isr.).

²²³ *Aksoy v. Turkey*, 23 E.H.R.R. 553, ¶ 84 (1996) (holding a 14-day detention impermissibly disproportionate to

the European Court's jurisprudence, the principle of proportionality is a multi-faceted one. The monitoring organ must consider the need for and scale of a given measure, the need for suspending implicated rights, the manner in which the measure has been applied in practice, and the nature and intensity of a threat over time and at a given moment.²²⁴

¶115 The axiom of necessity has provided a less yielding and more objective basis for judicial intervention. It does so not as a prospective source of authorization, but as a limiting consideration.²²⁵ The necessity requirement applies equally to the "duration, geographical coverage and material scope" of the emergency and measures of derogation resorted to.²²⁶ In 1976, the European Court in *Handyside v. United Kingdom* differentiated the "strictly required" standard of the Convention from an ordinary standard of necessity or proportionality, determining that it instead meant "indispensability." Though it split ten to nine in the ultimate outcome of case, the Court unanimously agreed upon the stricter standard.²²⁷ Despite the continuing judicial concession to discretion, this standard has been used since to invalidate measures even where courts have agreed with a government's assessment that a public emergency exists.²²⁸

¶116 It is difficult to see consistency in a history of cases that at once establishes a textually strict standard while simultaneously conceding a wide margin of discretion to the defending state's interpretation. It raises the concern that judicial review in such cases is simply a rubber stamp, creating legitimacy that in fact has not been earned. Yet it cannot be denied that courts *have* intervened against questionable government practice. The consistency sought might in the end lie in the fact that courts scrutinize emergency measures more vigorously than they have the original question of whether a valid emergency exists. Irrespective of whether such explanation is more empirical observation or normative suggestion, it allows for the relegation of discretion to one step of the bifurcated question of emergency, and the use of manageable judicial standards in the latter step. In so doing, it allows for the reconciliation of the political nature of emergency, and substantive judicial review utilizing the bedrock principles necessity and proportionality.

the threat posed); *cf.* *Brannigan v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993) (holding a 7-day detention proportionate).

²²⁴ See ORAÁ, *supra* note 33, at 148-49 (summarizing the bases for decision of the European Court in several cases, including *Ireland v. United Kingdom*, *Lawless*, and the *Greek Case*).

²²⁵ See Public Committee Against Torture in Israel v. The State of Israel, H CJ 5100/94 (1999), ¶ 34-36; *cf.* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004) ("[t]he Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document's specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements"). The words of William Pitt echo the need for caution: "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves." William Pitt, *Speech to the House of Commons*, 12 PARL. HIST. ENG. (Nov. 18, 1783).

²²⁶ *General Comment No. 29*, *supra* note 32, ¶ 4.

²²⁷ *Handyside v. United Kingdom*, 1 E.H.R.R. 737 (1976); *cf.* *The Greek Case* (Report of the Commission), 1 Eur. Ct. H.R. at 176 (1969) (state enjoys a "certain measure of discretion in assessing the extent strictly required by the exigencies of the situation").

²²⁸ See, e.g., *Demir v. Turkey* (21380/93), Eur. Ct. H.R. 88, ¶ 51 (1998); *Castillo Petruzzi v. Peru*, Inter-Am. C.H.R., (ser. C), No. 52, ¶ 204 (1999).

D. Limits on Chapter VII Power

1. Constitutionality

¶117 Under Article 103 of the Charter, the obligations of Member States prevail over those provided for by treaty.²²⁹ In light of their relative hierarchical positions as sources of international law, customary international law short of *jus cogens* is subject to preemption by Chapter VII action as well.²³⁰ In contrast, peremptory norms of *jus cogens* do not permit derogation; in the words of Judge ad hoc Elihu Lauterpacht in the Provisional Measures stage of the *Genocide* case, “the relief which Article 103 of the Charter may give the Security Council in case of conflict . . . cannot . . . as a matter of simple hierarchy of norms . . . extend to a conflict between a Security Council resolution and *jus cogens*.”²³¹ As in the domestic setting, even emergency cannot justify departure from certain non-derogable norms.

¶118 *Jus cogens* does not represent the only *ex ante* constraint on Chapter VII. The Council, as a creature of the Charter, must abide by some form of a constitutional rule of law. Indeed, even a weak construction of the constitutional maxim that “a stream cannot rise higher than its source”²³² suggests that the Council’s authority is simultaneously conferred and limited by the Charter, even though the Council may enjoy broader powers than the states delegating those powers to it.²³³ The ICTY has asserted that the Council is “subjected to certain constitutional limitations,”²³⁴ and while subsequent practice has conclusively ruled some out,²³⁵ several substantive limits remain.

i) *Human Rights*

¶119 First and foremost among substantive limits are the principles and purposes of the U.N. Under Article 24 of the Charter, the Council “shall act in accordance with the Purposes and Principles of the United Nations,” which include the promotion of human rights.²³⁶ Such a mandate was not simply intended as a hortatory gesture; during the San Francisco conference, the U.S. delegate noted that “the Charter had to be considered in its entirety and if the Security Council violated its principles and purposes it would be acting *ultra vires*.”²³⁷

¶120 Unfortunately, the purposes and principles have proven “abstract, general, difficult to apply and sometimes irreconcilable.”²³⁸ This is particularly the case with respect to the exceptional nature of the Security Council. The uneasy combination of mandatory “shall” terminology with non-legal and vague language like the “promotion of human rights” begs the question whether human rights law in fact strictly limits Council action, or is simply a factor to be considered. At the time of drafting, more comprehensive formulations met with little

²²⁹ U.N. Charter art. 103.

²³⁰ SCHWEIGMAN, *supra* note 96, at 196; *see also* ZWANENBURG, *supra* note 15, at 156.

²³¹ Application of the Convention on the Prevention & Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. Rep. 440, ¶ 100 (Prov. Measures of Sept. 13) (separate opinion of Lauterpacht).

²³² Australian Communist Party v. Commonwealth (1951) 83 C.L.R. 1 at 258.

²³³ SAROOSHI (1999), *supra* note 20, at 26-27.

²³⁴ *Tadic*, Case No. IT-94-I-AR72, ¶ 28.

²³⁵ *See* Certain Expenses of the U.N., *supra* note 16, at 167 (determining that measures under Chapter VII do not require the conclusion of Article 43 agreements); *see also* SIMMA, *supra* note 70, at 753 (observing that the Council may immediately turn to the provisions of 42 without having previously attempted measures under Article 41).

²³⁶ *See* U.N. Charter arts. 1, 2, 24.

²³⁷ Doc. 555.III/27, 11 UNCIO, at 379, *quoted in* SCHWEIGMAN, *supra* note 96, at 29.

²³⁸ Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT’L L. 519, 562 (1994).

success.²³⁹ Amendments to Article 24 clarifying the legal status of the provision and refinement of the obligation later in Chapter VII were rejected, at least in part because Member States felt they were sufficiently explained elsewhere.²⁴⁰ State-centered approaches to later treaties forming the basis of human rights law further call into question whether Article 24(2), in concert with Article 1(3), provides for the binding application of human rights law to Chapter VII action. Though the UN Human Rights Committee has emphasized that the ICCPR is designed to safeguard individual human beings, and is not simply a web of inter-State obligations,²⁴¹ the ICCPR only legally binds states. While human rights law is broadly applicable to the U.N. through its constitutional assumptions and as a subject of international law, its binding effect on the Council is dubious.

¶121 Still, human rights law as applied via the Purposes and Principles provisions remains pertinent to Chapter VII action. Lauterpacht cautioned that one should not “overlook the significance of” Article 24(2)’s requirement.²⁴² Judge Weeramantry’s dissent in the *Lockerbie* case notes that Article 24(2) represents a “circumscribing boundary,” imposing an “imperative” duty to follow “categorically stated” limits.²⁴³ Notwithstanding these concerns, at least one court has decided that there is only one limit to the binding effect of Council resolutions: “they must observe the fundamental peremptory provisions of *ius cogens*.”²⁴⁴

¶122 Clearly, there is a distinction between the political responsibility to “promote” on one hand, and the legal responsibility to *guarantee*²⁴⁵ on the other. At present, the Purposes and Principles provisions of the Charter present an unsatisfactory constraint on a Chapter VII authority that transcends general international law. Accordingly, courts have been unwilling to treat the Council’s adherence to its Principles and Purposes as a binding conception.

ii) *Necessity and Proportionality*

¶123 A second constitutional check—necessity and proportionality—may more rigorously apply human rights responsibilities to Council action. Necessity is written into the plain language of the Charter to constrain Chapter VII action. Specifically, measures under Article 42 are only available to the Council if action under Article 41 “would be inadequate;” that is, measures involving the use of force are only permissible where necessary to restore international peace and security if lesser measures prove, or are assumed, incapable of doing so. Moreover, even when validly acting under Article 42, the Council may only take such action “*as may be necessary*.”²⁴⁶

¶124 As in the domestic context, the notion of necessity is tied to imminence. Accordingly, preventive war has been argued to be “unequivocally illegal” and beyond the reach of Council power.²⁴⁷ The Security Council has never conceded that a force authorization may be based on a

²³⁹ ZWANENBURG, *supra* note 15, at 150 (observing Panama’s proposed language).

