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The UN Security Council's Response to Mass Atrocities by a Member State: A Crossroads of Law and Reality

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Abstract

The United Nations (UN) Security Council (SC) is tasked with the primary responsibility of maintaining international peace and security. In the pursuit of this aim, the extent of the SC's competence and powers has consistently been a subject of rigorous debate among both Member -States and scholars. One challenging situation that the SC confronts is when a Member State perpetrates mass atrocities against its own population. The present dissertation, employing a legal analysis methodology, seeks to examine whether this question falls in the competence of the SC and the powers vested in this body when dealing with the offending state in order to maintain or restore international peace and security. The inception and operation of the SC are based on the UN Charter, an international treaty that serves as the constituent document for the United Nations. Hence, any assertion regarding the competence and powers of the SC must derive its foundation from the provisions outlined in the UN Charter.

Prior to addressing the powers of the SC, it is imperative to first establish the competence of the SC concerning instances of a government committing mass atrocities against its own population. The jurisdiction of the SC is confined to addressing a threat to peace, breach of peace, and acts of aggression. The concept of peace in the UN Charter appears in a specific form and connotation. The form of peace in this context implies that peace is a state of relationships and connections among all subjects of international law, a condition that is imperative to be upheld under any circumstances. The connotation of peace, shaping the quality of relationships among Member States, pertains to the prohibition of the use of force and the implementation of human rights. Consequently, anything relating to the form and connotation of peace falls in the jurisdiction of the SC. Therefore, the matter of mass atrocities accommodates in the ambit of the SC.

After seizing a case, the SC, in accordance with Article 1 of the UN Charter and following the legal personality of the UN, is bound to act within the confines established by general

international law (GIL). GIL is the very foundation of modern international law which guarantees the existence and continuity of international law.

GIL includes axiomatic and axiological principles. The former emanates from the inherent nature and structure of international law, grounded in rational foundations. The latter is rooted in the shared values of the international community, revolving around the concept of humanity. GIL manifests itself in positive international law through the legal concepts of *jus cogens* and *erga omnes*. Given the imperative nature of GIL, the SC is bound to orchestrate its powers in the boundaries established by GIL when dealing with the offending state of mass atrocities.

In addition to defining the competence of the SC, the UN Charter, in certain instances, explicitly specifies the powers conferred upon this body, and in some cases the UN Charter empowers the SC to determine the necessary powers deemed appropriate for fulfilling its tasks. Nevertheless, any new powers must align with the established competence of the SC, and the body is not granted *carte blanche* to assume any powers it deems necessary. The new powers exercised by the SC through its practice inevitably fall into one of the following categories: facilitatory powers, quasi-legislative powers, quasi-judicial powers, or overthrowing the incumbent government.

Regarding faciliatory powers, in accordance with the UN Charter, the SC may be called upon by the parties to a dispute, the General Assembly, or the Secretary-General, or it can act *ex officio* to seek a peaceful resolution or adjust a situation through peaceful means. The extent of powers exercised by the SC in relation with the offending state would vary depending on the nature and specifics of the referral at hand. In the event that a referral is initiated by either party, after exhausting all attempts to peacefully resolve the dispute, the SC is vested with comprehensive authority under Chapter VI, namely, encouraging the parties to seek peaceful resolution, conducting investigations into disputes or situations that may lead to international tensions, recommending appropriate procedures or methods of adjustment, and ultimately recommending terms of settlement. When a referral is made without any prior attempts by the parties to resolve the dispute, the SC is limited in its ability to address the substance of the issue and it may, at most, provide recommendations for procedures or methods of adjustment.

In the context of quasi-legislative power, the SC enjoys quasi-legislative power to compel the offending regime to comply with its decisions regarding the manner in which peace shall be restored or maintained (secondary rules). In contrary, the competence of the SC does not warrant

the establishment of a general rule applicable across unspecified time and geography (primary rules) concerning mass atrocities, and subsequently under those general rules encounters with the perpetrator regime. However, under the general power it enjoys under Article 24, the SC may issue a propositional resolution to the General Assembly and suggest the articulation of a general rule pertaining to mass atrocities.

In the domain of quasi-legislative power, the SC is not empowered to function as a court and conduct judicial proceedings with regard to the perpetrator state (as a legal person). In addition, the SC lacks the power to impose sanctions on individuals accused of mass atrocities in the absence of a fair trial. Finally, given its absence of judicial power, the SC is precluded from establishing *ad hoc* tribunals to prosecute and punish individuals. Nevertheless, leveraging its general power under Article 24, the SC may issue a propositional resolution to the General Assembly and suggest the establishment of such tribunals.

If the measures taken by the SC to address mass atrocities by the offending state prove ineffective or insufficient, the SC is still precluded from resorting to regime change. The matter of the continued presence of a regime accused of mass atrocities falls in the exclusive jurisdiction of Member States.

Chapter I: Introduction

Background of the Research

1.1.1. Problem Statement

In the present era, the discourse on human rights has attained unprecedented prominence. The influence of human rights extends across various dimensions, encompassing both domestic and international realms, including but not limited to the fields of economy, politics, sociology, philosophy, as well as domains such as sport, social media, artificial intelligence, and technology. International law, *inter alia*, is not exempt from this pervasive influence. Despite the relatively short life of international law, spanning a mere couple of centuries, the present era witnesses an unprecedented degree of humanization within this domain. Modern international law is fundamentally predicated on humanity. Today, addressing the humanitarian aspect within any areas of international law is an indispensable component of any comprehensive discussion of that field. While integrating humanity into the framework of international law may not be perceived as more challenging than addressing other facets of collective social life, it is by no means an easier attempt. This challenge arises because legal systems inherently possess a formalistic structure. The effort to infuse these humanistic values into the legal framework faces resistance from the rigid and structured nature of the legal formalism. The culmination of such a conflict arises in international law when sovereignties, as the pillars of international legal tenets, are asked to conform to and observe the imperatives of humanity. While governments

worldwide face pressure from populations to comply with human rights standards, the actual implementation of such compliance is often met with resistance, as states strategically invoke the formalities embedded in international law. The realm of law is not characterized as a theater stage for the display of power dynamics, but it is a platform for the confrontation and articulation of legal arguments and mutual persuasion. What makes the situation more complex is that every subject of international law attempts to offer an egoistic interpretation of international rules. This sets the stage for a discernible clash within the triangle of humanitarian imperatives, legal formalism, and the individual policies of sovereignties.

At the time of drafting this thesis, an active conflict persists between Palestine and Israel in the Gaza region. Brazil, currently presiding over the United Nations (UN) Security Council (SC), has initiated a public debate focused on addressing the crisis in Gaza. Forty Member States and international institutions have registered to present their perspectives on the agenda. The keywords in all delegation speeches were literally international law and humanitarian law. But the question remains: which interpretation should be adopted?

In light of the pervasive and discursive nature of human rights discourse, coupled with the progressive evolution towards the integration of humanity into the corpus of international law, both subjects of international law and the public actively monitor and scrutinize governments' behaviors regarding compliance with the standards of humanity. The international community not only does not view the treatment of peoples by their respective governments as a matter of sovereign discretion but also maintains a zero-tolerance policy towards serious instances. Accordingly, accusing each other of perpetrating human rights violations is a ubiquitous phenomenon in contemporary times. The international community, in response to the challenge of mass atrocities, has implemented diverse strategies, including the formulation of international conventions and the establishment of international organizations. Among the array of mechanisms envisaged by the international community, the UN holds a notably distinguished position, particularly due to its inclusion of the SC as one of its organs. It is not hidden from anyone that the SC enjoys broad competence and unprecedented powers in the history of international law. This fact has given rise to a perspective that views the SC as the singular potent and competent entity equipped enough to address instances of mass atrocities committed by a Member State of the UN against its own population. The SC, through its practice, has embraced a generous interpretation of the UN Charter and consistently operated in alignment

with this perspective. In this regard, it may be argued that the issue of human rights falls in the ambit of the SC under Article 24[1]. If this scenario were to materialize, the SC, as stipulated by the UN Charter, would be endowed with the power to deploy measures it deems appropriate for the maintenance or restoration of international peace and security, and under Article 25, Member States have agreed to accept and comply with these measures. However, the implementation of such action plans by the SC has encountered resistance from Member States. In general, both Member States and the state accused of human rights violations have issue with the liberal interpretation of the UN Charter. They vehemently raise objections to the SC's jurisdiction when it intervenes in cases of grave human rights violations. Foremost among their arguments is the belief that the matter of human rights fundamentally pertains to issues inherently falling in the domestic jurisdiction of any Member State, as articulated in the first part Article 2(7). Consequently, they reject the view that it does not fall in the remit of the SC under Article 24 and the second part of Article 2(7). Additionally, it has been contended that the specific powers assumed by the SC for the purpose of maintaining international peace and security, exceed the legal limits prescribed, constituting actions that are *ultra vires*. As such, these powers cannot be lawfully exercised by the SC in any circumstances, including cases involving mass atrocities committed by a Member State. At this point, the main problem arises as a serious disagreement between two contradictory interpretations of the UN Charter regarding human rights. One perspective asserts that the SC is legally endowed with extensive competence and powers, while an opposing viewpoint contends that the UN Charter does not grant *carte blanche* to the SC but instead establishes limitations that this body cannot exceed. Therefore, the crux of the matter lies in elucidating the scope of competence and powers wielded by the SC in addressing instances of mass atrocities committed by a Member State. The absence of agreement on the extent of the SC's competence and the powers it may employ, provides a basis for additional research. This research aims to concentrate on the interpretation of the UN Charter concerning the mentioned problem in academic literature.

[1] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

1.1.2. Literature Review

This dissertation is guided by the research question: What is the scope of competence of the UNSC when a Member State commits mass atrocities against its people? This question is composed of three essential elements: the jurisdiction of the SC, the sovereignty of Member States, and the realm of human rights. Finding scholarly legal literature that scrutinizes the extent of the SC's jurisdiction concerning mass atrocities committed by Member States is quite challenging. Scholarly literature on the SC can be generally classified into two clusters: works aimed at providing a comprehensive overview of the scope of the SC's competence, and those dedicated to exploring one or two of the above-mentioned elements, or scrutinizing SC's jurisdiction in-depth within the context of a particular case.

In relation to the first category, legal studies in this group primarily focus on a detailed analysis of the UN Charter, scrutinizing its articles individually. By navigating through these analyses, a researcher can unearth valuable insights. In alignment with this perspective, there exist four distinguished scholarly works:[2] The law of the United Nations: a critical analysis of its fundamental problems: with supplement; Charter of the United Nations: Commentary and Documents; The Charter of the United Nations: A Commentary, The Law and Practice of the United Nations.

Although Goodrich and Matthew offer valuable insights into the SC, their examination is concise and, given the study's publication date, lacks coverage of many contemporary topics, particularly Chapter VII of the UN Charter and the discourse on human rights. In his scholarly contribution, Kelsen engages in an exhaustive and meticulous examination of the articles pertaining to the SC. His scholarly endeavor skillfully captures the nuanced interaction among various facets of the SC's powers, both in their internal dynamics and in their relationships with other organs within the UN. Nevertheless, similar to the shortcomings observable in the previous scholarly work, his contribution is marked by a similar deficit. Simma and his team provide an unparalleled comprehensive study of the UN Charter, delving into the historical background, interpretation, and relevant practices associated with each individual Article of the UN Charter.

[2] Leland Matthew Goodrich and Edvard Isak Hambro, *Charter of the United Nations: Commentary and Documents* (New York: Columbia University Press, 1949); Hans Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems: with supplement* (London: Stevens & sons, 1951); Bruno Simma and others, eds., *The Charter of the United Nations: A Commentary*, 3th ed. (London: Oxford University Press. 2012); Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations*, 3th ed. (Dordrecht: Martinus Nijhoff, 2016).

Key advantages of this study include, firstly, the incorporation of the international law context in the provided analysis, and secondly, the comprehensive legal examination and addressal of numerous contemporary issues and updates, especially human rights. Accordingly, it offers a great depiction of the scope of the SC's jurisdiction and the powers that this organ may utilize. However, concerning the SC, it exhibits a gap in addressing a number of contemporary challenges such as regime change. Furthermore, in the examination of the SC, its theoretical analysis predominantly relies on the practice of the SC and the assumption that its actions are *intra vires*. So, their work is not purely theoretical, and at times, it theorizes the practice of the SC rather than critically analyzing its legal validity. Conforti and Focarelli devoted a substantial portion of their work to recounting the practice of the SC, particularly addressing numerous contemporary issues, thereby offering valuable insights. But the presented analysis is concise, lacking coverage of the SC's contentious powers, and often fails to delve into the examination of the underlying logic and rationale behind the UN Charter Articles.

In relation to the second cluster of scholarly works, constituting a substantial portion of the literature, it is noteworthy to highlight the following key points.

Regarding the question whether the SC is subject to any limitations in accordance with the UN Charter, certain scholars assert that while the SC is oriented towards the preservation of international peace and security, it operates without any constraints imposed by international law and hence enjoys a *carte blanche*.[3] In this regard, Schweigman reads Article 1 in two separate parts and contends that the first part, addressing collective measures, specifies the competence of the SC when acting for international peace and security. The second part indicates the duty of the Members and Organs, including the SC, to pursue a peaceful settlement of disputes, which shall be done in conformity with justice and international law. The latter condition, according to Schweigman, does not apply to collective measures. In the same vein, Whittle advanced the viewpoint that in the execution of its responsibilities under Chapter VI,

[3] 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* (The Hague: Kluwer Law International, 2001); Bernd Martenczuk, "The Security Council, the International Court and judicial review: what lessons from Lockerbie?", *European Journal of International Law* 10, no. 3 (1999); Devon Whittle, "The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action," *European Journal of International Law*, 26, no. 3 (2015); Miguel Lemos, "Jus Cogens Versus the Chapter VII Powers of the Security Council: With Particular References to Humanitarian Intervention and Terrorism," *Chinese Journal of International Law*, 19, no. 1 (2020); Stefan Talmon, "The Security Council as world legislature," *American Journal of International Law* 99, no. 1 (2005).

the SC is compelled to comply with the principles of justice and international law. Conversely, in the context of Chapter VII, these constraints are perceived as non-binding, a justification supported by the theoretical underpinning of the extra-legal measures model. Accordingly, in the event of normal circumstances, the SC functions as a subject of international law; however, in abnormal situations, the SC exercises unrestricted discretion in the pursuit of peace under the banner of peace for peace. In summary, scholars advocate the stance that the SC enjoys complete liberty, grounding their arguments on the imperative of expediency essential for the efficient fulfillment of the SC's responsibility and a permissive interpretation of the UN Charter. Nevertheless, their examination falls short in providing legal reasoning that would formally justify the incorporation of non-legal factors and principles in favor of granting the SC unrestricted autonomy. Furthermore, in their analysis of the UN Charter, they interpret each article in isolation, neglecting to consider the broader context of the UN Charter and the consistency of international law. On the other hand, some commentators acknowledge the limitations of the SC, asserting that the UN Charter imposes restrictions but without offering detailed reasoning.[4] For example, they do not delve deeply into the reasons why the SC is bound by peremptory norms.

In terms of the powers vested in the SC under Chapter VI, researchers demonstrated minimal interest in this domain, let alone engaging in discussions related to human rights disputes or situations. Among those who have addressed this issue, the question of the legal interest and legal relationship of an interceding state with an offending state, as a potential trigger for the jurisdiction of the SC, remains largely unexplored. Furthermore, when delving into the scope of the SC's competence concerning human rights, it necessitates a preliminary examination of

[4] Ramses A. Wessel, "The UN, the EU and Jus Cogens," *International Organizations Law Review* 3, no. 1(2006); Matthew Saul & Nigel D. White, "Legal means of dispute settlement in the field of collective security: The quasi-judicial powers of the Security Council," in *International Law and Dispute Settlement: New Techniques and Problems*, ed. Duncan French et al (Oxford: Hart, 2010); Rosalyn Higgins, "The place of international law in the settlement of disputes by the Security Council," *American Journal of International Law* 64, no. 1 (1970); Terry D. Gill, "Legal and some political limitations on the power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter," *Netherlands Yearbook of International Law* 26 (1995):

whether human rights fall in the jurisdiction of the SC. Both opponents[5] and proponents[6] typically scrutinize the matter through the lens of specific Articles of the UN Charter, neglecting a comprehensive analysis of all related Articles. Notably, the examination of the Preamble is absent in the existing literature.

With respect to the quasi-legislative and quasi-judicial powers of the SC, the analysis of legal scholars often revolves around whether the appearance of the text of the UN Charter permits such powers or not.[7] However, the UN Charter has much more potential for scrutiny, providing a broader landscape to explore and discover more legally convincing implications.

Finally, the question of overthrowing an incumbent regime due to the commission of mass atrocities remains conspicuously absent from scholarly discussions. Commentators primarily address this matter in the context of the Libyan case, where the SC's resolution was interpreted by NATO as an endorsement for regime change. In this regard, the focus of legal scholars

[5] Erika De Wet, *The Chapter VII Powers of the United Nations Security Council*, vol.3 (Oxford: Hart, 2004); Abdulrahim P. Vijapur, "The Question of Domestic Jurisdiction and the Evolution of United Nations Law of Human Rights," *International Studies* 47, no.2-4(2010); Felix Ermacora, "Human Rights and Domestic Jurisdiction (Article 2, Par.7, of the Charter),"124 Collected Courses of the Hague Academy of International Law (Leiden: Brill, 1968);

[6] C.B.H. Fincham, *Domestic Jurisdiction* (Leiden: Sijthoff, 1948); Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens & Sons, 1950); Jeroen Gutter, Thematic Procedures of the United Nations Commission on Human Rights and International Law: in *Search of a Sense of Community* (Antwerpen: Intersentia 2006); Columbia Law Review Association, "The Domestic Jurisdiction Limitation in the United Nations Charter Source," *Columbia Law Review* 47 (1947); Hersch Lauterpacht, *The International Protection of Human Rights*, Collected Courses of the Hague Academy of International Law 70 (Leiden: Brill, 1947); Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (London: Oxford University Press 1963).

[7] Isobel Roele, "Sidelining Subsidiarity: United Nations Security Council Legislation and Its Infra-Law," *Law and Contemporary Problems 79*, no. 2 (2016); Ian Johnstone. "Legislation and adjudication in the UN Security Council: Bringing down the deliberative deficit," *American Journal of International Law* 102, no. 2 (2008); Frederic L. Kirgis, "The Security Council's first fifty years," *American Journal of International Law* 89, no. 3 (1995); Keith Harpher, "Does the United Nations Security Council Have the Competence to Act as Court and Legislature," *New York University Journal of International Law and Politics* 27, no. 1 (1994); Jost delbruck, "Article 24." in *The Charter of United Nations: A Commentary*, ed. Bruno Simma, 397-407 (Oxford: Oxford University Press, 1995); Mónica Lourdes de la Serna Galván, "Interpretation of article 39 of the UN Charter (threat to the peace) by the security council: is the security council a legislator for the entire international community?," *Anuario mexicano de derecho internacional* 11 (2011); Marco Alberto Velásquez-Ruiz, "In the Name of International Peace and Security: Reflections on the United Nations Security Council's Legislative Action." *International Law* 18 (2011); Luis Miguel Hinojosa Martinez, "The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits." *International and Comparative Law Quarterly* 57, no. 2 (2008): Kenneth Manusama, *The United Nations Security Council in the post-cold war era: applying the principle of legality* (Leiden: Brill, 2006); Daniel H. Joyner "Non-proliferation law and the United Nations system: resolution 1540 and the limits of the power of the Security Council." *Leiden Journal of International Law* 20, no. 2 (2007); Munir Akram and Syed Haider Shah, "The Legislative Powers of the United Nations Security Council," in *Towards World Constitutionalism*, ed. RSJ Macdonald and DM Johnston (Leiden: Brill, 2005).

centered on whether the SC's resolution permitted regime change or not.[8] Thus, scholars did not investigate whether the SC fundamentally possesses such power or not.

In sum, commentators predominantly focused on articulating their individual perspectives on the SC, seeking to establish legal justifications for their assertion without conducting a comprehensive analysis of contrary viewpoints and providing reasoned refutations. Therefore, a gap exists in scholarly discourse, that systematically and legally examines the extent of the competence and powers wielded by the SC when faced with instances of a Member State perpetrating mass atrocities against its own population.

1.1.3. Contribution to the Literature

Researchers have extensively studied the SC and the issue of human rights, but often as distinct and isolated topics. Within the body of literature addressing the interplay of the SC and human rights, a prominent thematic lies in humanitarian intervention by the SC, assessing the legal aspects of SC-initiated actions regarding specific situations, and examining how the specific powers vested in the SC interact with the discourse of human rights. Thus, the literature gap is evident in the lack of addressing contemporary challenges related to the competence of the SC, as well as in the lack of in-depth legal analysis, and a failure to consider the context and requirements of modern international law.

This dissertation adds to the existing body of literature on the UN law. The current dissertation, by addressing both substantive and procedural inquiries concerning the functioning of the SC, introduces a unique legal theoretical framework which explores the SC's competence and powers in the context of dealing with a Member State that acts as a perpetrator. It marks the first instance of such comprehensive legal analysis. This study presents a doctrinal analysis of the implications of peace in the UN Charter, systematically investigates the intricate relationship between the competence of the SC and international law, and examines the criteria outlined in

[8] W. Michael Reisman, "The Manley O. Hudson Lecture - Why Regime Change Is (Almost Always) a Bad Idea," *American Journal of International Law* 98, no. 3 (2004); Alexander Bellamy, "The responsibility to protect and the problem of regime change," in *Ethics of Armed Humanitarian Intervention*, ed. Don E. Scheid(Cambridge: Cambridge University Press, 2014); Yasmine Nahlawi, "The legality of NATO's pursuit of regime change in Libya," *Journal on the Use of Force and International Law* 5, no. 2 (2018); Mehrdad Payandeh, "The United Nations, Military Intervention, and Regime Change in Libya," *Virginia Journal of International Law* 52, no. 2 (2012); Pippan Christian, "The 2011 Libyan uprising, foreign military intervention, and international law," *Juridikum: Zeitschrift für Kritik–Recht–Gesellschaft* 2 (2011).

the UN Charter for assessing the legality of the powers asserted by the SC. Finally, the current dissertation serves as a legal benchmark for future studies on the limitations of the SC and the legality of measures adopted by this body. This includes not only instances related to a specific case involving a state violating human rights massively but also extends to other situations or disputes when the SC decides to act.

1.2. Research Design

1.2.1. Research Question

Notwithstanding the affirmation in the San Francisco negotiation and the advisory opinion of the International Court of Justice (ICJ) regarding the SC's prerogative to delineate its initial operational boundaries, it is imperative to recall that the UN Charter does not confer upon either the UN's organs or its Member States the authority to conclusively adjudicate the extent of the SC's jurisdictional domain. In light of the aforementioned discussion on the statement of the problem and the identified gap in the existing literature, the central research question posed by this dissertation is: What is the scope of competence of the United Nations Security Council when a Member State commits mass atrocities against its own people? The outcomes of investigating this research question provide insight into the jurisdictional relationship between the SC and situations or disputes arising from mass atrocities committed by a Member State, and the powers may be ascribed to the SC in addressing such cases. The central question of this dissertation requires seeking a legal resolution for subsequent sub-questions, which are as follows:

To provide a thorough response to the primary question, it is imperative to initially comprehend the notion of peace as the foundational constituent of the SC's jurisdiction in the UN Charter. Consequently, this dissertation attempts to unfold the meaning of peace within the UN Charter. Hence, a part of this dissertation is dedicated to addressing the question: What implications does the concept of peace in the UN Charter carry?

Following the conceptualization of peace, the subsequent step involves examining the interplay between the SC's actions and the rules of international law. In this context, the dissertation systematically investigates the question: In the exercise of its discretionary authority to assess disruptions to peace and as well as determining the necessity for action, does the SC encounter any limitations in the execution of its actions?

Following the seizure of a situation or dispute by the SC, this organ would take appropriate measures to maintain or restore international peace and security. At this point, a natural question arises: Is the SC granted *carte blanche*, allowing it to deploy any powers in its attempts to maintain international peace and security? In instances where the SC makes a decision or implements a measure, there is a plausible scenario wherein Member States may perceive them as *ultra vires*. Consequently, it is natural for disagreements to emerge between the SC and the offending state regarding the decisions made by the SC.

Given the absence of a hierarchical structure and a mandatory judicial mechanism in the UN system, the need arises to address the question: In the event of a disagreement between the (SC) and a state accused of mass atrocities, pertaining to the interpretation of the UN Charter, whose interpretation should take precedence?

1.2.2. Aims and Objectives of the Research

Unfortunately, despite the advancements made by the international community to establish an environment conducive to the realization of fundamental rights and freedoms for every individual, there remains a persistent observation of gross violations perpetrated by governments against these rights. Considering the obligatory nature of the SC's decisions and the substantial powers vested in this organ for the maintenance and restoration of international peace and security, the aim of this research is to explore the extent of the SC's competence and capabilities under the UN Charter in addressing gross violations of human rights perpetrated by a Member State against its own people.

In pursuit of this aim, this dissertation commences by scrutinizing the concept of peace in the UN Charter. Given that, according to this instrument, the competence of the SC is confined to matters related to the threat of peace, breach of peace, and acts of aggression, it is imperative to comprehend the concept of peace to assess whether the grave violation of human rights by a government against its people falls within the jurisdiction of the SC or not. Secondly, it analyzes the relationship between the legal authority of the SC and other rules of international law. This analysis aims to determine the extent to which the SC's performance is governed by the rules and norms of international law. Lastly, the research explores the UN Charter to examine the legality of the powers asserted by the SC and the permissible extent to which it can assume new

powers in addressing situations or disputes arising from mass atrocities in relation to the sovereignties of Member States.