²⁴⁰ See The Rapporteur, *Report of the Rapporteur of Committee III/3 on Ch. VIII, Sec. B, The UN Conference on International Organization* [UNCIO], 504-5, U.N. Doc. 881 III/3 146 (June 10, 1945); see also Akande, *supra* note 98, at 313.

²⁴¹ *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, ¶ 17, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 1, 1995) (adopted Apr. 11, 1994) [hereinafter *General Comment No. 24*].

²⁴² Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1993 I.C.J. Rep. 440, ¶ 101 (separate opinion of Lauterpacht).

²⁴³ *Lockerbie*, 1992 I.C.J. 114, 171 (dissenting opinion of Weeramantry).

²⁴⁴ Case T-315/01, *Kadi v. Council of the European Union*, 2005 E.C.R. II-3649, ¶ 230.

²⁴⁵ Frédéric Mégret & Florian Hoffman, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314, 324 (2003).

²⁴⁶ U.N. Charter art. 42 (emphasis added).

²⁴⁷ CENTER FOR ECONOMIC AND SOCIAL RIGHTS, *Tearing up the Rules: the Illegality of Invading Iraq* 7 (2003).

“potential” nor “non-imminent threat of violence.”²⁴⁸ Frequently, the Council issues warnings to offending States through non-Chapter VII resolutions in an attempt to avoid intervening before the conflict, or perhaps more accurately Member States’ willingness to respond to the nascent conflict, ripens. Resolutions provide for discretion to be exercised by authorized actors in matters of policy and operations, but only to the extent such decisions and actions are necessary to further the mandate or some subsection thereof. In addition, mandates frequently provide for “further authorization as necessary in the light of developments,”²⁴⁹ allowing for the narrow tailoring of mandates to the threat level faced at a given point in time.

2. Judicial Review

¶125 The jurisprudence of the ICJ reveals a Court which, content to assert its relevance, has done little more than carve out a narrow role through which it can undertake incidental review.²⁵⁰ Still, as the U.S. case *Marbury v. Madison* illustrates, this very assertion of competence is in the long run important.²⁵¹ Though the Court has yet to intervene in Council action, it has established its legal authority to do so.

¶126 ICJ jurisdiction over Council action has two primary bases. Under Article 96 of the Charter, the Council “may request” an advisory opinion “on any legal question.”²⁵² The propriety of Council action may also arise incidentally in a case between two states. In rendering its decision on the jurisdictional objections of the U.S. in the *Nicaragua* case, the Court firmly established its authority to decide on matters under the Council’s Chapter VII purview. The Court stated that although the Council exercises functions of a “political nature” in contrast to the Court’s “purely judicial functions,” “both organs can . . . perform their separate but complementary functions with respect to the same events.”²⁵³ “Even after a determination under Article 39,” the Court found that it could adjudicate on matters already the focus of Council action.²⁵⁴ It repeated this assertion in the Provisional Measures stage of the *Genocide* case, holding that Council action could not violate *jus cogens*.²⁵⁵

¶127 In the *Lockerbie* case, the ICJ again ambiguously asserted its competence.²⁵⁶ In its decision on concurrent jurisdiction in the provisional measures stage, the Court noted that “a

<http://cesr.org/filestore2/download/523/tearinguptherules.pdf>.

²⁴⁸ INTERNATIONAL COMMISSION OF JURISTS. *The Australian Section of the ICJ Questions the Proposed Attack on Iraq* (Feb. 20, 2003), <http://www.icj.org/IMG/pdf/doc-65.pdf>.

²⁴⁹ See, e.g., S.C. Res. 1575, ¶ 13, U.N. Doc. S/RES/1575 (Nov. 22, 2004).

²⁵⁰ See SCHWEIGMAN, *supra* note 96, at 271.

²⁵¹ See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

²⁵² U.N. Charter art. 96, para. 1.

²⁵³ Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, Rep. 434-35, ¶ 95 (Prov. Measures of Nov. 26).

²⁵⁴ *Id.*, at 432, 436, ¶¶ 90, 98.

²⁵⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 325, Rep. 440, ¶ 100 (separate opinion of Lauterpacht).

²⁵⁶ Following American and British demands that Libya surrender for trial two Libyan nationals allegedly responsible for the bombing of Pan Am Flight 103, the Council adopted resolution 731 urging a “full and effective response” from Libya. Libya filed applications with the ICJ accusing both countries of breaching their obligations under the Montreal Convention, but before a decision was rendered the Council adopted resolution 748 under Chapter VII, imposing mandatory sanctions on Libya should it fail to deliver the men by a certain date. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 114, Rep. 142 (Prov. Measures of Apr. 14); S.C. Res. 731, ¶ 3, U.N. Doc. S/RES/731 (Jan 21, 1992); S.C. Res. 748, U.N. Doc. S/RES/748 (March 31, 1992).

decision of the Security Council properly taken in the exercise of its competence . . . cannot be summarily reopened,” and Resolution 748 satisfied this condition.²⁵⁷ Still, the validity of Council resolutions was *prima facie*, rather than an irrebuttable presumption.²⁵⁸ A Chapter VII measure outside of the Council’s competence, or not “properly taken,” could well be subject to later review. Several judges, however, expressed doubt as to whether Resolution 748 prejudiced the functions of the Court, and as such lacked validity.²⁵⁹ Judge Krzysztof Skubiszewski’s dissent in the *East Timor* case later supported this position, arguing that “the Court is competent . . . to interpret and apply the resolutions of the Organization” and “make findings on their lawfulness, in particular whether they were *intra vires*.” In other words, “the decisions of the Organization . . . are subject to scrutiny by the Court with regard to their legality, validity and effect.”²⁶⁰

¶128 As acknowledged by the *Legal Consequences* case, though, the Court possesses no general power to review Council resolutions adopted under Chapter VII.²⁶¹ Rather, it is an “incidental jurisdiction”²⁶² by which the Court can assess the validity of Council action where relevant to the determination of state disputes. Additionally, as Jose Alvarez notes, its jurisdictional limits make it unlikely that the Court would find a Council decision “null and void” *per se*, but rather “illegal” as applied to the parties.²⁶³

3. The “Parliamentary” Check

¶129 Article 24 of the Charter dictates that the Council has “primary,” but not sole, responsibility for the maintenance of peace and security. Consequently, the Council encounters a republican check on its Chapter VII powers. Unlike checks common to domestic emergency regimes, however, the General Assembly cannot restrain the affirmative exercise of Council power; it can only act in the face of Council *inaction*.

¶130 Article 10 of the Charter gives the General Assembly the power to review matters within the jurisdiction of any UN organ and make recommendations, unless the matter is “actually before the Security Council.”²⁶⁴ Under the Uniting for Peace resolution, passed by a strong majority, the General Assembly reserved the right to make recommendations for “collective measures” where “there appears to be a threat to the peace, breach of the peace, or act of aggression” and the Council has failed to “exercise its primary responsibility.”²⁶⁵ In case of a breach of the peace or act of aggression, the General Assembly further permits itself to recommend the use of armed force when necessary.²⁶⁶ For example, the Uniting for Peace Resolution served as the basis for the U.N. Peacekeeping force in the Congo and later the U.N. Command for an Emergency Force deployed to the Egypt-Israel border.²⁶⁷ Though its validity

²⁵⁷ Lockerbie, 1992 I.C.J. 114, 129 (declaration of Oda).

²⁵⁸ *Id.*; see also SCHWEIGMAN, *supra* note 96, at 268; see also Akande, *supra* note 96, at 313-318.

²⁵⁹ Lockerbie, 1992 I.C.J. 114, 129 (declaration of Oda); Lockerbie, 1992 I.C.J. 114, 138 (separate opinion of Lachs).

²⁶⁰ *East Timor* (Portugal v. Australia), 1995 I.C.J. 90, Rep. 251 ¶ 86 (June 30) (dissenting opinion of Skubiszewski).

²⁶¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. Rep. 16, 33, ¶¶ 88-89* (Advisory Opinion).

²⁶² *Tadic*, Case No. IT-94-I-AR72, ¶ 21.

²⁶³ Jose Alvarez, *Judging the Security Council*, 90 AM. J. INT’L L. 1, 5 (1996).

²⁶⁴ U.N. Charter art. 10.

²⁶⁵ Uniting for Peace, G.A. Res. 377 (V) (Nov. 3, 1950).