1.2.3. Rationale of the Research

Most academic research pertaining to the UNSC is approached from the lens of political science. Among commentators, those who have conducted legal studies have primarily analyzed the competence and powers of the SC in relation to specific situations or particular aspects of the law of the SC. A similar assertion is applicable about human rights. It would be inaccurate to assert a complete absence of studies; however, there has been a discernible lack of direct focus on investigating the legal interplay between the competence of the SC and instances of mass atrocities perpetrated by a Member State. Taking into account the humanistic foundation of modern international law and the ongoing process of humanizing the international legal system, also considering the powers and competencies that sovereign states possess alongside the SC in the international law, a noticeable gap exists in academia for a theoretical legal discussion regarding the interaction between the scope of the SC's competence and situations involving mass atrocities by a Member State. The caveat in this context demands legal study as the sole means of persuading subjects of international law. This study is essential to address the intricate interplay among the SC's competence, the sovereignties of Member States, and the commission of mass atrocities by the latter under the UN Charter at the theoretical level. This dissertation is focused on providing a legal theoretical framework to assess the extent of the SC's jurisdiction under the UN Charter when confronted with situations involving mass atrocities committed by a Member State against its own population. The absence of defined criteria in both international jurisprudence and academic discourse creates a challenge for legal and political researchers when they study the SC. This absence hinders the formation of a conclusive understanding regarding the legality of actions taken by the SC. Furthermore, while the primary focus of this study is on mass atrocities, it is worth noting that the arguments presented in this dissertation can be applied to situations beyond instances of mass atrocities. Researchers, legal litigators, and governments can leverage these arguments in a broader context. Beyond its immediate effects, the dissertation carries a long-term impact. As long as the international community continues its pursuit of universal peace and as long as aspects of international life are shaped by human rights considerations, the analytical insights offered by

this thesis will remain valuable. Therefore, this dissertation receives backing from both academic and pragmatic perspectives.

1.2.4. Significance of the Research

Based on the presently available instruments in the realm of international law, it can be asserted that the SC represents the singular feasible means to address the challenge posed by mass atrocities committed by sovereignties.

The delineation of the UN Charter's permissibility for the SC to intervene in issues pertaining to the respect and guarantee of human rights by Member States has consistently been a source of contention between the SC and the Member States. While the former demonstrates a policy of a generous interpretation of the UN Charter, the latter essentially treats human rights as a domestic issue and thus subscribes to a narrow interpretation of the SC's competence in this regard. In this confrontation between the SC and sovereignties, law is the sole compelling tool of persuasion for both parties to demonstrate cooperation in achieving the objectives outlined in the UN Charter. It is important to remember that, similar to any other international organization, the UN relies on the cooperation of its Member States to implement decisions. Despite the binding nature of the SC's decisions, the functionality of this body would be paralyzed without the active contribution of its Member States. Hence, it is essential that not only the SC and the offending state believe in the legality of the decision made, but also the international community must be effectively persuaded to contribute meaningfully.

By utilizing a legal analysis methodology, this dissertation attempts to portrait the legal status of the SC's competence as it is, in addressing the troubling phenomenon of mass atrocities under the UN Charter, and thereby offering a clear and comprehensive understanding of the SC's competence for the benefit of UN organs, Member States, and academia. Additionally, by furnishing legal criteria, this dissertation has a lasting impact on the future analysis of the SC's practices by Member States and interested researchers in this area. Finally, this dissertation endeavors to present a research product characterized by coherence and consistency across the spectrum of international law by incorporating a comprehensive understanding of the entire context of international law in the analysis of materials. Therefore, the findings of this dissertation make a scholarly contribution by presenting a coherent, consistent, and predictable

legal framework for the competence of the SC. This framework is not limited to the question of mass atrocities, but it carries potential to be extended in other questions as well.

1.2.5. Scope of the Research

The realm of the SC offers many compelling fields for study; however, this research specifically focuses on analyzing the scope of the SC's competence in addressing mass atrocities committed by Member States against its own population under the UN Charter. Given the nature of the research question and the methodology employed, this dissertation is subject to limitations from various angles. Firstly, it seeks to theatrically discuss the legal domain of the SC's competence. Consequently, the thesis deliberately avoids incorporating political considerations into the analysis. Secondly, it explores the theoretical dimensions of the SC's competence. Therefore, the thesis intentionally refrains from integrating a legal analysis of the SC's practice. Although specific decisions and actions taken by the SC were the inspiration for the author's choice of topics and their overarching themes, but the analysis of individual decisions or actions is not the target of this study. Because the evaluation of the legality of the SC's practice requires the availability of a legal benchmark, which is currently lacking in international law. The central aim and contribution of this dissertation to literature is to establish and offer such a legal touchstone. Additionally, the legal dogmatic method stands out as the most appropriate method for analyzing the legality of the SC's practice. Consequently, this issue is beyond the scope of the present research, as it necessitates a distinct and independent research question and methodology. Thirdly, due to the unique position held by the UN Charter in the realm of international law and the unparalleled powers bestowed upon the SC by this instrument, the primary focus of this research is confined to the UN Charter. Finally, it is important to note that the materials sourced from the SC, its subsidiary organs, and any entities established by the SC have not been utilized in this study. Because while it is recognized that all actions of the SC initially carry the presumption of legality, the legal status of specific decisions made by this body has been a subject of substantial disagreement among both states and scholars. Therefore, utilizing these materials without verifying their legality on a case-by-case basis would impinge the purity and originality that this dissertation wishes to maintain.

1.2.6. Limitations of the Research

In the course of this thesis, it is essential to acknowledge and delineate certain inherent limitations that affect the current research. A primary constraint arises from the notable lack of comprehensive prior legal studies specifically delving into the scope of competence of the SC. The existing literature mainly explored the practice of the SC.

1.3. Research Methodology

The methodology adopted in this thesis is the legal analysis method. This method is employed when a research question aims to comprehend the law as it is, and to address a regimented structure of law. The rationale behind employing this method is to seek an answer to a question concerning the status of a legal norm or a specific concept within the legal system generically.[9] In this method, the focus is placed on the purely cognitive ascertainment of the meaning or function of legal norms/rules or specified concept within the legal system.[10] Thus, this thesis seeks to explore the extent of the SC's competence in addressing mass atrocities committed by a Member State under the framework of the UN Charter.

Approach: The idealistic approach considers utopian ideas effective in transforming and evolving international relations. In this approach, values, principles, and law are the determining factors that give order to the views of the international relations actors and justify their behaviors.[11] In this context, international law may constitute a fundamental cornerstone in steering international life. Accordingly, given the strengths and importance of the values related to human rights in modern international law and specifically in the UN Charter, the idealistic approach aligns well with the research question of this dissertation.

Relevant Sources: Given the research question, this study primarily focuses on international instruments, particularly the UN Charter, and the decisions of the ICJ. Furthermore, due to the nature of the chosen methodology, scholarly works form the main portion of materials in this thesis.

[9] Hedayatollah Falsafi, *Seyre Aghl dar Manzoomeh-ye Hoghooghe Beynolmelal* (Tehran: Nashr Now, 2020), 212.
[10] Hans Kelsen, *Pure Theory of Law*, Translation from The Second (Revised and Enlarged) German Edition by Max Knight (Berkeley: University of California Press, 1967), 355.
[11] Falsafi, *Seyre Aghl dar Manzoomeh-ye Hoghooghe Beynolmelal*, 391-392.

Processing Sources: Legal scholars widely agree that Articles 31 and 32 of the Vienna Convention on the Law of Treaties [12] (1969) are firmly grounded in both international treaties and customary international law. Hence, its rules are applicable to the interpretation of international conventions, including the UN Charter. Accordingly, the author employed these Articles as the method of interpretation, and all the related texts will be construed based on their ordinary meaning in their context and considering their object and purpose.

1.4. Research Structure

1.4.1. Chapter 2

The UN has assigned the SC with the pivotal responsibility of maintaining and restoring international peace and security. Given that the UN Charter did not create peace but rather mirrors prior strenuous endeavors at both domestic and international levels for universal peace, it is essential to have detailed look into the history and background of the peace of the UN Charter. Chapter two aims to provide a picture of the historical odyssey of universal peace, chronicling its evolution from ancient times to the present day, particularly from a legal standpoint. The chapter begins with a discourse on peace in an era lacking an international legal order. Subsequently, it examines the notion of peace following the Westphalian treaties, marking the birth of sovereignties and the inception of a rudimentary international legal framework. Next, it explores the influence of the Enlightenment era, national movements, and peace activists on the realization of peace. Finally, it concludes by examining the concept of peace post-First World War, with a particular focus on the League of Nations as a pivotal milestone in the international endeavor towards universal peace.

1.4.2. Chapter 3

Chapter three is dedicated to studying peace in the context of the UN Charter. It seeks to explore what the peace of the UN Charter implies. This question is important as the UN Charter confines the jurisdiction of the SC solely to matters of international peace and security. Examining the concept of peace will contribute to a clearer understanding of the extent of the SC's competence. In line with this aim, this chapter starts by examining the legal status of peace

[12] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

in international law post-Second World War. It then advances to a detailed analysis of two facets of the peace outlined in the UN Charter: its form and connotation. It proceeds to explore the obligations stemming from peace for both the organs of the UN and its Member States. The chapter concludes by examining specific cases that serve as evidence of the conceptualization of peace undertaken by the author.

1.4.3. Chapter 4

In a situation governed by law, the possession of competence is inevitably accompanied by limitations. Thus, this chapter is dedicated to investigating the limits, if any, that may constrain the competence of the SC when applying its jurisdiction to a state accused of human rights violation. The central focus in this regard is Article 1 of the UN Charter, aiming to analyze whether this instrument anticipated any limitations on the SC or assumed this organ to be without legal checks, rendering this body *legibus solutus*. This chapter commences by examining the arguments supporting the freedom of the SC and its legal consequences in international law. Subsequently, it delves into the interpretation that believes in the UN Charter's reference to limits existing in international law for the SC, namely, *jus cogens* and *erga omnes*. This section undertakes a rigorous analysis of the underlying foundations of both *jus cogens* and *erga omnes* in positive international law. At the conclusion of this chapter, attention is directed towards the legal interplay between *jus cogens* and *erga omnes* in relation to the SC to explore the potential legal impacts that they may exert on the SC's competence.

1.4.4. Chapter 5

Chapter VI of the UN Charter speaks of conciliatory role of the SC and grants this body the competence to intervene positively in the pacific settlement of disputes and situations. Chapter five aims to investigate the extent of the SC's authority in addressing disputes or situations arising from mass atrocities committed by a Member State. For this purpose, it starts by examining the legal analysis of procedures initiated by Member States regarding human rights violations. Given that this thesis focuses on mass atrocities committed by a state against its own population, this section also explores the potential existence of a dispute arising between the state committing human rights violations and an interceding state in the light of international treaties and law of responsibility of states for internationally wrongful acts. This section as well accommodates the procedures instituted by the SC *ex officio*, by the General Assembly (GA),

and by the Secretary-General (SG). Additionally, the examination will extend to the powers wielded by the SC in all four types of referrals. Next, the chapter proceeds by exploring the feasibility of disobedience to SC resolutions by an offending state and the jurisdictional objections it may raise against the decisions and actions of the SC. In the light of this topic, this chapter concludes by addressing questions related to providing an authentic interpretation of the UN Charter and determining the origin of human rights, whether it is a domestic or international matter under the UN Charter.

1.4.5. Chapter 6

the chapter six includes an analysis of the quasi-legislative and quasi-judicial powers of the SC in the legal scale. The first part of this chapter will thoroughly examine both perspectives supporting and opposing the quasi-legislative powers of the SC. Furthermore, this section will delve into the legal analysis of the feasibility of applying quasi-legislative power to an offending state by the SC. The last section of this chapter is dedicated to a legal assessment of the feasibility of employing quasi-judicial powers by the SC. Specifically, the focus will be on evaluating the application of such a power to both natural (individuals) and legal (states) persons involved in mass atrocities. This examination seeks to clarify the extent to which quasi-judicial mechanisms may be invoked by the SC for perpetrators of mass atrocities.

1.4.6. Chapter 7

The concluding chapter of this dissertation delves into the possibility of changing the regime responsible for mass atrocities through the actions of the SC. The center of focus in this chapter is Paragraph 7 of Article 2. This line commences with an examination of the scope of the principle of non-intervention and regime change under the said article. Next, it continues with analyzing the first segment of paragraph 7 of Article 2, which speaks of matters essentially fall under domestic jurisdiction of Member States from the perspective of states, to explore what is the legal implication of it regarding regime change as a domestic affair. It proceeds to scrutinize the second segment of paragraph 7 of Article 2, which speaks of the exemption of the SC from the ban stipulated in the first segment when acting under Chapter VII, to explore the legal justifiability, under the UN Charter, of the power to instigate regime change in favor of the SC. Lastly, this chapter finds its end by discussing whether the matter of regime change falls in the domestic jurisdiction of Member States or falls in the ambit of the SC.

Chapter II: The Evolution of Peace: From Social Value to Legal Axiom

2.1. Introduction

The primary goal of this chapter is to explore the evolution of peace within the context of international law's historical development. Although peace has been analyzed from a variety of perspectives by scholars, this chapter emphasizes the dynamics involved in shaping the concept of peace from a legal angle. In this odyssey, both international and national dynamics are discussed in chronological order. It begins with an examination of peace in the early and Middle Ages, a time when the Church held dominant authority and Europe was overshadowed by religious thoughts. The narrative then traces the impact of the Westphalia treaties and the rise of nation-states, highlighting their contributions to the establishment of a peace-oriented order. Subsequently, the chapter explores the roles played by national movements and individual peace activities in promoting universal peace. In the final section, the focus shifts to the institutionalization of peace through the League of Nations

2.2. Peace in Ancient Times and The Middle Ages: Peace as a Social Value

Traditionally, peace has not been viewed as an independent concept but rather as a concept tied to war. In historical contexts, war was often considered a legitimate means to achieve objectives. Hence, the term 'natural status' is the most appropriate to describe the relationship between international actors during this period. Hobbes described the state of nature as "a condition of desires and passions that creates distrust and universal enmity among people in a realm where nothing is unjust".[13] In the state of nature " the notions of rights and wrong, justice and injustice have there no place".[14] The state of nature is a condition of conflict characterized not by immediate warfare but by a recognized inclination toward it.[15] It is a situation in which individuals or groups are prepared to engage in combat with one another.[16] Given the fact that the majority of wars were terminated through ceasefire agreements, peace was conceptualized as the mere absence of war.

Atrocities of all kinds and generations of hatred between communities were the fallout of war. To curb the escalation of warfare, early thinkers advocated the concept of a just war. According to Augustine, genuine earthly peace would remain unattainable as long as humanity persists in living in a state of sin, prioritizing materialistic pleasures over higher, spiritual fulfillment.[17] For Augustine, lasting peace would be realized when humanity is liberated from sin and death.[18] Augustine did not outright prohibit war as a means to establish earthly peace. In his perspective, war would not be sinful if: (a) it was declared by a legitimate public authority; (b) aimed at penalizing wrongdoers; and (c) pursued to maintain peace, aid the virtuous, or prevent evil. Thus, he argues that not only should war not be entirely banned, but under specific conditions, the achievement of earthly peace relies upon resorting to war. He pointed out that "the earthly city desires earthly peace, albeit only for the sake of the lowest kind of goods; and

[13] James (Sákéj) Youngblood Henderson, "The Context of the State of Nature," in *Reclaiming Indigenous Voice Vision,* ed. Marie Battiste (Vancouver: UBC Press, 2000)16.
[14] Thomas Hobbes, *Leviathan* (London: Andrew Crooke,1651) 79.
[15] Ibid 77.
[16] Henderson, "The Context of the State of Nature," 16.
[17] Robert Busek, "Defenders of the Faith: Augustine, Aquinas, and the Evolution of Medieval Just War Theory," *Saber and Scroll* 2, no. 1 (2013): 11.
[18] John Langan, "The elements of St. Augustine's Just War Theory," *The Journal of Religious Ethics* 12, no. 1, (1984): 29.

it is that peace which it desires to achieve by waging war."[19] He further elaborated that a just war must be driven by legitimate motives, specifically the establishment or preservation of earthly peace. As a second criterion, public authorization is warranted in two situations: self-defense and offensive war[20], such as when a nation or state being attacked has not rectified a harmful act committed by its citizens or failed to return wrongfully taken possessions.[21] At the end, Augustine concluded that "[a] great deal depends on the causes for which men undertake wars, and on the authority they have for doing so: for the natural order which seeks the peace of mankind ordains that the monarch should have the power of undertaking war if he thinks it advisable, and that the soldiers should perform their military duties in behalf of the peace and safety of the community."[22] In the 13th century, Saint Thomas Aquinas crafted the doctrine of just war.[23] He articulated his perspective on warfare and associated forms of violence, classifying them as sin against peace.[24] Inspired by Augustinian theology, Aquinas believed in three conditions for a just war. The first and third conditions mirror Augustine's propositions: the war must be commanded by a legitimate sovereign authority, and the belligerents must have a righteous intention, seeking the promotion of good or the prevention of evil. Concerning the second condition, there is a nuanced change in his viewpoint. Aquinas argued that a just cause is necessary; specifically, those being attacked should face attack due to their fault.[25] In this manner, Aquinas invalidated all other types of warfare instigated for wrong reasons, such as the fulfillment of human avarice. Later, Emery Cruce explored the idea of peace influenced by the Crusades'era. He believed that achieving peace lies in uniting Christians, Muslims, Jews, and even Atheists, rather than providing grounds for them to engage in conflicts.[26] Additionally, he emphasized that the army should be utilized for defensive purposes, safeguarding free

[19] Augustine, *The city of God against the pagans*, ed. and tr. R. W. Dyson (Cambridge: Cambridge University Press, 1998), 639; Christopher Kaczor, *Thomas Aquinas on Faith, Hope, and Love: A Summa of the Summa on the Theological Virtues* (Washington: The Catholic University of America Press, 2020), 229.
[20] Ibid.; Langan, "The elements of St. Augustine's just war theory," 23.
[21] Herbert A. Deane, *The Political and Social Ideas of St. Augustine* (New York: Columbia University Press, 1963), 312.
[22] Augustine, "Contra Faustum Manichaeum," in *The Nicene and post-Nicene Fathers 4*, ed. Philip Schaff, tr. Richard Stothert (Massachusetts: Hendrickson**,** 1995), 301.
[23] Alexander Moseley, "Just War Theory," The Internet Encyclopedia of Philosophy,<https://iep.utm.edu/justwar/> (Accessed November. 30, 2023).
[24] Gregory M. Reichberg, "Aquinas' moral Typology of Peace and War," *The Review of Metaphysics* 64, no. 3 (2011): 479.
[25] Busek, "Defenders of the Faith: Augustine, Aquinas, and the Evolution of Medieval Just War Theory," 16.
[26] Istvan Kende, "The history of peace: Concept and Organizations from the Late Middle Ages to the 1870s," *Journal of Peace Research* 26, no. 3 (1989): 236.

relationships, and combating pirates and robbers, rather than resorting to war.[27] While his contention restricts the commencement of wars, it still recognized warfare as a valid method for resolving conflicts. Hugo Grotius furthered the Just War Theory by concentrating significantly on the systematic elucidation of the legitimate reasons for initiating war.[28] Grotius posited that war could serve as a means to establish right. He argued that when legal resolutions prove ineffective, war becomes a recourse, justifiable either as a preventive measure against potential wrongs or as a response to wrongs already perpetrated.[29] Later, Saint-Pierre, a proponent of perpetual peace, approached the concept of war from a novel perspective. He argued that due to the absence of a permanent alliance among European rulers and a lack of a common binding law, disputes cannot be resolved without resorting to war, thus, war becomes an unavoidable tool.[30] Therefore, the key to attaining peace and preventing war lies in forming a permanent and robust alliance instead of relying on the balance of power.[31] Although waging war during the medieval age was not entirely banned, and rulers could wage war under the pretext of a just cause, most rulers neither valued the theory nor considered it a legal rule.

2.3. Peace After the Westphalia Treaties: Understanding the Imperative for Peace

The conclusion of the Westphalia treaties has catalyzed a significant shift in the nature of international actors and the international order. The sovereign nation-states emerged following the Peace of Westphalia, allowing them to enjoy and exercise absolute authority within their borders.[32] States have become new entities on the global map, functioning autonomously and independently from each other.[33] Unlike medieval political ideologies, which relied on submission to a central hierarchy,[34] the new players define their interests, and shape their

[27] Ibid, 237.
[28] G. I. A. D. Draper, "Grotius' place in the development of legal ideas about war." In *Hugo Grotius and International Relations*, ed. Hedley Bull and others (Oxford: Clarendon Press, 1990), 194.
[29] Jon Miller, "Hugo Grotius," *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), ed. Edward N. Zalta. <https://plato.stanford.edu/archives/spr2021/entries/grotius/>. (Accessed November. 30, 2023).
[30] Kende, "The History of Peace: Concept and Organizations from the Late Middle Ages to the 1870s," 238.
[31] Ibid.
[32] Eric Allen Engle, "The Transformation of the International Legal System: The Post-Westphalian Legal Order," *QLR* 23, no. 1 (2004): 25.
[33] Stephan Hobe, "The Era of Globalisation as a Challenge to International Law," *Duquesne Law Review* 40, no. 4 (2002): 657.
[34] Steven Patton, "The Peace of Westphalia and it Affects on International Relations, Diplomacy and Foreign Policy," *The Histories* 10, no. 1 (2019): 97.

destinies. To comprehend the extent of sovereignties' freedom and authority, one need only consider that states enjoyed the capacity to wage aggressive war at their discretion.35 The newly established system could not have materialized without immunity from external interventions. To tackle the problem of interference, the Westphalia treaties devised the principle of state equality. Under this principle, all states were regarded as equal entities, thereby denying anyone the authority to meddle in the internal affairs of another state. In this regard, Holsti explained that "the peace legitimized the ideas of sovereignty and dynastic autonomy from hierarchical control. It created a framework that would sustain the political fragmentation of Europe."[36] In the same vein, Knutsen wrote that "the powers of the pope and the emperor . . . were drastically reduced by the Treaty of Westphalia. With this Treaty, the concept of the territorial state gained common acceptance in Europe."[37] In contrast to the concrete nature of sovereignty, equality was merely an axiomatic principle. It is unprecedented in the history of international law for global actors to come together and reach consensus on a rational axiomatic principle to govern their relationships. The Westphalia treaties introduced a novel system that established a certain level of order in global affairs.[38] Within the framework of the Westphalia treaties, participants envisioned a paradigm emphasizing the paramountcy of equal sovereignty as the cornerstone of the new order.[39] Even though it was evident that states differed in many aspects such as size, wealth, power, and global influence, participants still embraced the principle of equality as an axiom due to the absolute need to construct an order where states could autonomously handle their affairs free from external interference and, therefore, they can freely conclude treaties with each other in order to exercise their sovereignty over their territories.[40] According to their perception, this order would ensure future peace.[41] Article I of Treaty of Munster declared: *"That there shall be a Christian and Universal Peace, and a perpetual, true, and sincere Amity,*

[35] Hobe, "The Era of Globalisation as a Challenge to International Law," 657.
[36] Kalevi J. Holsti, *Cambridge Studies in International Relations: Peace and War: Armed Conflicts and International Order, 1648-1989*, Series Number 14 (Cambridge: Cambridge University Press, 1992), 39.
[37] Torbjorn L. Knutsen, *A History of International Relations Theory* (Manchester: Manchester University Press, 1992), 71.
[38] Engle, "The Transformation of the International Legal System: The Post-Westphalian Legal Order," 25.
[39] Michael Vaughan, "After Westphalia, whither the nation state, its people and its governmental institutions?", paper Presented at *The International Studies Association Asia-Pacific Regional Conference* (29 September 2011), 6.
[40] Glen Kelley, "Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations," *Columbia Journal of Transnational Law* 39, no. 2 (2001): 525-526.
[41] Ove Bring, "The Westphalian Peace Tradition in International Law: From Jus ad Bellum to Jus contra Bellum," *International Law Studies Series. US Naval War College* 75 (2000): 58.

between his Sacred Imperial Majesty, and his most Christian Majesty; as also, between all and each of the Allies, ... That this Peace and Amity be observed and cultivated with such a Sincerity and Zeal, that each Party shall endeavour to procure the Benefit, Honour and Advantage of the other"[42]

In this system, nonetheless, the current order remains vulnerable to violations at any time. The sole method to safeguard states' interests is to implement counter measures. Thus, reciprocity laid the foundation for interactions between states (Article VI). Article CXXIII of the Treaty of Munster stipulates that if one party breaches the treaty:

[... the concluded Peace shall remain in force, and all Partys in this Transaction shall be oblig'd to defend and protect all and every Article of this Peace against anyone, without distinction of Religion…].[43]

In summary, the Westphalia system was established based on the fundamental principle of equal status among states, along with its two concomitant concepts: the freedom to enter contracts and reciprocity. The former serves as a demonstration of sovereign autonomy, and the latter functions as a means for safeguarding interests. In this context, the parties of Westphalia believed that they could guarantee peace for all involved. The concept of just war had eroded in credibility as a thought, and the progression of war dynamics had accelerated. While in the pre-Westfalia period there were limited numbers of actors permitted to wage war under the authority of the hierarchy's apex, the newly established order allows numerous sovereignties to engage in warfare at their own discretion. The idea of equal sovereignty with full autonomy could not ensure peace due to its purely rational foundation. In the new system centered around sovereignty, each state is perceived as a self-interested entity focused solely on its own benefit, disregarding the interests of others. Consequently, a state would unabashedly deviate from existing law whenever its interests dictate. As Engle truly stated: "[t]he Westphalian system thus contributed to and, as a consequence, was transformed by two world wars because 'sovereignty' was no longer a guarantor of peace but rather of war."[44] Contrary to predictions, focusing solely on individual interests through the principles of equality, reciprocity, and freedom of contract proved counterproductive. Because States established a societal system based entirely on

[42] *Major Peace Treaties of Modern History 1648-1967 Volume 1*, ed. Israel L. Fred (New York: Chelsea House Publishers, 1967), 9.
[43] Ibid, 46.
[44] Engle, "The Transformation of the International Legal System: The Post-Westphalian Legal Order," 25.