²⁶⁶ *Id.*

²⁶⁷ S.C. Res. 143, U.N. Doc. S/RES/143 (July 17, 1960); G.A. Res. 1000 (ES-1) (Nov. 5, 1956).

was largely affirmed by the opinion, the International Court of Justice in *Certain Expenses* clarified that the power of the General Assembly to act in the maintenance of international peace and security was a residual one, and did not include “coercive,” “preventive or enforcement measures . . . under Chapter VII.”²⁶⁸

¶131 In summary, the General Assembly does constrain the discretion of the Council in its use of Chapter VII. But it does so only as a lower bound. Beyond political opprobrium and its authority over the budgetary allotments for peace operations, the Assembly cannot formally act to restrain Council measures under Chapter VII; it can only act in its stead. This is not itself a nullity. Where the Council hesitates, the General Assembly’s recommendations may shape the ultimate character of later Council action through resource commitments and operational design. Therefore, while the General Assembly’s “Uniting for Peace” authority does not provide the post hoc or parliamentary check seen in emergency regimes, it continues to limit Council discretion in its response to emergency.

4. The Hard and Soft Check of Political Considerations

¶132 The institutional backdrop of Council Chapter VII action most clearly diverges from that of the domestic exercise of emergency powers in the sphere of political checks. The Council’s heterogeneous composition and “equality” amongst the P-5 (as guaranteed by the veto) creates a decidedly non-unitary body. In this context, the veto power serves as a hard, albeit non-judicial, limit on the Council’s exercise of Chapter VII authority; but it can just as easily be used as an obstructionist tool thwarting the valid, and perhaps necessary, exercise of power.

¶133 The Council’s need for legitimacy, on the other hand, represents a soft political check of some importance.²⁶⁹ Recent experiences indicate that the Council’s use of Chapter VII powers may be growing faster than contributors’ willingness to act.²⁷⁰ Unlike a domestic government, the Council has no sovereign rights, nor does it possess a monopoly on force. It relies on the legitimacy of its decisions, as well as the moral and political import of its actions, to secure the resources needed to effectuate its designated measures. In a system where countries outside of the P-5 voluntarily contribute the vast majority of personnel, case-by-case compliance depends in large part on “perceptions of the legitimacy of the [C]ouncil and its actions.”²⁷¹ This legitimacy, in turn, depends on “some combination of conformity to shared norms and to established law.”²⁷² The challenge once more is to constitutionalize the practice of the Council through constraints political and legal, procedural and substantive, soft and hard.

²⁶⁸ *Certain Expenses of the U.N.*, *supra* note 16, at 176-77.

²⁶⁹ In light of the obsolescence of Article 43 and the Council’s inability to compel contributions, it relies on the voluntary contributions of Member States, which in turn depend on perceptions of the Council. *See supra* note 16.

²⁷⁰ CENTER ON INTERNATIONAL COOPERATION, ANNUAL REVIEW OF GLOBAL PEACE OPERATIONS 2007, 11 (Ian Johnstone ed., 2007) *available at* http://www.cic.nyu.edu/internationalsecurity/docs/peacekeeping_BRIEFINGPAPER.pdf [hereinafter “ANNUAL REVIEW 2007”].

²⁷¹ Ian Hurd, *Legitimacy, Power and the Symbolic Life of the UN Security Council*, 8 *Global Governance* 35, 35 (2002).

²⁷² Grant & Keohane, *supra* note 14, at 35.

E. Limiting Council Power

- ¶134 Again, reference to the regulative ideal of emergency suggests that the Council exercise of Chapter VII power *is* subject to legal constraints. Reform might emerge in any of several contexts, including the ICJ's undertaking of an increased reviewing role.
- ¶135 The ICJ could reassess its Charter analysis, and import the exacting standards of necessity and proportionality into its review of Council action, whether incidental or general. Necessity has been underutilized at the international level as grounds for judicial review. Written explicitly into the Charter text, it provides a manageable judicial standard by which the Council's political discretion can be reined in. As in judicial review of emergency, necessity is a multi-faceted analysis examining both the measures taken and the threat faced. The violation of human rights law can and should be integrated into this analysis. Though one could imagine an analysis wherein Council action that violates human rights law would be *prima facie* "unnecessary," such a dramatic change in existing legal practice is not required. Assuming robust scrutiny of review, it is enough to treat failure to guarantee human rights as one of several factors in determining whether an action is narrowly tailored to the threat faced. Such judicial analysis would further drafters' intent in promoting human rights, effectuate the plain text of the Charter, and assure responsible and proportionate Council action. Practically, it would be a workable basis for review that would avoid a paradigm shift from that of contemporary international judicial oversight.
- ¶136 Moreover, the Court could advance the process through the amendment of its statute to allow for more general jurisdiction over the Council, either in binding dispute resolution or through a more broadly available channel of advisory opinions. A more substantive system of review could emerge from modifications to the rules regarding advisory opinions, or within the existing system through further judicial refinement of the terms of art "competence" and "validity." Though the ICJ has been prone to the same judicial deference in matters of international peace and security that its domestic counterparts have in emergency affairs, the potential for more substantive review exists.
- ¶137 The Council itself could create an independent subcommittee or organ dynamically reviewing the proportionality, necessity and validity of its measures. Greater legal regard to the necessity of Chapter VII action and development of an international "necessity jurisprudence" would further add clarity to gray areas of Council action, such as humanitarian intervention.²⁷³ The next Section explores an area where the need for limits is particularly compelling: Council delegation of Chapter VII authority to other entities.

IV. CONTROLS ON DELEGATED AND AUTHORIZED ACTION

- ¶138 The decisions of the Security Council rely on the Secretariat and Member States for enforcement. Council resolutions authorize these entities to take prescribed action, and in many instances delegate discretionary powers to achieve the resolutions' ends, subject to the contours defined therein.²⁷⁴ A resolution may delegate such power, whether it directly implicates Member State action, as in the burgeoning field of "Council legislation," or establishes a peace operation authorized to use force under Chapter VII. Any analysis of Council action, therefore, must take

²⁷³ This is as opposed to the moral and political "overwhelming and exceptional necessity" argument put forward by NATO in justifying its intervention in Kosovo. Thomas Franck, *Humanitarian and Other Interventions*, 43 COLUM. J. TRANSNAT'L L. 321, 327 (2005).

²⁷⁴ For a deeper treatment of the subject of delegation vs. authorization, see SAROOSHI (1999), *supra* note 20.

into account its bifurcated nature, and appreciate the distinctions between Council design and implementation by the authorized parties.

¶139 Recent practice has demonstrated the propensity of acting entities to not only recognize the exceptional nature of Chapter VII, but also to rely on it to justify non-compliance with provisions of international law, especially in the field of human rights. These violations, this article argues, are in fact derogations, identical to the common exercise of emergency powers. Unfortunately, such derogation has heretofore occurred in an unaccountable fashion. Though derogating actors have justified their practices through the rhetoric of exception, they have not subscribed to the legitimating checks of emergency. Against the backdrop of effete existing accountability mechanisms at the level of implementation, this has opened the door to not simply derogation, but violation as well. If exceptionalism is endemic to Council-authorized action, this article argues that it should be practiced in accordance with the ideals of emergency doctrine. Given the idiosyncrasies of the international architecture though, this ideal likely requires resort to a pluralistic accountability system.

A. *The Exception Mindset of Peace Operations*

1. Exceptionalism Across Actors and Sectors

¶140 U.N. peace operations often arrive on the ground with a level of organization and coherence mirroring that of their fractured host territories.²⁷⁵ Counted amongst their maladies are “countless ill-coordinated and overlapping bilateral and United Nations programmes,” “inter-agency competition preventing the best use of scarce resources,” and disagreement over the hierarchy of mandates and international obligations.²⁷⁶ Accountability mechanisms are often muted as the United Nations assumes a measure of authority absent legal checks.

¶141 Against this tempestuous backdrop, a state of exception is often presumed. In the broad sense, norms of interaction are “smudged” and the short-term commitment to liberal norms is eased in order to promote long-term stability.²⁷⁷ An air of legal malleability hovers over the Chapter VII mission. In the area of reconstruction, a peace operation “is one of the rare settings in which international institutions and aid organizations remain tolerant and sometimes actively complicit in [leakage, widespread waste and bribery].”²⁷⁸ As concerns democratic reform, peace operations have been known to interfere with the very same free exercise of democratic choice that they otherwise seek to promote. In Bosnia, for example, the democracy mission turned into what one author has deemed a “grotesque parody of democratic principles,” as political statements that “could be construed” as expressions of support for territorial separation or independence were proscribed by the Election Appeals Sub-Commission.²⁷⁹ Believing such inconsistencies justified by exceptional and temporary security situations, as well as the “all

²⁷⁵ High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, ¶ 38, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld>, [hereinafter High-Level Panel Report]; see also Espen Barth Eide et al., *Report on Integrated Missions: Practical Perspectives and Recommendations*, 18 (May 2005), <http://www.globalpolicy.org/security/peacekpg/general/2005/05integrated.pdf>; Fredrik Galtung, *Introduction: The Corruption Dimension of Post-War Reconstruction*, in *CORRUPTION IN POST-WAR RECONSTRUCTION* (Daniel Large ed., 2003), available at <http://www.transparency-lebanon.org/Publications/Corruption%20in%20PWR.htm>.