rational principles without striving for any shared objective, resembling a body without a soul. Any actor may disrupt the established order if its interests necessitate such action. In light of these conditions, numerous commentators wrote that war emerges due to a state's unrestricted sovereignty.[45]

2.4. The Congress of Vienna (1814)

In the mid-18th century, the emergence of Napoleon had a profound impact on the Westphalian order. While the Westphalian system emphasized equality among states, Napoleon aspired to dominate the entire continent of Europe. His ambitions came to fruition, and he gained a power that was continental in scope.[46] The Russian Tsar, perceiving himself as Napoleon's imminent target, offered Austria to build a coalition against him while Austria had already declared loyalty to France. Austria seceded from its alliance with France and joined Russia.[47] A similar offer was extended to England, which was enthusiastically welcome. The British Prime Minister outlined three key goals for the suggested coalition against France: the reversal of France's conquests, requiring France to revert to its previous borders; safeguarding the reclaimed territories from potential future French aggression; and, following the restoration of peace, creating a comprehensive pact for mutual protection and security among various powers, and re-establishing a unified system of public law in Europe.[48] Eventually, the coalition was formed with Prussia's ally. Following their victory over Napoleon, this coalition convened the Congress of Vienna, spanning from September 1814 to June 1815, with the aim of shaping the future European order.[49] The Congress participants were committed to the Westphalia order, and hence The Congress led to the decision to restore the borders as they were before.[50] Apart from reinstalling the Westphalian order, the Congress marked a substantial milestone for states. While the Westphalia treaties demonstrated that interests could be met through multilateral agreements, the Congress' experience proved that interests might also be fulfilled through

[45] Ibid.
[46] Edouard Driault, "The coalition of Europe against Napoleon," *The American Historical Review* 24, no. 4 (1919): 605.
[47] Ibid, 620.
[48] Adam Zamoyski, *Rites of Peace: The Fall of Napoleon and the Congress of Vienna* (London: Harper Press, 2007), 31.
[49] Ghervas, Stella. "Three lessons of peace: From the congress of Vienna to the Ukraine crisis." *UN Chronicle*, vol. 51, no. 3 (2014), p. 10.
[50] Diemut Majer and Wolfgang Hohne, "The European Idea in the Time of the Congress of Vienna," Journal on European History of Law 5, no. 2 (2014): 2; Driault, "The coalition of Europe against Napoleon," 619.

multilateral diplomatic gatherings. As part of the final act of Congress, a paragraph was incorporated that is of great significance. It states:

"To facilitate and to secure the execution of the present Treaty, and to consolidate the connections which at the moment so closely unite the Four Sovereigns for the happiness of the world, the High Contracting Parties have agreed to renew their meetings at fixed periods, either under the immediate auspices of the sovereigns themselves, or by their respective Ministers, for the purpose of consulting upon their common interests, and for the consideration of the measures which at each of those periods shall be considered the most salutary for the repose and prosperity of Nations, and for the maintenance of the Peace of Europe".[51]

Metternich, an Austrian diplomat, had raised this issue before the Congress opened, stating "[t]his time the treaty of peace is already made, and the parties are meeting as friends, not necessarily having the same interests, who wish to work together to complete and affirm the existing Treaty."[52]

2.5. The Hague Conferences of 1899 and 1907

During the 19th century, progress in technology resulted in the manufacture of advanced weapons, especially naval armaments, fundamentally altered the nature of warfare.[53] These weapons, with significant destructive power and causing severe suffering in war, drove the development of new warfare methods. To maintain military equilibrium, numerous nations allocated substantial funds to national armaments, notably in Europe, the United States, and Japan.[54] During this period, because of humanist thinking and observation of war calamities, the public were awakened to the inherent cruelty of war and the aggravation of its effects by neglect of its victims, particularly prisoners of war and wounded soldiers.[55] The Hague Conferences of 1899 and 1907 convened to find methods for sustaining international peace by banning the use of force for resolving conflicts and imposing limitations on the use of weapons and warfare tactics by warring parties. The first Conference was orchestrated by Nicholas II, the Russian Tsar, and the second was initiated by Theodore Roosevelt, the President of the United States.

[51] C. K. Webster, *The Congress of Vienna 1814-1815* (London: Oxford University Press, 1920), 144.
[52] Richard Langhorne, "Reflections on the Significance of the Congress of Vienna," *Review of International Studies* 12, no. 4 (1986): 318.
[53] Detlev F. Vagts, "The Hague Conventions and Arms Control," *American Journal of International Law* 94, no. 1 (2000): 31.
[54] Ibid, 32.
[55] Ibid.

Both conferences resulted in final acts, treaties, and declarations. Despite its failure to restrict armaments and military expenditure, the Conferences achieved success in regulating the laws of war, neutrality, and establishing a Permanent Court of Arbitration for the peaceful resolution of disputes. Several remarkable aspects characterize these Conferences. Unlike earlier international assemblies that were exclusive to powerful states, this marked the first instance where a diverse array of states from various regions gathered to deliberate on peace as a shared concern. This inclusivity stemmed from the recognition that peace was a matter of universal import, demanding contributions from all corners of the world. Twenty-six states, mainly from Europe, as well as the United States, Brazil, Siam, Japan, China, and Iran, participated in the first Conference, and forty-four countries participated in the second Conference. In this line, Aldrich pointed out that "[t]hey established an agenda for negotiation, in the parliamentary-diplomatic mode, for the next hundred year".[56] Furthermore, non-governmental organizations such as the Red Cross, peace societies, inter-parliamentarism, feminism, separatist movements, socialists, anarchists,[57] the Inter-Parliamentary Union, the Institut de Droit International, and peace activists like Baroness Bertha von Suttner, Ivan Bloch, and Andrew Carnegie made significant contributions to the Conferences both before and during the event.[58] Lastly, both Conferences placed high value on the concept of humanity. The Hague Conferences, bearing the title of peace, did not view peace solely as a matter between states but also took into account the human aspect of peace. In an Imperial Rescript on 24 August 1898 directed to all ambassadors at the St. Petersburg Court, the foreign minister, Count Muraviev, expressed that: "by means of international discussion, the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and, above all, of limiting the progressive development of existing armaments".[59] In an instructional letter, the office of the American presidency clarified that the purpose of the American delegation's participation in the 1899 Conference was to deliberate on the most effective methods to ensure enduring peace and its benefits for all

[56] George H. Aldrich, and Christine M. Chinkin, "A Century of Achievement and Unfinished Work," *American Journal of International Law* 94, no. 1 (2000): 90.
[57] Arthur Eyffinger, *The 1899 Hague peace conference: the parliament of man, the federation of the world* (Leiden: Brill, 1999), 5.
[58] Maartje Abbenhuis, "Hague Conferences of 1899 and 1907," in *The Encyclopedia of Diplomacy*, ed. Gordon Martel (West Sussex: John Wiley & Sons, 2018), 827.
[59] *The Hague Conventions and Declarations of 1899 and 1907: Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations*, ed. James Brown Scott (New York: Oxford University Press, 1915), v.

peoples.[60] In the final Act of the first Conference in July 1899, the summit's purpose was stated as "[t]he International Peace Conference, convoked in the best interests of humanity …".[61] In this regard, Clark wrote, "the conferences promoted the broadly humanitarian notion that international society had responsibilities for the welfare and well-being of humankind, and that these extended beyond the traditional concerns of international society".[62] In a statement from the secretary of the British Peace Society, it was noted that: "it was successful beyond all anticipation, and that it had augured a new era for mankind".[63]

2.6. The Impact of Humanism on Peace

Parallel to the progress made in the pursuit of peace among states (north stream), a significant shift in human thinking has commenced (south stream), known as humanism. Humanism has influenced every aspect of human life. Humanism is interpreted in diverse manners but it is generally defined as "the concern for the ennoblement and enrichment of human life in individual as well as in social terms".64 Tzvetan extensively explored humanism and condensed its core principles into three concise concepts: "autonomy of the I, finality of the you, universality of the they".[65] He elucidated these three principles in the following manner: "The humanists have therefore sought to establish a meaningful relationship between their values and what they have recognized as the very identity of the human race. The universality of the they seem, then, to be the counterpart of the membership of all human beings, and they alone, in the same living species. The finality of the you accords with the affirmation of the fundamental sociability of men, of their need for one another, not only for their survival and reproduction, but also for their constitution as conscious and communicative beings: the enjoyment of others is the result of this necessary relationship. The autonomy of the I corresponds to the human capacity to remove oneself from any determination. Membership in the same species, sociability, or the existence of a consciousness of self are not values in themselves; but humanist

[60] Ibid, xix.
[61] Ibid, 1.
[62] Ian Clark, *International legitimacy and world society* (Oxford: Oxford University Press, 2007), 61.
[63] William Evans Darby, *The Peace Conference at the Hague: Its history, work, and results* (London: Peace Society, 1899), 49.
[64] Leon Thiry, "Humanism and the Axiology of Peace," *Peace Research* 13, no. 4 (1981): 157.
[65] Tzvetan Todorov, *Imperfect Garden: The Legacy of Humanism* (Princeton: Princeton University Press, 2002), 40.

values conform to these characteristics of the species".66 In the realm of Humanism, human beings cease to be a dependent object; instead, they become a subject, and the expression of their subjectivity is manifested through the freedom of will. Human beings are the 'ultimate end', 67 and shape their own fate. As Todorov pointed out: "It was revolutionary to claim that the best justification of an act, one that makes it most legitimate, issues from man himself: from his will, from his reason, from his feelings".68 Concerning the subjectivity of human beings, it is essential to acknowledge and reflect upon the wisdom expressed by Kant: "Autonomy consists not only of governing oneself but also of obeying only the law that we ourselves have prescribed. He speaks in the same sense of dignity: to preserve one's dignity is to act in conformity only with those principles and maxims accepted by the subject".69A pivotal aspect of humanist thought is the recognition that every individual is a subject; but it is imperative to acknowledge the subjectivity of others too. Todorov characterizes this perspective as embracing 'freedom, respect for others, and equality of dignity for all'.70 Humanism enables individuals to pursue their aspirations either independently or collaboratively. Among these aspirations, the pursuit of peace holds significant value. In contrast to the medieval era when peace was regarded as a concern of kingdoms, the post-Enlightenment period shifted the discourse under citizens' right.71 According to public opinion, peace belongs to everyone, and everyone should contribute to its attainment. The 'south stream' consists of two clusters: national movements and individual initiatives.

2.6.1. National Movements

Although national movements have predominantly concentrated on their internal affairs within the confines of their nations, their impact resonated on a global scale, significantly contributing to global peace. Despite distinctions between national movements and the state's trajectory, their outcomes were comparable. The latter sought to safeguard a nation from external threats posed by other states, whereas the former worked to shield the nation's interests within its domestic borders against internal threats. In the course of evolution and the pursuit of

[66] ibid.
[67] Ibid, 39.
[68] Ibid, 9.
[69] Ibid, 47.
[70] Ibid, 41.
[71] David Cortright, *Peace: A History of Movements and Ideas* (Cambridge: Cambridge University Press, 2008), 27.

universal peace, certain national movements have made noteworthy contributions. In this context, the pivotal roles played by the American and French revolutions.

2.6.1.1. The American Declaration of Independence (1776)

In 1776, the thirteen American colonies dissolved their political connections with Great Britain and proclaimed the United States of America as an independent sovereign state. The Declaration of Independence, which ratified in the same year, formally recognized the United States of America as a separate and legitimate nation-state.[72] The Declaration stands as an iconic landmark in the sanctification of human dignity and has functioned as a wellspring of motivation for subsequent national movements. Humanistic thinking has been widely recognized as one of the reasons for the American Revolution. Bailyn conducted an in-depth analysis of the impact of enlightenment philosophy on the pre-revolutionary era and explored its manifestations in the Pamphlets. He wrote that "more directly influential in shaping the thought of the Revolutionary generation were the ideas and attitudes associated with the writings of Enlightenment rationalism-writings that expressed not simply the rationalism of liberal reform but that of enlightened conservatism as well".[73]

A noteworthy aspect of the Declaration is its pioneering recognition of the entire human species. While the Bill of Rights (1689) was promulgated in England beforehand and notably influenced American revolutionaries, it cannot be deemed the inaugural document in this regard. Unlike the Declaration, the Bill of Rights exclusively pertained to the people of England and did not address all of humanity. The Declaration eloquently resonated with the essence of human autonomy by asserting that independence stems from the inherent right to self-determination. The Declaration stated:

"when in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation".[74]

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[72] Carlton F. W. Larson, "The Declaration of Independence: A 225th Anniversary Re-Interpretation," *Washington Law Review* 76, no. 3 (2001): 702.
[73] Bernard Bailyn, *The ideological origins of the American Revolution*, 15th edition (Massachusetts: Harvard University Press, 2017), 26.
[74] Adrienne Koch and William Peden, *Thomas Jefferson* (New York: Random House,1944), 23-24.

As per the Declaration, the freedom of humanity is inherently obvious and, consequently, needs no additional rationalization or justification. Essentially, it confirms the 'autonomy of the I' as an inherent trait in all human beings. It declared:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights".[75]

In addressing the intricate interplay among humanity, law, and political dynamics in the American Revolution, Bailyn perfectly expressed that: "to assume, and act upon the assumption, that human rights exist above the law and stand as the measure of the law's validity".[76] As outlined in the Declaration, 'the right to self-determination' stands at the very heart of human rights, and hence the future political framework in the United States shall be structured upon this principle.

3.1.2. The French Declaration of the Rights of Man and Citizen (1789)

In the middle of the 18th century, French society was stratified into three estates: the clergy, the nobility, and the rest of the population.[77] The exclusive enjoyment of privileges and advantages by clergy and nobility, coupled with "the monarchy's impending financial bankruptcy and political ineptitude in the period 1788–1789 gave rise to the French Revolution".[78] In this regard, Soboul noted that the French people revolted against the seigneurial system and the privileged social orders.[79] The French Revolution led to the Declaration of the Rights of Man and the Citizen (1789), a highly remarkable accomplishment that holds great values for both French and the international community. Under the impact of this Declaration, the concept of the public rights of individuals has been integrated into the positive law of European states and has served as a source of inspiration for the constitutions of nearly all countries across the world.[80] Undoubtedly, the Declaration marked a significant milestone in international human rights law. Primarily, it stands as a transcendent document,

[75] Ibid.
[76] Bailyn, *The ideological origins of the American Revolution*, 230.
[77] *Encyclopedia of social history*, ed. Peter N. Stearns (New York: Garland Publishing, 1993), 193.
[78] Ibid, 194.
[79] Albert Soboul, *A short history of the French Revolution, 1789-1799*, Trans. Geoffrey Symcox (California: University of California Press, 1977), 1.
[80] Georg Jellinek, *The declaration of the rights of man and of citizens: a contribution to modern constitutional history* (New York: Henry Holt and Company, 1901), 86.

addressing humanity, instead of dedicating to specific groups, or targeting solely the French society.[81] As in the preamble stated:

"… believing that the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man…".

Secondly, the Declaration affirms that human rights derive intrinsically from the inherent nature of humanity *per se*. Society, government, or any other entity is not a source of granting rights to humans. Article 1 declared men are born and remain free and equal in rights. Article 2 characterized the mentioned rights as the natural and inalienable rights of man. As a final point, it is a declaration of abstraction. The document did not tie rights to a particular event or context; instead, it recognized the presence of rights in every conceivable circumstance.[82] It is noteworthy that at the time of drafting the Declaration, France had no established government, and intriguingly, the document did not allocate any words to delineate the function of government. The Declaration underscored the paramount significance of human contribution in attaining human dignity, advocating for bottom-up reform to shape a future political and legal framework grounded on the protection and respect of human rights. As Voltaire wrote before the revolution: "Permanent peace that could be established for people can only be: tolerance, the permanent peace as invented by a French abbot named Saint-Pierre was a mere dream ('chimere') which cannot exist among monarchs just as it cannot be established between elephants and rhinoceroses, between dogs and wolves… The only way to bring peace to people is to destroy all dogmas which divide them, and restore verity, which would unite them; that would be permanent peace. And such a peace is by far not a dream… Every man should be actively working, according to his abilities, on the destruction of fanaticism, and restore peace, what this monster has chased away from the empires, from the families, from the hearts of miserable mortals…".[83]

[81] Hedayatollah Falsafi, "Philosophical Basis of Human Rights" (lecture, shahid Beheshti University, Tehran, Iran, 2016).
[82] Ibid.
[83] Kende, "The history of peace: Concept and organizations from the late Middle Ages to the 1870s," 230.

2.6.2. Individual Actions

In his work, Cortright offers a comprehensive overview of noteworthy peace initiatives in the late eighteenth and nineteenth centuries. Inspired by his research, these movements can generally be categorized into two clusters driven by distinct objectives: the first advocating against war, and the second promoting self-determination and the eradication of slavery. The latter pursued the essence of Humanism, emphasizing the 'autonomy of I, while the former actively bolstered the advocacy for peaceful conflict resolution, specifically through the process of arbitration.

2.6.2.1. Peace Initiatives Led by Individuals

The inception of peace initiatives can be traced back to the United States, where the New York Peace Society was established in August 1815 by David Low Dodge and a select group of clergy and merchants.[84] Their belief was rooted in the idea that war contradicts the essence and teachings of Christ and leads to a state of barbarism and moral degradation.[85] In opposition to William Pitt the Younger's military intervention in the French Revolution, the 'Friends of Peace' movement was formed in 1790s London. Among its influential members was William Wilberforce, a leading advocate against the slave trade, who conveyed these antiwar sentiments to the prime minister.[86] In 1816, William Allen and other Quakers, anti-slavery and social reform activists, formed the British Society for the Promotion of Permanent and Universal Peace, believing that war was in conflict with the spirit of Christianity and against human interest[87]. In 1828, William Ladd founded the American Peace Society (APS) in New York to "give a tone of prominence, unity, and strength to all the exertions of all the friends of peace in the United States, and indeed of all the inhabitants of North America".[88] Many local peace societies became subsidiary organizations of the APS [89] contributing to the dissemination of peace throughout the country. The APS was committed to the peaceful resolution of disputes

[84] Peter Brock, *Freedom from War: Nonsectarian Pacifism 1814–1914* (Toronto: University of Toronto Press, 1991), 19.
[85] Cortright, *A history of movements and ideas*, 27.
[86] J. E. Cookson, *The Friends of Peace: Anti-War Liberalism in England, 1793–1815* (Cambridge: Cambridge University Press, 1982), 128.
[87] Cortright, *A history of movements and ideas,* 28.
[88] Merle Eugene Curti, *The American peace crusade, 1815-1860* (New York: Octagon books, 1965), 43.
[89] Ibid.

and encouraged the use of arbitration as a method of resolving international disputes.[90] The first peace societies in Europe were founded in Paris in 1821 with the Société de la morale chrétienne, and in Geneva in 1830 with the Société de la paix de Génève.[91] The nascent peace societies in Europe drew inspiration from religious philosophy as well as the principles of democracy and freedom.[92] In 1846, Elihu Burritt, an American peace activist, established the League of Universal Brotherhood (LUB) in England as a forum "for the abolition of War, Slavery, Intemperance, and of all institutions and customs, the world over, which do not recognize and respect the image of God and a human brother in every man, of whatever clime, color, or condition of humanity".[93] In its pursuit of fostering permanent and universal, the LUB orchestrated a sequence of international conferences, specifically including the ones held in Paris in 1849, London in 1850, and Frankfurt in 1851.[94] After years of committed efforts in the realm of global peace, Andrew Carnegie founded the Carnegie Endowment for International Peace in 1910, with the aim of advancing peace initiatives worldwide. He acted as the organization's chief leader, and lavished millions of dollars on it.[95] He financed the establishment of the Temple of Peace in The Hague (the Permanent Court of Arbitration), as well as the offices of the Pan American Union in 1906 and the Central American Court of Justice in 1908.[96] According to him, the intense national and imperial competitions prevalent in world politics causes a serious threat, and hence, he dedicated his life to establishing a league of peace and propagating treaties for peaceful resolution of disputes through arbitration.[97]

2.6.2.2. American Civil War and The Lieber Code

After the election of Abraham Lincoln as the President of the United States in 1860, seven states in the lower South formally seceded from the United States of America (Union) between December 1860 and February 1861, and subsequently, four states in the upper South joined

[90] Ibid,56-59.
[91] Sandi E. Cooper, *Patriotic Pacifism: Waging War on War in Europe, 1815-1914* (New York: Oxford University Press, 1991), 16.
[92] Roger, Chickering, *Imperial Germany and a World without War: The Peace Movement and German Society, 1892-1914* (Princeton: Princeton University Press, 2015), 331.
[93] Elihu Burritt, *The Advocate of Peace and Universal Brotherhood*, Vol. I No. V (Worcester Mass: E. Burritt, 1846), 244.
[94] Cortright, *A history of movements and ideas*, 35.
[95] David S. Patterson, "Andrew Carnegie's quest for world peace," *Proceedings of the American Philosophical Society* 114, no. 5 (1970): 371.
[96] Ibid, 375.
[97] Ibid, 378 -383.

them between April and May 1861. By February 18th of that year, these seceding states established the Confederate States of America, adopted a constitution, and elected Jefferson Davis as their president for a single six-year term.98 White wrote the following explanation regarding the motives behind the secession of the states seeking separation: "by 1860 a generation of southern Americans had come to conclude that the benefits enjoyed by American citizens at large were no longer likely to be afforded to them if they remained participants in the Union, and that those benefits might well accrue to them as members of a new southern American republic".99 The secessionists aimed for recognition of their independence from the Union, but the Union insisted on their reunion. Lincoln's intolerance towards the separation of the eleven states led to a four-year civil war. To inform the army of its international obligations, Lieber collaborated with the board of officers, under Lincoln's approval, to draft a code of land warfare known as the Instructions for the Government of Armies of the United States in the Field (General Orders NO.IOO).100 The codification was carried out with the principle of identifying what is essential to defeat the enemy and to delegitimize unnecessary cruelty.101 Regarding Lieber's role in the codification, Paust stated: "he [Lieber] focused also on the need to ensure that cruel and unnecessary death, injury, or suffering did not pertain, that persons out of combat were treated humanely, and that wanton devastation and destruction did not occur during warfare".102 Concerning the impact of the Lieber Code on limiting states' actions during internal wars, Perna noted: "This also marked the passage from the Code of chivalry and honour, which, being individual and personal, imposed self-imposed restraints, to rules of law whose validity and respect is based only on legal bases and enforced externally".103 The Code was innovative in terms of tracking peace by targeting what is occurring through anti-peace, namely, war. It conveys the message that if states are permitted to wage war, they are not entitled to act without constraints. In this respect Perna stated: "The articles of the Lieber Code under the heading 'insurrection-civil war rebellion' are noteworthy in that they show humanitarian

[98] G. Edward White, *Law in American History, Vol. I: From the Colonial Years through the Civil War* (New York: Oxford University Press, 2012), 382.
[99] Ibid, 383.
[100] Laura Perna, *The Formation of the Treaty Rules Applicable in Non-International Armed Conflicts,* (Leiden: Brill, 2006), 31.
[101] Louise Doswald-Beck and Sylvain Vité, "International humanitarian law and human rights law," *International Review of the Red Cross (1961-1997)* 33, no. 293 (1993): 14-15.
[102] Jordan J. Paust, "Dr. Francis Lieber and the Lieber Code," *Proceedings of the Annual Meeting (American Society of International Law)* 95 (April 4-7, 2001): 113.
[103] Perna, *The Formation of the Treaty Rules Applicable in Non-international Armed Conflicts*, 31.

concern regarding conflicts which, for a long time, international law had considered to be outside its scope. The most relevant provisions, whilst aiming at extending the humanitarian law of war treatment to rebels, try to assure governments that the application of the rules of war to rebels would not mean any change in the legal status of the fighters".104 In the course of the Civil War, the Code significantly alleviated human suffering and inspired similar legal frameworks in Prussia, the Netherlands, France, Russia, Spain, Great Britain, and several other states throughout the nineteenth century.105 In addition, it had a significant impact on subsequent international conventions concerning the laws of war, including the St. Petersburg Convention of 1868, Brussels Convention of 1874, the Hague Conventions of 1899 and 1907, London Convention of 1908, and the series of Geneva Conventions from 1864 to 1949.106

2.6.2.3. The Red Cross

Having witnessed the Battle of Solferino, Henry Dunant contemplated that if conflict is inevitable, it should be conducted with minimal brutality.[107] Based on this idea, Dunant founded the Red Cross to protect victims of war. The Red Cross adheres to the principles of humanity, impartiality, neutrality, independence. The first principle constitutes the foundation of the activities carried out by the International Committee of the Red Cross (ICRC). In this regard Forsythe wrote: "The central purpose of ICRC humanitarian protection is to safeguard the basic worth and welfare of individuals in distress in conflict situations. Philosophically speaking, the ICRC tacitly endorses a type of liberalism emphasizing the equal value and autonomous worth of the human being – the individual taking no direct and active part in conflict matters – regardless of national identity or any other distinguishing characteristic other than personhood".[108]

As of the present time, the ICRC operates in numerous countries through National Societies. In the post-First World War era, these National Societies made significant contributions to maintaining peace through the promotion of international solidarity. [109] Forsythe categorized

[104] Ibid, 33.
[105] Paust, "Dr. Francis Lieber and the Lieber Code," 114.
[106] Ibid, 113.
[107] Yves Sandoz, "The Red Cross and peace: Realities and limits," *Journal of Peace Research* 24, no. 3 (1987): 288.
[108] David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge: Cambridge University Press, 2005), 162-163.
[109] Sandoz, "The Red Cross and Peace: Realities and limits," 288.