²⁷⁶ High-level Panel Report, *supra* note 275, ¶ 38.

²⁷⁷ Galtung, *supra* note 275.

²⁷⁸ *Id.*

²⁷⁹ DAVID CHANDLER, *BOSNIA: FAKING DEMOCRACY AFTER DAYTON* 158 (Pluto Press 1999).

necessary means” backing of Chapter VII, actors across sectors have confidently proceeded. As they have, a sense of exception has permeated the operational sphere. In the areas of rule-of-law reform and human rights promotion, this has at times manifested itself in actions that have not measured up to mandates’ lofty goals, as was the case in Kosovo.

2. Kosovo

¶142 The United Nations Mission in Kosovo (UNMIK), which would become a “high-water mark of international authority” and a sovereign government unto itself,²⁸⁰ demonstrated several of these symptoms. Despite a mandate that charged the mission with the protection of human rights and an overarching standards system that required the establishment of an “[impartial]” justice system “fully” respecting human rights, the mission often did not practice what it preached.²⁸¹ In its executive role, UNMIK consistently operated above the law with an unfettered veto authority through the Special Representative of the Secretary-General (SRSG) over all decisions of the Provisional Institutions of Self-Government (PISG); at the same time, its own actions were placed outside of the scope of judicial review.²⁸² It also infringed on the independence of the judiciary, exerting “considerable influence on the practical aspects of the courts’ work” through its administration of the courts, control of issues relating to remuneration and authority for clarifying the applicable law.²⁸³ The credibility of its rule-of-law component was further compromised by unclear legislation, often subject to extensive delays and delinquent public notification.²⁸⁴ UNMIK appointment of judges and prosecutors without parliamentary approval further violated the Constitutional Framework.²⁸⁵ As UNMIK more frequently passed emergency decrees and characterized its regulations as “political” to bypass legislative processes and avoid local input,²⁸⁶ it increasingly operated as if it were in a Chapter VII emergency.

¶143 These contradictory rule of law efforts reflect the tensions between efficacy, ownership and accountability in UN operations. They also demonstrate a willingness to cut corners and derogate from formal legal requirements on the part of a mission cognizant of the exceptional situation it faces and the exceptional authority granted by Chapter VII. In many ways, this exceptionalism is understandable; local pressure coupled with “sluggish” police deployment and disintegrated infrastructure and institutions, such as that faced in East Timor, often makes rigid adherence to liberal conceptions of law and rights impossible.²⁸⁷ A comparable exceptionalism on the part of UNMIK, though, was less excusable in its context.

²⁸⁰ See generally RICHARD CAPLAN, INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES (Oxford University Press 2005).

²⁸¹ See S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999); U.N. MIK, *Kosovo Standards Implementation Plan* (Mar. 31, 2004), available at http://www.unmikonline.org/pub/misc/ksip_eng.pdf.

²⁸² Henry Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 DUKE J. COMP. & INT’L L. 1, 6 (2004).

²⁸³ U.N. MIK Regulation 1999/24 (Dec. 12, 1999); see also Carsten Stahn, *Justice Under Transitional Administration: Contours and Critique of a Paradigm*, 27 HOUS. J. INT’L L. 311, 331 (2005); Ombudsperson Institution in Kosovo, *Fifth Annual Report, 2004-2005*, at 17, delivered to the Special Representative of the Secretary General of the United Nations, (July 11, 2005) [hereinafter *Ombudsperson Fifth Annual Report*].

²⁸⁴ Ombudsperson Institution in Kosovo, *Third Annual Report, 2002-2003*, at 2-3, delivered to the Special Representative of the Secretary General of the United Nations (July 10, 2003) [hereinafter *Ombudsperson Third Annual Report*].

²⁸⁵ David Marshall & Shelly Inglis, *Human Rights in Transition: The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 107 (2003).

²⁸⁶ *Id.* at 100, 117-18.

²⁸⁷ CAPLAN, *supra* note 284, at 60-61.

¶144 In matters of public order and internal security, the “*sine qua non*” of international administration,²⁸⁸ the paradigm of exception more closely reflected that of illegitimate emergency. UNMIK practiced executive detention with some regularity in its earlier years, often disregarding judicial determinations in the process.²⁸⁹ In October 1999, three men first arrested by KFOR were detained under UNMIK Regulation 1999/26 for a twelve month period. After a panel of international judges found that evidence was insufficient for their detention and so ordered their release, the SRSG nevertheless extended their detention by executive order.²⁹⁰ This exercise of executive power was repeated in the detention of an Albanian suspected of murdering three Serbs, again ignoring a judicial order of release.²⁹¹ Successive executive orders subsequently overruled a panel of international judges in extending the detention of four Kosovar Albanians alleged to have been involved in the bombing of a bus escorted by KFOR in February of 2001.²⁹² Under Regulation 2000/47’s operational immunity standard, no recourse was available through which detention orders could be challenged, or compensation sought.²⁹³

¶145 Faced with growing condemnation from the human rights community, UNMIK argued that its actions were derogations justified by the “internationally-recognized emergency” in Kosovo. Under such circumstances, “special measures” were permissible which “in the wider interests of security” would “allow authorities to respond to the findings of intelligence that are not able to be presented to the court system.”²⁹⁴ Still, there had never been any formal declaration of emergency. Aware that the Former Yugoslav Republic was a signatory to the ICCPR and that as such it might be necessary to declare a state of emergency, UNMIK had for some time in its internal communications discussed the matter before the Secretary-General declared the “emergency” to be “largely over.”²⁹⁵ Thus, no emergency was ever officially proclaimed, nor did UNMIK ever comply with reporting requirements of the European Convention or the ICCPR, a central principle of legitimate emergency doctrine.

¶146 Even had proper derogation measures been taken, the permissibility of UNMIK action in these cases remains in doubt. In the *Tadic* case, the prosecution maintained that “it is part of international law that a fair trial of accused persons will be rendered,” and the “Security Council . . . should not take steps or measures which fly in the face of that.”²⁹⁶ Moreover, the ICJ has observed that to “wrongfully . . . deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the

²⁸⁸ *Id.* at 45.

²⁸⁹ See, e.g., *Omsbudperson Third Annual Report*, *supra* note 288.

²⁹⁰ See Rawski, *supra* note 188, at 122 (citing Organization for Security and Co-operation in Europe, *Kosovo: A Review of the Criminal Justice System: Sept. 1, 2000–Feb. 28, 2001*, at 84-85, available at http://www.osce.org/documents/html/pdftohtml/969_en.pdf.html).

²⁹¹ Zaqiri would ultimately be held in detention for almost two years before being acquitted. Marshall & Inglis, *supra* note 289, at 113; see also WILLIAM O’NEILL, *KOSOVO: AN UNFINISHED PEACE* 86 (Lynne Rienner 2002).

²⁹² CAPLAN, *supra* note 284, at 64.

²⁹³ Rawski, *supra* note 188, at 122.

²⁹⁴ U.N. MIK, *UNMIK Refutes Allegations of Judicial Bias and Lack of Strategy* (June 25, 2001), <http://www.unmikonline.org/pub/news/bl98.html>. In this respect, the practice of detention in Kosovo stands in contradistinction to that in E. Timor, which was less the product of security concerns than it was a necessity in the face of a crippled legal system. See Amnesty International, *East Timor: Justice Past, Present and Future* (July 27, 2001), <http://web.amnesty.org/library/index/engASA570012001?OpenDocument>.

²⁹⁵ See The Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, ¶ 62, delivered to the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2001/218 (Mar. 13, 2001); see also O’NEILL, *supra* note 295, at 78; see also Marshall and Inglis, *supra* note 289, at 104-06.

²⁹⁶ F.P. King, *Sensible Scrutiny: The Yugoslavia Tribunal’s Development of Limits on the Security Council’s Powers under Chapter VII of the Charter*, 10 EMORY INT’L L. REV. 509, 565 (1996).

principles of the Charter of the United Nations.²⁹⁷ Guarantees of a regular trial in Articles 71 and 72 of the Fourth Geneva Convention reaffirm this principle.²⁹⁸ Domestically, executive detentions have long been targeted by review fora as suspect for their disproportionate and discriminatory nature.²⁹⁹ Over time, arbitrary deprivations of liberty and “deviations from the fundamental principles of fair trial” have grown to be considered violations of non-derogable rights and categorically invalid.³⁰⁰

¶147 UNMIK’s experience thus represents a dubious invocation of emergency and a dangerous example for robust Chapter VII operations. Especially questionable is the U.N.’s claim of an “internationally recognized emergency,” as UNMIK had not reported derogations under any human rights instrument. The most likely formal source of international recognition—the closest thing resembling an official proclamation—is found in the Article 39 determination contained in Resolution 1244.³⁰¹ If that is the case, the UN has embarked down a worrisome path, equating Chapter VII with emergency despite the lack of corresponding guarantors of accountability.

3. Al-Jedda

¶148 The recent *Al-Jedda* case highlights the distinction between Council action and that of its delegates, and further depicts delegates’ conflation of Chapter VII with emergency. Hilal Abdul-Razzaq Ali Al-Jedda, a dual British and Iraqi citizen, was interned and detained in October 2004 by the American-led Multi-National Force (MNF) while traveling in Iraq for personal and business matters.³⁰² Thereafter, Al-Jedda brought an action against Britain, a member of the MNF, under international human rights law (European Convention and the ICCPR) and international humanitarian law (The Fourth Geneva Convention) seeking his release and return to Britain. Both the Divisional Court and Court of Appeals found in Britain’s favor, holding that the applicable regime established by Security Council Resolution 1546 overrode Al-Jedda’s rights under the major conventions.³⁰³

¶149 The discretionary delegation of Chapter VII power is readily apparent in MNF’s calculated language choices and self-defined parameters. Resolution 1546 determined that the situation in Iraq constituted a threat to international peace and security, and pursuant to Chapter VII authorized the MNF to take “all necessary measures to contribute to the maintenance of security and stability in Iraq.”³⁰⁴ Though saying little more, the actual Council resolution dictated that

²⁹⁷ Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), I.C.J. Rep. 42, ¶ 91 (1980).

²⁹⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 71, 72, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

²⁹⁹ See, e.g., *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1996); *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1994) (reviewing but upholding a 7-day detention).

³⁰⁰ *General Comment No. 29, supra* note 32, ¶ 11-13, 16; see also *Consideration of Reports Submitted by States Parties under Article 40 of the ICCPR (Israel)*, U.N. Doc. CCPR/C/79/Add.93, ¶ 21, (Aug. 18, 1998); *Judicial Guarantees in States of Emergency*, Inter-Am. C.H.R. 13 (holding judicial guarantees essential to preventing violations of non-derogable rights are themselves non-derogable).

³⁰¹ See S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

³⁰² The MNF argued that there were reasonable grounds to believe that Al-Jedda was involved in recruiting and supporting terrorists, smuggling weapons and conspiring to attack MNF forces. As such he was detained on a preventative basis subject to periodic review. *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence (Court of Appeals Judgment)*, Case No. C1/2005/2251, [2005] EWHC 1809, ¶ 5 (March 29, 2006) [hereinafter *Al-Jedda*]; see also BBC News, *Iraq Detainee Loses Court Appeal* (Mar. 29, 2006), http://news.bbc.co.uk/2/hi/uk_news/4856406.stm.

³⁰³ The case will be heard on appeal by the House of Lords later in 2007.

³⁰⁴ S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004).

such measure accord with a series of bilateral correspondence between Iraqi Prime Minister Ayad Allawi and U.S. Secretary of State Colin Powell.³⁰⁵ In a letter dated June 5, 2004, Powell noted that the MNF would undertake internment “where . . . necessary for imperative reasons of security.”³⁰⁶

¶150 Citing the preemptive nature of Article 103 of the Charter, the Court of Appeals held that “if the Security Council, acting under Chapter VII, considers that the exigencies posed by a threat to the peace must override, for the duration of the emergency, the requirements of a human rights convention [other than *jus cogens*] . . . the UN Charter has given it the power to so provide.”³⁰⁷ Moreover, the responsibilities to promote human rights created in Articles 55 and 56 of the Charter did not create comparable obligations.³⁰⁸ Resolution 1546, then, “qualified” Britain’s outstanding human rights obligations for as long as necessary to “restore peace.”³⁰⁹

¶151 The Court’s decision reflects the superimposition of the Council’s overriding authority in invoking Chapter VII onto the actions and decisions of those delegates and authorized actors operating in Chapter VII contexts. It also depicts Chapter VII as emergency and permits derogation, particularly in the field of human rights, by authorized actors where necessary for security reasons. As such, Chapter VII effectively triggers the exception clauses of the major human rights instruments; it is then left to the courts to ensure that the validating principles of emergency doctrine are observed.

B. *The Council Counterterrorism Regime and the Globalization of Emergency*

¶152 With its comprehensive “list and sanctions” regime, the Council has established an enduring and prospective multilateral counterterrorism strategy necessitating an entrenchment of Chapter VII. As discussed previously, the system applies sanctions, such as travel restrictions and the freezing of funds, to a list of individuals whom Member States allege to be supporters of terrorist groups affiliated with the Taliban and al-Qaeda. This extension of Council jurisdiction already mirrors a protracted emergency regime in one respect, providing a pretext and perhaps impetus for rights violations by domestic governments. The Counterterrorism Committee (CTC) has been criticized for advising countries to amend their laws in ways that violate common norms and basic human rights; countries such as Belarus have used CTC comments to legitimize repressive legislation.³¹⁰ Meanwhile, the CTC has done little to affect change, consistently declining to adopt proposals offered by the UN High Commissioner for Human Rights.³¹¹ Though the multilateral approach to counterterrorism is promising, the failure to adequately balance security and human rights considerations tarnishes the regime’s centerpiece.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at annex.

³⁰⁷ Al-Jedda, *supra* note 302, ¶¶ 71-72. The Court of Appeals decided the question of humanitarian law on the grounds that Al-Jedda, as a British national, was not a protected person under the meaning of the Fourth Geneva Convention, but these facts notwithstanding, the Hague Regulations allowed for the internment of persons deemed to be an immediate threat to security. *Id.* ¶¶ 40, 46.

³⁰⁸ *Id.* ¶ 77.

³⁰⁹ *Id.* ¶ 80.

³¹⁰ Special Rapporteur, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶¶ 60-61, U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005).

³¹¹ High Commissioner for Human Rights, *Report of the U.N. High Commissioner for Human Rights and follow-up to the World Conference on Human Rights*, UN Doc. E/CN.4/2002/18, at 17-21 (Feb 27, 2002) (annex).

1. Due Process and Terrorism as a Threat to International Peace and Security

¶153 In recent years, the Council has more readily used the practice of listing, including the imposition of sanctions against designated individuals representing “threat[s] to the peace and national reconciliation process” in Côte d’Ivoire.³¹² The significance of due process is not unfamiliar to the Council, having previously been brought to its attention through the Chapter VII-based United Nations Compensation Commission³¹³ and an annual General Assembly resolution urging States to “guarantee the right to due process” while countering terrorism.³¹⁴ Despite this attention, protection of due process has been largely absent from the Council listing process.

¶154 Only recently has an embryonic system of due process protections emerged, after years of concern that “the way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions.”³¹⁵ Yet despite the revision of CTC guidelines and the creation of a “focal point” within the Secretariat for processing de-listing requests in Resolution 1730,³¹⁶ “it would be a stretch to conclude that the new [changes] fully respond to due process concerns.”³¹⁷ Because of the CTC’s consensus rules, the outcome of de-listing requests still depends on the Member State that initially proposed the listing.³¹⁸ The substance of this “review,” seven years in the making, remains questionable.

¶155 A series of cases from the European Court addressing the resulting deprivation of rights again highlights the equivalence between unaccountable Chapter VII practice and illegitimate emergency. The cases of *Kadi*, *Yusuf*, *Hassan*, and *Ayadi* concern individuals who were added to the Council list and whose assets were frozen by European Union regulations adopted in response to the Council’s Chapter VII resolutions.³¹⁹ In each, the applicants primarily alleged violations of their rights under the European Convention and its First Protocol, including a right to property, a right to a judicial remedy, and a right to non-interference in private life.³²⁰ Finding that the regulations were “necessary” to implement Council resolutions³²¹ and applicants’ attempts to distinguish their cases were not dispositive, the Court of First Instance rejected the

³¹² S.C. Res. 1572, ¶¶ 9-12, U.N. Doc. S/RES/1572 (Nov. 15, 2004); *see also* S.C. Res. 1727, U.N. Doc. S/RES/1727 (Dec. 15, 2006).

³¹³ S.C. Res. 692, ¶ 2, U.N. Doc. S/RES/0692 (May 20, 1991); The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687*, U.N. Doc. S/22559, ¶ 20 (May 2, 1991) (“[g]iven the nature of the Commission, it is all the more important that some element of due process be built into the procedure”).