ICRC activities into two streams: practical policy and legal policy. The former involves providing direct aid to war victims, and the latter pertains to proposing drafts of international legislation. He explained that "since the organization saw itself not as an actor in conflicts, but rather as a promoter of national aid societies, legal development was a main ICRC activity. These two trends were later to explain much about the ICRC. There was an emphasis both on pragmatic action in the field, and on legal standards".[110]

The Geneva Conventions of 1949 stand as a prominent example of the ICRC's efforts to codify humanitarian law. Over the years, the ICRC's humanitarian interests have progressed from international armed conflicts to domestic wars and later to internal issues occurring even in times of peace.[111] The 25th International Conference of the Red Cross, centered on the theme of humanity, declared that the Red Cross "promotes mutual understanding, friendship, co-operation and lasting peace among the nations".[112] The Red Cross operations in conflict situations have consistently been acknowledged as their contribution to peace, just as with international humanitarian law.[113]

2.7. Peace After the First World War: Towards the Institutionalization of Peace

The ramifications of the First World War prompted nations to recognize that achieving a peaceful world would be elusive without the collective contributions of all states. Hence, in 1920, the League of Nations was founded with the aim of maintaining international peace.[114] The Covenant of the League of Nations represents a pivotal moment in the annals of peace, as it marked the first occasion when states officially embraced peace as a legal norm. The framers of the Covenant regarded peace as the soul revitalizing the inert corpse of international society. The states' parties recognized that, beyond their individual interests, a common good exists among them. They recognized that achieving their individual interest is possible only in the shadow of peace.

[110] Forsythe, *The humanitarians: The international committee of the Red Cross*, 19.
[111] Ibid,13.
[112] Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross (Geneva, 1986), 5.
[113] Sandoz, "The Red Cross and peace: Realities and limits," 287.
[114] Susan Pedersen, "Back to the League of Nations," *The American historical review* 112, no. 4 (2007): 1099.

The axiom of equality, inherited from the Westphalian tradition, retained its validity in the League. As observed by Lord Robert Cecil- Technical Delegate for the League of Nations on behalf of Great Britain- the League was designed to function while respecting national sovereignty to the greatest extent possible, ensuring minimal interference in state affairs.[115] Article 1 of the Covenant provided:

> *"The Members of the League undertake to respect and preserve … the territorial integrity and existing political independence of all Members of the League."*

As discerned from the Covenant, the concept of peace continues to signify the absence of war. It was stipulated that any war or threat of war against a Member State constitutes a threat to the 'peace of nations'. According to Article 10, an act of aggression infringes upon 'the territorial integrity and established political independence of all Members'. While the primary focus of the framers was on the waging war, it still stood as a valid method for pursuing policies and several states voiced their concern regarding this matter. According to the French government, the choice to engage in warfare persists as a tool for national diplomacy, and as well this option remains available to leaders aiming to reclaim lost territories or expand existing ones through force if deemed necessary.[116] In the same vein, the president of Balfour expressed alarm that "the danger I see in the future is that some powerful nation will pursue a realpolitik in the future as in the past … I do not believe we have yet found, or can find, a perfect guarantee against this calamity. No machinery in the world could stop an aggressor who really meant business".[117] Nevertheless, the Covenant mandated its Member States to refrain from resorting to war for a duration of three months in the event of a dispute arising between them (as stated in Article 12). Philip Kerr, an advisor to Lloyd George at the Paris Peace Conference, reasoned this as: "if adequate delay can really be secured after notification of a dispute likely to lead to war, the greatest menace to the general peace of the world will have been removed".[118] Similarly, Henig wrote that "it was assumed, would allow tempers to cool, states who had embroiled themselves in potentially dangerous situations to extricate themselves without too much loss of face, and the League Council time to establish the facts of the conflict and to draw

[115] Preliminary Peace Conference, Protocol No. 3, Plenary Session of February 14, 1919, ed. Joseph V. Fuller, *Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919*, Volume III(Washington: United States Government Printing Office, 1943), 216.
[116] Henig, *The Peace That Never Was the Peace That Never Was: A History of the League of Nations*, 100.
[117] Ruth Henig, *The League of Nations* (Edinburgh: Oliver and Boyd, 1973), 10.
[118] J.R.M. Butler, *Lord Lothian (Philip Kerr), 1882-1940* (London: Macmillan, 1960), 172.

up a report. Finally, it would allow public opinion in the countries involved, and in all member states, to bring its pressure to bear on the leaders and governments involved in the dispute to settle it peacefully".[119]

Despite peace being integrated into the Covenant as a legal norm for the first time, it held the same status as other norms in the hierarchy of international law and in comparison to the axiom of equality, it held a subordinate position in the ranking.

2.7.1. Failure of the League of Nations

Although the League was coined as a stage for the pursuit of the common good, sovereignties based their policies and relationships on principles of equality rather than peace, and when confronted with dilemmas involving the clash between equality and peace, they consistently gave precedence to the former. Two discernible factors can be pinpointed as the causes for peace not attaining the deserved recognition in the Covenant: lack of universality and lack of belief.

2.7.1.1. Lack of Universality

The idea of pursuing peace through the League failed to captivate the attention of the majority in the international society, especially the world powers. The League of Nations had 42 founding members, 16 of whom left or withdrew. Later members, including Germany, Italy, Spain, Japan, Brazil, and Austria, also did not remain until the end. The Soviet Union, which joined in 1934, was expelled in 1939 due to its invasion of Finland. The United States was notably absent from the League of Nations. Considering itself a world power, the United States deemed it unnecessary to bear obligations for the sake of worldwide peace. Instead of strengthening the mainstream, the United States charted its own distinct course of action on the global stage. Simultaneously, while the United States was preparing to enter an individual peace treaty with Germany, it extended invitations to major naval powers for a conference in Washington, focusing on discussions regarding naval limitations, Pacific affairs, and matters related to the Far East. The Washington Conference resulted in significant agreements concerning arms limitations and peaceful settlements, which were independent of the League of Nations.120 The United States clearly stated its policy that it could effectively safeguard its interests without being subject to the onerous obligations associated with membership in the League of

[119] Henig, *The Peace that Never was: A History of the League of Nations*, 67.
[120] Ibid, 82.

Nations.121 Cabot Lodge, American senator, expressed that "the Republicans had destroyed Mr. Wilson's League of Nations … we have torn up Wilsonism by the roots".122

2.7.1.2. Lack of Belief in the Covenant Among the Members

Member States construed and executed numerous Covenant articles in a manner that prioritized their individual interests over ensuring the realization of international peace. One of the key articles of the Covenant was Article 10. It provided:

> *[The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.]*

The Canadian government proposed striking out or substantially amending Article 10, but Woodrow Wilson rejected the proposal, as he considered it as an attack on the very heart of the League itself.[123] In Canada's opinion, Article 10 was unfairly burdensome on countries that derived minimal benefits from it, hence, it became Canadian policy to pursue an amendment to Article 10.[124] The Canadian delegation proposed the removal of Article 10 during the League Assemblies of 1920 and 1921. Subsequently, a committee of legal experts reviewed the Article and reported the Assembly that it entails merely "the governing principle to which all members of the League subscribe' and that members were 'not obliged to take part in any military action".[125] Precisely, the Canadian government expressed apprehension regarding the commitments that the League Council could impose on its Members under Article 10. Canada was concerned that these obligations might clash with its interests.

Another significant indicator of a lack of belief can be observed in England's policies as one of the world powers. Although England made great efforts to secure US membership, it was not primarily for the sake of achieving peace, but rather due to concerns related to economic losses and the fear of lagging behind in economic competition. As Hurst noted: "To the British Empire

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[121] Ibid, 83.
[122] Verbatim records of Imperial Conference 1921, Cab 32/3; W Kuehl and Dunn, American Internationalists and the League of Nations 1920–39 (Kent: Kent State University Press, 1997), 18.
[123] Henig, *The Peace that Never was: A History of the League of Nations*, 94.
[124] G.P. de T. Glazebrook, *Canada at the Paris Peace Conference* (London: Oxford University Press, 1942). 67-71.
[125] Henig, *The Peace that Never was: A History of the League of Nations*, 97.

the exclusion of the United States from the obligations under Article 10 means that burdens might have to be supported single-handedly which no Government would lightly undertake without an assurance that the other great States would do their part, more particularly its great commercial rival across the Atlantic. Great Britain cannot take part in a war without diverting its shipping and its commerce from their normal channel, and if the United States are to be free to stand out, the Americans would use the opportunity to seize trade opportunities which Great Britain was forced to forego … The economic boycott was the weapon wherewith the League intended to coerce an aggressor or recalcitrant member … An economic boycott with the Americans standing outside it is certain to mean that the Americans will endeavor to trade with the boycotted country".[126]

2.8. Conclusion

It has always been one of the primary concerns and enduring aspirations of the international society to attain universal peace. In ancient and medieval times, peace was perceived as the absence of war, and the theory of just war aimed to restrict the conduct of warfare. This theory did not forbid war but imposed certain limitations and conditions on it. Following the Peace of Westphalia, the concept of peace retained the same understanding, but it was pursued through various methods and approaches. During this era, the international legal framework emerged, founded upon the principle of sovereign equality. Stakeholders in international affairs believed that establishing relationships on the basis of equality would serve as a safeguard for peace, protecting against external interventions, notably in the form of warfare. Following the ramifications of the First World War, the League of Nations was established, and peace was dressed in the garb of a legal norm, even though the right to wage war remained intact. The aftermath of the Second World War underscored that achieving universal peace necessitated restructuring the international order in harmony with the prerequisites of peace. In parallel with the efforts of states, the Age of Enlightenment motivated individuals to actively engage in promoting peace. National movements and peace advocates played a substantial role in shaping what is now recognized as the concept of peace. For the international community, the quest for

[126] Documents on British Foreign Policy 1919-1939, 1st Series, Vol V, ed. E. L. Woodward and Rohan Butler (London: Her Majesty's Stationery Office, 1954), 1027.

peace was not a mere choice but an imperative. Thus, both states and peoples devoted substantial efforts to institutionalize an international framework oriented towards ensuring peace.

Chapter III: The Scope of the Security Council's Competence under the United Nations Charter in the Context of International Law

3.1. Introduction

Prior to the adoption of the United Nations Charter (the UN Charter), peace was primarily perceived as the absence of war and the international order was based on the bedrock of state equality, accompanied by its concomitants: contractual freedom and reciprocity. The former serves to exercise sovereignty, while the latter serves to protect interests. The supremacy of state equality was envisioned as a pathway to peace. However, the picture of isolated, equal sovereignties with full autonomy does not ensure perpetual peace, as it relies on the precarious foundation of absolute rationality. Due to the consequences of this order, especially in the aftermath of the Second World War, members of the international society restructured the state-centric international order. Following the UN Charter era, peace transitioned from a mere legal norm to an axiological norm, attaining a superior status than the equality of states and harnessing the absolute will of sovereignties. Peace stands at the heart of the modern legal order, pertaining to every subject of international law. In this context, the UN Charter serves as the manifestation of this agenda. The establishment of the UN aimed to secure lasting peace for the international community even beyond its original members. Therefore, it is essential to scrutinize the implications of the UN Charter in the realm of peace. According to the UN Charter, the Security Council (SC) has the primary responsibility of maintaining international peace and security and, as such, the SC has a discretionary power to decide what constitutes a threat to peace, a breach of peace, and an act of aggression. The SC's discretionary power is

broad to the extent that certain commentators argue that peace is defined by the SC itself. However, specific Articles in the UN Charter offer clarity on the connotation of peace, illuminating the extent of the SC's competence. This chapter delves into new perspectives on peace in the post-World War II era. It initiates by analyzing the Nuremberg and Tokyo tribunals, highlighting their significant role in reshaping international law to align with the requirements of peace as an axiological principle. The subsequent section explores the concept of peace in the United Nations Charter and thereby offering insights into the extent of the SC's jurisdiction.

3.2. Transformation of Peace after the Second World War: Upgraded to Fundamental Norm

The inability of the League of Nations to avert the Second World War compelled the international society to reevaluate strategies for preserving peace for the future. Hersch Lauterpacht famously wrote in the wake of World War II that: "international law should be functionally oriented towards … the establishment of peace between nations ….".[127]

In a legal context, despite being a recognized norm, the peace of the Covenant could not function harmoniously with the principle of sovereignty. Because both principles carried equal enforcement, and in case of conflict, sovereignty could supersede peace both in theory and practice. Hence, it was imperative to elevate the status of the norm of peace above sovereignties in the hierarchical structure. To achieve this aim, nation-states established an international legal order based on peace. Accordingly, the norm of peace has been revamped to the status of an axiom. Therefore, sovereignties are legally bound to comply with the requirements of peace, which was regarded as a fundamental norm. Unlike the principle of state equality, which emerged as a rational axiomatic consequence of the Westphalian order, the peace following the Second World War stems from the values affirmed by the international community. The axiom of peace sanctified the corpus of Westphalian principles. This sacred soul governs the sovereign will of states, permitting them to shape their policies provided such actions do not threaten peace. As a result, the prohibition of war becomes a fundamental imperative in this context. The Nuremberg and Tokyo Tribunals stand as notable illustrations of this evolved comprehension of the status of peace in the new international legal order.

[127] Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Yearbook of International Law* 23 (1946): 51.