³¹⁴ G.A. Res. 60/158, ¶ 7, U.N. Doc. A/RES/60/158 (Feb. 28, 2006).

³¹⁵ High-Level Panel Report, *supra* note 275, ¶ 152.

³¹⁶ S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006).

³¹⁷ SECURITY COUNCIL REPORT, TARGETED SANCTIONS: LISTING/DE-LISTING AND DUE PROCESS (Jan. 2007), http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.2294423/k.3920/January_2007BRTargeted_Sanctions_ListingDeListing_and_Due_Process.htm.

³¹⁸ Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, *Guidelines of the Committee for the Conduct of its Work*, ¶ 8(c), (Nov. 29, 2006), http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

³¹⁹ Case T-306/01, *Yusuf v. Council of the European Union and Commission of the European Communities*, 2005 E.C.R. II-3553; Case T-315/01, *Kadi v. Council of the European Union and Commission of the European Communities*, 2005 E.C.R. 3649; Case T-49/04, *Hassan v. Council of the European Union and Commission of the European Communities* 2006 E.C.R. II-52; Case T-253/02, *Ayadi v. Council of the European Union and Commission of the European Communities*, 2006 E.C.R. II-2139.

³²⁰ *Id.*

³²¹ *Ayadi*, *supra* note 319, ¶ 13.

independent culpability of Community states and instead held that primacy extended to Council decisions under Chapter VII by virtue of Article 103.³²² Accordingly, the Court observed that it could not review the lawfulness of decisions of the Council or of the Sanctions Committee concerning human rights protection, but it could indirectly review Council action to determine its compliance with *jus cogens*.³²³ Ostensibly proceeding to review the alleged violations under these latter auspices, the Court borrowed the logic of *Bosphorus*, an earlier case involving Council sanctions against the Federal Republic of Yugoslavia, to hold that infringements on the rights in question were permissible, as they were *proportionate* to the overriding “fundamental general interest” of the international community.³²⁴ In this fashion, the Court substituted a hard look at the non-derogability of the rights involved, indirectly considering the importance of the justifying threat, for a searching review of Council power. At the same time, it recognized that cooperation could be implemented in a more narrowly tailored fashion; in dictum, the Court suggested the need for domestic level hearings to mitigate the negative effects of the regulations.³²⁵

¶156 From *Yusuf* to *Ayadi*, the European Court asserted itself while acquiescing to Council action in a manner reminiscent of the ICJ in *Lockerbie*. Noting that its competence was limited to the periphery of *jus cogens*, the Court nonetheless engaged in a substantial balancing of the rights in question as an effective proxy for a more general review of Council action. What is more, the Court first engaged in a substantive review of the “necessity” of the European Community’s action in implementing the Council resolution. This review injected into the jurisprudence not only a “proportionality” discourse through the “general interest” standard, but also the “necessity” standard common to emergency within the question of attribution. Even more important, the Court integrated the discourse of emergency into Chapter VII in recognizing that the rights violations were justified by reference not simply to a resolution, but to the “fundamental” interest in international peace and security. At the same time, in expanding the Chapter VII shelter to “authorized” acts of derogation, the Court highlighted the deficiency of limitations on authorized and delegated action beyond “*jus cogens* review.” In its shallow treatment of the principles of necessity and proportionality and unwillingness to seize the opportunity to pierce the impunity of Council action through its enforcers, the Court avoided a chance to constitutionally rein in Chapter VII action.

C. Restraints, Guarantors, and Mechanisms at the Level of Implementation

¶157 In providing authorized actors with broad license, Chapter VII shifts the stasis between law, rights and security. It does so in a manner contemplated by the Charter to confront urgent and exceptional threats. As translated to the exceptionalism with which Council-authorized actors have gone about their work, Chapter VII rightly recognizes that common legal rules can prove to be inapposite in highly idiosyncratic operational contexts. This exceptionalism, though, is only justified to the extent that it is *necessary* to achieve operational ends, which the Council has in turn deemed essential for the restoration or maintenance of international peace and

³²² *Yusuf*, *supra* note 319, ¶¶ 231, 234, 243; *Kadi*, *supra* note 319, ¶¶ 181-204; *Hassan*, *supra* note 319, ¶ 92; *Ayadi*, *supra* note 323, ¶ 116.

³²³ *Yusuf*, *supra* note 319, ¶¶ 272, 276, 277; *Kadi*, *supra* note 319, ¶¶ 221, 226; *Hassan*, *supra* note 319, ¶ 101; *Ayadi*, *supra* note 319, ¶ 116.

³²⁴ Case C-84/95, *Bosphorus v. Minister for Transp., Energy and Communications*, 1996 E.C.R. I-03953, ¶¶ 66-67; *see also Hassan*, *supra* note 319, ¶¶ 92, 101.

³²⁵ *Ayadi*, *supra* note 319, ¶ 147.

security. Where unconstrained, it becomes little more than rationalization for cutting corners and circumventing safeguards. Where recourse to sanctions is absent, exceptionalism not only threatens populations of individuals with potentially capricious exercises of governmental power, but also compromises the promotion of the rule of law.

¶158 Again, emergency doctrine is a condign framework protecting against such an outcome, provided that it can be effectively translated through available oversight mechanisms. The normative thrust, then, lies in conceptualizing a system of checks against unjustified delegatee action that can approximate those operating in the ideal realm of emergency, and that still provide for a commensurate operational flexibility. Though a survey of existing practice reveals a host of institutional weaknesses, it also presents a matrix of standards and mechanisms which can potentially provide a sturdy bulwark against illegitimate action under Chapter VII auspices.

1. Human Rights Law

¶159 Enforceability remains the critical limitation preventing human rights law from acting as an effective restraint on Council authorized or delegated action. The U.N. and its officials are largely immune to claims of *intra vires* human rights obligations, as they are not a signatory to the major human rights instruments and enjoy broad functional immunity.³²⁶ In addition, as the *Al-Jedda* and *Kadi-Yusuf* line of cases indicate, courts have extended the transcendental authority of Chapter VII beyond immediate Council action to its foreseeable “implementers.” Courts have chosen not to attribute *intra vires* authorized action directly to acting states even where standing would be then possible. Similarly, the courts have not characterized peace operations as Article 29 subsidiary organs with actions imputable to the U.N., which would bind it by “generally accepted norms of human rights law such as articles 9(5) and 14(6) of the ICCPR” relating to unlawful detentions and convictions.³²⁷ In both instances, the exceptional nature of Chapter VII justifies derogations from customary and treaty-based human rights law contained both in immediate Council decisions and derivative actions.

¶160 What this jurisprudence leaves behind are limits existing primarily at the periphery. In addition to holding individuals accountable for *ultra vires* rights violations, the courts have intervened where actions violate *jus cogens*.³²⁸ This limited role holds some promise insofar as courts are willing to move beyond *Barcelona Traction* to recognize a broader list of non-derogable norms of *jus cogens*.³²⁹ There has been wide support for classifying certain norms relating to detention as *jus cogens*.³³⁰ Legal scholars, practitioners and others have argued that as

³²⁶ Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15; *see also* UNMIK, Internationally Recognized Human Right Standards, <http://www.unmikonline.org/regulations/unmikgazette/02english/Eirs/hri.htm> (last visited Jan. 7, 2007) (listing those international human rights treaties binding on the Provision Institutions of Self-Government, but none are declared binding on UNMIK directly).

³²⁷ The Secretary-General, *Letter dated 19 September 2000 from the President of the International Criminal Tribunal for the Former Yugoslavia addressed to the Secretary-General*, U.N. Doc. S/2000/904, at 3, (Sept. 26, 2000) (annex).

³²⁸ *See Yusuf*, *supra* note 319, ¶¶ 272, 276-77; *Kadi*, *supra* note 319, ¶¶ 221, 225; *Hassan*, *supra* note 319, ¶ 101; *Ayadi*, *supra* note 319, ¶ 116; *see also* International Law Association Berlin Conference on Accountability of International Organizations, Berlin, F.R.G., 2004, *Final Report*, 19 (for the proposition that, although Article 103 establishes the primacy of the Charter obligations, the Member States cannot be required to breach peremptory norms of international law), *available at* <http://www.ila-hq.org/pdf/Accountability/Accountability%20Of%20International%20Organisations%202002.pdf>.

³²⁹ *Barcelona Traction, Light, and Power Company (Belg. v. Spain)*, 1970 I.C.J. Rep. 3, ¶¶ 33-34 (Feb. 5).

³³⁰ *See, e.g.*, INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS:

a non-negotiable matter extra-legal detention should be used only when “absolutely necessary to protect national security and public order” and only when subject to certain fundamental judicial guarantees.³³¹ The expansion and development of this *jus cogens* jurisprudence can help to solidify the outer boundaries of Council action and supplement norms, including necessity and proportionality principles, to develop a salient, palatable and broad space in which actors can implement Chapter VII decisions.

2. Humanitarian Law

¶161 International humanitarian law provides an analogue for the limiting effect of emergency doctrine tailored to the war and post-war context. While recognizing that relaxing legal rules during an exceptional situation is appropriate, it too seeks to limit this relaxation primarily through principles of necessity, proportionality and distinction. Obligations under humanitarian law defined in the Hague Regulations and Geneva Conventions have evolved into customary norms over the years, comprising a “minimum yardstick” reflecting “elementary considerations of humanity.”³³² Indeed, these norms, specifically designed to address the state of exception, possess “an absolute and non-derogable character”³³³ in contrast to the case of human rights law.

¶162 International humanitarian law applies to belligerent conflict as well as occupation. Under Chapter VII, peace operations have engaged in both situations.³³⁴ Yet, while parallels exist among belligerency, belligerent occupation and the roles assumed by peace operations, it is an awkward if not difficult admission for the U.N. to make.³³⁵ As a result, the legal status of the U.N. vis-à-vis international humanitarian law has long been unclear.³³⁶ Organizations such as the International Red Cross have argued that the U.N. is subject to international humanitarian law to the extent it engages in armed enforcement under Chapter VII, but several courts have rejected such argument.³³⁷ This rule changed in 1999 with the passing of the Secretary-General’s bulletin on the “Observance by United Nations Forces of International Humanitarian Law.”³³⁸ The bulletin formally recognizes the applicability of International Humanitarian Law to United Nations peace operations under Chapter VII, and establishes legal consequences through

A COMPARATIVE STUDY BY THE INTERNATIONAL COMMISSION OF JURISTS, 461-62 (1983).

³³¹ *Id.*

³³² Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, ¶ 218 (Nov. 26).

³³³ Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 511 (Jan. 14, 2000).

³³⁴ See MICHAEL KELLY, RESTORING AND MAINTAINING ORDER IN COMPLEX PEACE OPERATIONS: THE SEARCH FOR A LEGAL FRAMEWORK (Christopher Greenwood & Timothy L. H. McCormack eds., Kluwer Law International 1999).

³³⁵ Mégret & Hoffman, *supra* note 248, at 332.

³³⁶ See KELLY, *supra* note 334, at 176 (explaining that while the U.N. has long held itself to “observ[ing] and respect[ing] the principles and spirit of the general international conventions,” prior to 1999 it did not concede the existence of any legal obligations on its behalf).

³³⁷ *R. v. Brocklebank*, [1996] CMAC-383 (Can.) (holding that neither the Geneva Conventions nor its Protocols applied to peace operations); see also Judgment of the Belgian Military Court Regarding Violations of IHL Committed in Somalia and Rwanda, 54 A.R. 1997 (Nov. 20, 1997).

³³⁸ The Secretary-General, *Bulletin of the Secretary General on the Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999) [hereinafter *Observance by U.N. Forces of Int’l. Humanitarian Law*].

prosecution in national courts for violations by authorized actors.³³⁹ It also enumerates a series of fundamental principles, including certain threadbare safeguards for detention.³⁴⁰

¶163 It is now widely accepted that humanitarian law applies equally to UN operations and authorized actors.³⁴¹ While the “right of the United Nations force,” or authorized actor, “to choose methods and means . . . [is] not unlimited,”³⁴² the minimalist provisions of humanitarian law represent a low threshold for legitimacy. At the same time, in using standards of necessity and terms of art such as “for imperative reasons of security,” the provisions of international humanitarian law require standardized, non-arbitrary procedures and corresponding safeguards.³⁴³

3. Mandate Construction

¶164 A third potential constraint on the scope of authority assigned to authorized actors is provided by the language of the mandate. Rather than being construed as blanket license for implementing actors, the mandate imposes tangible limits on operational discretion. If need be, language should be refined, and mandates narrowly constructed, to achieve this effect. Terms such as “all necessary means” should not simply endow actors with broad discretion, but impose a hard constraint of necessity on subsequent action. Guidelines for the use of force, frequently developed in reports of the Secretary-General and Status of Force and Status of Mission Agreements, should be included transparently in the mandate itself. The ad hoc nature of operational practice, which provides little in the way of precedent and regularized doctrine, underscores the importance of using precise and, where appropriate, limiting language more generally in the mandate.³⁴⁴

¶165 Substantive limits in the mandate are also desirable. Territorial and temporal limits on the mandate itself and invocation of Chapter VII within the mandate would help rein in delegated actions, as would tighter control and oversight measures including “a clear system of reporting and accountability.”³⁴⁵ Whether the responsiveness and flexibility of the Council allow for a role in operational decision-making *a priori* merits consideration as well. Ultimately, though, as with human rights, humanitarian law and other standards, mandates ultimately require enforceability. In the context of peace operations, neither courts nor the Council itself have asserted a strong role in oversight, allowing for the unsanctioned expansion of delegated powers without repercussion.

³³⁹ *Id.*, § 4; see also The Secretary-General, *Report of the Secretary-General on a Road Map towards Implementation of the United Nations Millennium Declaration*, ¶ 19, delivered to the General Assembly, U.N. Doc. A/56/326 (Sept. 6, 2001).

³⁴⁰ See *Observance by U.N. Forces of Int’l. Humanitarian Law*, *supra* note 338.

³⁴¹ See KELLY, *supra* note 334, at 168; see also T.D. Gill, *Legal and Some Political Limitations on the Power of the U.N. Security Council to Exercise Its Enforcement Powers Under Chapter VII of the Charter*, 26 *Netherlands Y.B. Int’l L.* 33, 78 (1995).

³⁴² *Observance by U.N. Forces of Int’l. Humanitarian Law*, *supra* note 338, § 6.

³⁴³ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 78, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (on regular procedures and rights of appeal for protected persons).

³⁴⁴ Doctrine is one of the five key priorities of the Department of Peacekeeping Operation’s “Peace Operations 2010” agenda.

³⁴⁵ U.N. SCOR, 45th Sess., 2963d mt g. at 76, U.N. Doc. S/PV.2963 (Nov. 29, 1990), *quoted in* CHESTERMAN, *supra* note 71, at 188.

4. Mechanisms of Review

¶166 The existing accountability system is a weak conglomerate consisting of the binding authority of judicial review and the political authority of advisory oversight. Judicial review has not proven to be a reliable guarantor of legitimate Chapter VII action, while advisory bodies, by virtue of institutional weakness, have been unable to adequately complement judicial mechanisms.³⁴⁶

¶167 Assuming more substantive standards are necessary and desirable to guarantee the legitimacy of Chapter VII-authorized actions, the ambivalent role played by international courts suggests that a more pluralistic system of accountability might be in order. Expanding the reach of judicial oversight and “hardening” certain aspects of advisory review could improve the situation. However, the historical timidity of judicial review in the context of emergency suggests that such an approach might simply buy a bigger rubber stamp. Rather, the idiosyncrasies of international law may in fact make inevitable a pluralistic system.³⁴⁷ The steadier first step lies in crafting a more coherent system of Chapter VII review at both the centralized and decentralized (operational) levels by “connecting the dots” and establishing proper channels between the upper echelons—the Security Council, global review and the operational level. Such reform should also give affected parties access to review via the legal standards discussed in this paper.

¶168 At present, several loci of judicial review exist, even as the ICC has thus far written itself out of the picture. The ICJ presents a potentially formidable check on Council action, but it must be willing to utilize the standards it has been given to carve out a role within the contours of exception. Review also exists at the “local” level, although its competence at this point in time lies primarily in national courts prosecuting the criminal and decidedly *ultra vires* conduct of authorized actors. Meanwhile, criminal accountability reform efforts undertaken by the Special Committee on Peacekeeping Operations and the General Assembly are stagnating.³⁴⁸

¶169 Host-territory courts and judicial fora designed to address the exception play review roles as well. For example, the Statute of the Special Court for Sierra Leone expressly provides for jurisdiction over serious violations of international humanitarian law committed by peace operations personnel;³⁴⁹ the Human Rights Chamber for Bosnia and Herzegovina issues final and binding decisions on applications based on alleged violations of the European Convention or other accepted agreements.³⁵⁰ The competence of such courts, however, is not confined to such matters, nor should the capacity of such courts to review the general legality of Council-authorized action according to domestic law and international standards be underestimated. The

³⁴⁶ The Kosovo Ombudsperson Institution, despite its limitations, plays perhaps the most significant role amongst its ilk, as other institutions are generally more limited in scope and lack its institutional support (OSCE). SIMON CHESTERMAN, *YOU THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING* 147-149 (Oxford University Press 2004).

³⁴⁷ Robert Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 MICH. J. INT’L L. 1121, 1130 (2003).

³⁴⁸ See generally The Secretary-General, *Note by the Secretary-General on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations*, delivered to the General Assembly, U.N. Doc. A/60/980 (Aug. 16, 2006).

³⁴⁹ Statute of the Special Court of Sierra Leone, at art. 1 (Jan. 16, 2002), available at <http://www.sc-sl.org/scsl-statute.html>; see also S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

³⁵⁰ Dayton Peace Agreement, The General Framework Agreement: Annex 6, art. VIII, Dec. 14, 1995, available at http://www.ohr.int/dpa/default.asp?content_id=374; see generally Human Rights Commission for Bosnia and Herzegovina, Decisions of the Human Rights Chamber for Bosnia and Herzegovina which was established according to Annex 6 of the Dayton Agreement, <http://www.gwdg.de/~ujvr/hrch/hrch.htm>.

Constitutional Court of Bosnia and Herzegovina has long had jurisdiction over whether laws promulgated by the U.N. operation comply with the Bosnian Constitution, international human rights law, and general rules of public international law.³⁵¹ Subsidiary organs have also shown themselves able to pierce the Council's veil in remedying rights violations. In Kosovo, a Detention Review Commission capable of invalidating executive orders was established by Regulation 2001/18, though its questionable independence has left its potential largely untapped.³⁵² Recently, in *Prosecutor v. Rwamakuba*, the ICTR held itself bound to "generally accepted human rights norms," and consequently found that its inherent powers gave it the authority to provide compensation for the violation of a defendant's right to legal assistance.³⁵³ In connecting the dots between the affected party, liability for Council-authorized action and a tangible remedy (in the instant case, US\$2,000), *Rwamakuba* represents a significant step forward in developing a limiting jurisprudence.

¶170 The ICTR's ability to effectuate its determinations stands in stark contrast to the persuasive authority of several mission-specific oversight bodies. Mission-level ombudsperson institutions and human rights advisory panels have been endorsed as "essential" operational components,³⁵⁴ despite their legal impotence. The plight of the Ombudsperson Institution in Kosovo is instructive.³⁵⁵ The office was established by UNMIK Regulation 2000/38 to respond to complaints and open investigations concerning human rights violations, administration policies and legislation to ensure their compliance with the requirements of good governance.³⁵⁶ However, its jurisdiction does not extend to all authorized actors (most notably KFOR), and the remedies at its disposal are few. Although the Ombudsperson may correspond with civil authorities, offer recommendations and issue special reports for more egregious and widespread problems, it cannot issue binding decisions, nor can it affect judicial decisions or directly investigate criminal matters.³⁵⁷ As a result, both UNMIK and the PISG have been dismissive and uncooperative towards the Ombudsperson Institution.³⁵⁸

¶171 Integrating the Ombudsperson Institution into a more standardized regime of Chapter VII oversight would likely ameliorate these limitations. Early inclusion of the institution in mandates extending its jurisdiction to cover a broader spectrum of actors and norms and enhancing its factfinding powers would help in this respect. So too would placing the ombudsperson within a larger system at the mission level, as the preliminary liaison between aggrieved parties and more formal oversight mechanisms, and at the international level, as an agent of a larger standing international ombudsperson institution. Notably, the Generally

³⁵¹ Constitution of Bosnia and Herzegovina art. VI (1995); see New York University School of Law, *Constitutional Watch: A country-by-country update on constitutional politics in Eastern Europe and the ex-USSR*, 10 EAST EUROPEAN CONSTITUTIONAL REVIEW 1 (Winter 2001), available at <http://www.law.nyu.edu/eecr/vol10num1/constitutionwatch/bosnia.html>.

³⁵² On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders, U.N. MIK Reg. 2001/18 Aug. 25, 2001.

³⁵³ *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, ¶¶ 48, 58 (Jan. 31, 2007).

³⁵⁴ Rawski, *supra* note 188, at 116 (internal citations omitted).

³⁵⁵ See generally, e.g., Rawski, *supra* note 188; also CHESTERMAN (2004), *supra* note 346, at 147-149.

³⁵⁶ *Ombudsperson Fifth Annual Report*; *supra* note 287, at 5; see also CHESTERMAN (2004), *supra* note 350, at 85, 149 (for the proposition that the Kosovo Ombudsperson Institution, despite its limitations, plays perhaps the most significant role amongst its ilk, as other institutions are generally more limited in scope and lack its institutional support).

³⁵⁷ *Ombudsperson Fifth Annual Report*, *supra* note 287, at 6.

³⁵⁸ *Id.* at 23-24

Assembly has discussed the seedlings of such a proposal as part of its broader consideration of the “Administration of Justice at the United Nations.”³⁵⁹

¶172 Room for improving top-down oversight over authorized action and delegated power exists as well. Models for implementing such a plan range from the World Bank Inspection Panel to the previously discussed Council Counterterrorism Committees³⁶⁰ and the freestanding Counterterrorism Executive Directorate. The Peacebuilding Commission provides a potentially ready-made oversight mechanism, though its rules of procedure and general *modus operandi* would differ significantly with such a mandate. The domestic context provides another framework in the form of a State of Emergency Inquiry Board like that employed by Ethiopia.³⁶¹ A freestanding Chapter VII Inquiry Board, Commission or Committee could serve several functions limiting the authority of the Council and authorized actions alike. It could make transparent alleged “transgressions,” inspect and review allegations according to consistent and recognized standards of exception, and recommend corrective action to the Council.

¶173 Certainly, such frameworks for improving oversight may be viable, but to be effective they must exist strategically within, and perhaps at the helm of, a broader system of oversight. Otherwise, the crystallizing congruency between Chapter VII and emergency at the level of implementation will continue to hinder accountable and effective practice.

V. CONCLUSION

¶174 The word “accountability” is often used as a “protean concept, a placeholder for multiple contemporary anxieties.”³⁶² It too easily becomes a catch-all, encompassing matters of legitimacy, legality, merit and efficacy. As used, the term speaks to “answerability,” insofar as it seeks to ensure that defined and enforceable limits to actors’ discretion exist. With the conflation of Chapter VII and exception at the level of implementation, the force of these limits diminishes. The Council and authorized actors have been complicit in this trend, excusing their own transgressions by reference to the beneficial ends of their work. Whether the imperative of international security is invoked as an after-the-fact rationalization for derogations, or is in fact part of the preliminary calculus leading thereto, the normative exceptionalism of Chapter VII is crystallized, and without corresponding limits the notion of a lawless and unanswerable cadre of actors is reinforced.

¶175 Exceptionalism, though, does not equate with categorical impunity.³⁶³ The integrity of the constitutional system established by the Charter requires that *different* limits on Council and Council-authorized action exist, limits discernable by specific reference to the exception. Although the maintenance of peace and security may in fact sit in a position of primacy vis-à-vis

³⁵⁹ The Secretary-General, *Report of the Redesign Panel on the United Nations System of Administration of Justice*, ¶¶ 12-15, delivered to the General Assembly, U.N. Doc. A/61/758 (Feb. 23, 2007).

³⁶⁰ See, e.g., CHESTERMAN (2004), *supra* note 346, at 152.

³⁶¹ Ethiopian Constitution art. 95(5).

³⁶² Jerry Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS, AND EXPERIENCES 115, 115 (Michael Dowdle ed., Cambridge University Press 2006).

³⁶³ Similarly, limits do not equate with rigid legality and strict enforcement. This calls into question the defending States’ contention in the case of *Behrami v. France* (Application no. 71412/01), pending before the European Court, that human rights accountability would spell the end for international operations such as NATO’s in Kosovo. See Clare Dyer, *Governments Contest Human Rights Accountability of Troops in Kosovo*, GUARDIAN UNLIMITED, Nov. 13, 2006, available at <http://www.guardian.co.uk/guardianpolitics/story/0,,1946174,00.html>.

the other functions of the U.N.,³⁶⁴ the values of constitutionalism and legitimacy are served by giving due regard to both sides in reconciliation. If the state of exception mindset is to persist, its validity—and that of the Council, authorized actors and multilateralism more generally—depends on the authority of such a system of oversight. If not, actors flaunting legalism under the banner of the UN promise to sever the organization from the nobility of its ends.

¶176 The danger of Chapter VII anomie is real. To assure the continued celerity, flexibility and effectiveness of Council action while simultaneously respecting the intended limits of the Charter, a new paradigm appreciating the Council's polyglot nature is in order. The regulative ideal of legitimate emergency doctrine provides just such a framework, highlighting deficiencies in past and current praxis while providing an archetypal system through which these issues can be addressed. As clamoring for Security Council reform reaches a crescendo (while inching tediously towards fruition), the value of such an architecture is particularly propitious. For in the end, the more effective and attainable path to the ostensible goals of reform might well be through the Council's domain, as opposed to its membership. Time will tell.

³⁶⁴ Mary Ellen O'Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, 36 COLUM. J. TRANSNAT'L L. 473 (1997), cited in CHESTERMAN, *supra* note 71, at 52.