3.2.1. Nuremberg and Tokyo Tribunals: Testaments to Peace as a Legal Axiom

The victorious states of the Second World War conducted a series of Nuremberg and Tokyo trials with the aim of prosecuting and punishing Nazi and Japanese leaders. These tribunals were established to trial individuals accused of crimes against peace, crimes against humanity, and war crimes.[128] The charge of war crimes has escaped vehement criticism because of its solid basis in customary international law.[129] Crimes against humanity, despite being a novel concept, found validation by the argument that they reflect the universal rule of law among all civilized nations.[130] Crimes against peace, however, became a contentious and intricate matter due to the unclear legal basis upon which the crime was criminalized.[131] The disagreement arose from scholars' varying viewpoints on the application of *the nullum crime sine lege* principle. In line with this principle, individuals cannot be punished for an offense that has not been defined as a crime. Critics of The International Military Tribunals (IMT) Charter argued that the precedents of international law do not accommodate any crime categorized as crimes against peace. They contended that prosecuting individuals for crimes against peace constitutes a clear infringement of the prohibition on *ex post facto* punishments.[132] Article 6 of the IMT Carter defines crimes against peace as: "Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing". The main question here is how indictment can be brought against individuals for the act of waging war, a key component of crimes against peace, when it was not considered illegitimate or illegal under the Covenant of the League of Nations or any other established sources of international law.

This question ought to be contextualized in the realm of international law, taking into account a wider perspective beyond the mere conflict of principles. The IMT Charter chose the

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[128] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945, available at:<https://www.refworld.org/docid/3ae6b39614.html> (accessed December 14, 2023).
[129] George A. Finch, "The Nuremberg Trial and International Law," *American Journal of International Law* 41, no. 1 (1947): 20-22; Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009), 69-79.
[130] ThomasWeigend, " 'In general a principle of justice' The Debate on the 'Crime against Peace' in the Wake of the Nuremberg Judgment," *Journal of international criminal justice* 10, no. 1 (2012): 42.
[131] Ibid.
[132] Finch, "The Nuremberg Trial and international law," 28; Hans Kelsen, "The Rule against Ex Post Facto Laws and the Prosecution of the Axis War Criminals," *Judge Advocate Journal 1945*, no. 3 (Fall-Winter 1945): 8-9.

title ‘crimes against peace’, but its definition pertained to aggressive war. The Article initially indicates that the historical understanding of peace as the absence of war remains valid, and peace and war are still believed to be intertwined concepts. But the significant aspect of the Article is that it evinces a shift in the concept of peace within international law in response to the aftermath of the Second World War and the lingering memories of the First World War’s somber era. Due to the calamities caused by war, the international community had no option but to ban aggressive war. It was believed that maintaining peace was impossible as long as war retained its legitimacy. This perception went unnoticed in the League of Nations. The victorious states filled this gap with the IMT Charter by incorporating a prohibition on aggressive war and punishing those responsible for acts of aggression. In this regard, one could question the legitimacy of such criminalization. According to the author, such criminalization by the IMT Charter could be justified merely on the grounds of the newly established international order. The IMT Charter would be understandable and meaningful only in a peace-oriented system where peace stands as a fundamental norm equipped with all essential tools for its maintenance. It is important to note that the IMT Charter was not a pioneering effort to prohibit war. This initiative was first undertaken in the Pact of Paris (Kellogg-Briand) of 1928, which explicitly renounced the use of war as a means to resolve international disputes. Nevertheless, there is a subtle distinction between the Kellogg-Briand Pact and the IMT Charter. In the former, the prohibition applied exclusively to the signatories, not extending to third parties. Thus, it functioned as a normal legal rule, akin to other rules that states commonly consent to. It is a common point of view that Kellogg-Briand Pact did not trigger universal peace. L.Ethan Ellis pointed out that although the treaty was a source of immense pride, that sense of achievement ‘would be turned to disillusionment during the author’s lifetime’.[133] Later, Ellis stated that the Pact “enlisted a world’s promises, but no single sanction, in its support”. Morgenthau questioned whether the Pact established international law or was simply a declaration of moral principles lacking legal impact.[134] Kershaw viewed it as ‘a dead letter from the moment it was signed’. [135] Hans Kelsen wrote that ‘the failure of the Briand-Kellogg Pact, however, is due to

[133] Latham Ethan Ellis, *L. ETHAN ELLIS. Frank B. Kellogg and American Foreign Relations, 1925- 1929* (New York: Rutgers University Press, 1961), 368.
[134] Hans Morgenthau and others, *Politics among nations: The struggle for power and peace* (New York: Alfred A. Knopf, 1978), 287.
[135] Ian Kershaw, *To Hell and Back: Europe, 1914-1949* (Harlow: Penguin, 2015), 285.

its own technical insufficiency" '- its scope was too broad and it had not provided enforcement provisions.[136] Modern analysts, Jutta Brunne´e and Stephen J. Toope, expressed greater skepticism, contending that 'the pact was declared moribund and treated as the prime example of naïve idealism'.[137] Charles De Visscher wrote that "The significance of the Briand-Kellogg Pact lies in the moral imperative of which it was the expression," although he concluded that this imperative "sooner or later imposes itself on the legal order."[138] In their work, The Internationalists, Hathaway and Shapiro argued for the thesis that the Pact of Paris established a new international legal order by redefining aggressive warfare from a lawful to an unlawful means.[139] Nonetheless, despite their novel perspective, Hathaway and Shapiro remained unconvinced that the Paris Pact was the exclusive foundation for the transition from the old to the new legal order; instead, they regarded the Paris Pact as a pivotal milestone within that transformative process. The failure of the Paris Pact became apparent to all state parties in 1931 with Japan's aggression in Manchuria, Italy's invasion of Ethiopia in 1935, the German occupation of Austria in 1938, and ultimately, the outbreak of the Second World War.

In contrast, the prohibition of war in the IMT Charter triggered universal peace, and the Nuremberg and Tokyo tribunals epitomized the ground-level norm of peace. Justice Jackson, the Chief United States Prosecutor during the Nuremberg trials, rationalized the establishment of the Nuremberg Tribunal and the imperative for U.S. participation under the auspices of peace and in alignment with the prerequisites of a peace-oriented order. He pointed out that "Germany did not attack or invade the United States in violation of any treaty with us. The thing that led us to take sides in this war was that we regarded Germany's resort to war as illegal from its outset, as an illegitimate attack on the international peace and order. And throughout the efforts to extend aid to the peoples that were under attack, the justification was made by the Secretary of State, by the Secretary of War, Mr. Stimson, by myself as Attorney General, that this war was illegal from the outset and hence we were not doing an illegal thing in extending aid to

[136] Hans Kelsen, *Peace Through Law* (Chapel Hill, University of North Carolina Press, 1944), 18.
[137] Jutta Brunnee and Stephen J. Toope, *Cambridge Studies in International and Comparative Law: Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010), 274.
[138] Charles De Visscher, *Theory and Reality in Public International Law*, tras. P. E. Corbett (Princeton: Princeton University Press. 1968), 298-299.
[139] Oona Anne Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017), 21-24.

peoples who were unjustly and unlawfully attacked…No one excuses Germany for launching a war of aggression because she had grievances, for we do not intend entering into a trial of whether she had grievances. If she had real grievances, an attack on the peace of the world was not her remedy."[140] According to the Tribunal's passage, current international law allows for the formation of tribunals empowered to penalize war aggressors. As previously discussed, the international community viewed war as diametrically opposed to the concept of peace. The disruption of peace constituted the foremost justification for the illegitimacy of war. The consistency of the IMT Charter with international law is contingent upon international law itself being oriented towards peace. In other words, the IMT Charter aligns with international law only if international law is inherently centered on promoting peace. The Court held:

> *"The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law already existing at the time of its creation; and to that extent is itself a contribution to international law. The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."*[141]

In analyzing the accomplishments of the Nuremberg and Tokyo Tribunals in the context of international law and contemplating the potential for the reproduction of peace in an innovative way, Paupp wrote that "[t]he historical record of the Nuremberg Tribunal still serves to demonstrate that advances in the international law of the human right to peace, as well as the actualization of peace itself, stem from transformations in human consciousness, and in the creative capacity of people dedicated to the cause of peace to imagine and legally mandate a different kind of world."[142]

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[140] Jackson, Robert H. *Report of Robert H. Jackson: United States Representative to the International Conference on Military Trials, London, 1945. A Documentary Record of Negotiations of the Representatives of the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, Culminating in the Agreement and Charter of the International Military Tribunal*. Vol. 3080. US Government Printing Office, (1949), 383-384.

[141] The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General, A/CN.4/5, United Nations - General Assembly International Law Commission (Lake Success, New York, 1949), 38.

[142] Terrence E. Paupp, *Redefining Human Rights in the Struggle for Peace and Development* (Cambridge: Cambridge University Press, 2014), 415.

3.3. Peace in the Charter of United Nations

The UN is instituted as a mechanism to achieve universal peace, with each UN body endowed with distinct qualifications tailored to attain this goal. The purposes and principles of the UN are declared in Articles 1 and 2 of the UN Charter. Article 1 declares the maintenance of international peace and security as the foremost purpose of the UN. Article 4 stipulates that states demonstrating a commitment to peace are eligible for membership in the Organization. In accordance with Article 11, the General Assembly (GA) is authorized to deliberate and address 'any questions or matters' related to 'the maintenance of international peace and security'. Based on Article 24, the SC is entrusted with 'primary responsibility for the maintenance of international peace and security'. According to Article 62, the Economic and Social Council 'may make or initiate studies and reports' regarding the purposes and principles of the United Nations. Article 76 stipulated that '[t]he basic objectives of the trusteeship system … shall be: to further international peace and security'. Under Article 92, the International Court of Justice (ICJ) functions as a venue for the peaceful resolution of international disputes. Last but not least, under Chapter XV of the UN Charter, the Secretary-General (SG) and the Secretariat are charged with the duty of executing the missions delegated by the UN's organs. Moreover, the SG may bring to the SC's attention any issues that 'may threaten the maintenance of international peace and security'. As it is perspicuous, the fundamental tenet of the UN Charter is the pursuit of peace as its paramount purpose, and the different organs are assigned distinct roles to accomplish this aim.

The concept of peace is contentious, and scholars have examined it through diverse viewpoints. Nevertheless, the author aims to highlight a subtle aspect related to the concept of peace in the context of the UN Charter. To grasp the UN Charter's implications concerning peace, one must distinguish between peace's form and its connotation. In general, more research has been conducted on the connotation of peace but less attention has been given to the form of peace. Whatever the connotation of peace may be, it is not applicable without a form, just as a liquid is not usable without a container. According to the UN Charter, the form of peace manifests as relationships, connections, or links, and its connotation lies in the implementation of human rights.

3.3.1. Form of Peace

Article 1 of the UN Charter implies that the form of peace is relationships among Member States. Paragraph one of Article 1 emphasizes that the realization of peace depends on 'collective measures' taken by all members. Paragraph two aimed to foster amicable 'relations among nations'. Paragraph three focused on 'international cooperation', and the final paragraph regarded the UN as a platform 'for harmonizing the actions of nations'. The language in Article 1 suggests the UN is dedicated to forging connections between sovereign states. In other words, the UN Charter strives for peace in the form of interaction among its Member States. The author intends to draw upon an illustration from Galtung's scholarly contribution. He stated that "[i]magine that between all the nations in the world today high walls are erected, and much more efficient than walls currently existing between nations, so that no interaction at all is possible. There is no communication, no contact, no interactions between the nations."[143] While this blueprint appears safe, less problematic and put all issues within the realm of domestic affairs, the framers of the UN Charter did not opt for such a vision for the future. The fantasy of the wall is fundamentally incongruous with the principles outlined in Article 1.

3.3.2. Connotation of Peace

If peace is viewed as a relationship among international actors, it requires an exploration into the nature and quality of this relationship. To address this question, it is imperative to focus on the Preamble and Article 1 of the UN Charter. The preamble of the Charter encapsulates the shared goals and collective determination of the founding states to unite, coordinate, and regulate their international actions.[144] The Preamble elucidates the original architects, along with the aims, and *modus operendi* of the UN. To gain a comprehensive understanding, delving into the historical context of the UN is inevitable.

On 14 August 1941, a joint declaration between the United States and England, known as the Atlantic Charter, marked the beginning of the UN's history. According to Principle Three of the Atlantic Charter:

[143] Johan Galtung, *Theories of peace A synthetic approach to peace thinking* (Oslo: International Peace Research Institute, 1967), 13.
[144] Gábor Sulyok, "Thoughts on the necessity of security council reform," *Acta Juridica Hungarica* 48, no. 2 (2007): 149.

"[T]hey(sovereignties) respect the right of all peoples to choose the form of government under which they will live".

The principle six stated:

"[A]fter the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want".

A quick examination of these two principles reveals that they embody the principle of 'autonomy of I'. In addition, these principles affirm the inherent right of nations to shape their own future and destiny, a prerogative that should be respected by others. The Preamble of the Declaration of the United Nations (1 January 1942), signed by 26 states, proclaimed the protection of "life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands". For the first time, this Declaration stated that "the protection of human rights was stated explicitly as a peace aim of the Allies".[145] During the formation of the UN, one of Jan Christian Smuts' key contributions, was the suggestion to incorporate a preamble into the UN Charter. He also advocated for the recognition of human rights as foundational values in the preamble.[146] On 25 April 1945, the United Nations Conference on International Organization began its work in San Francisco with the aim of planning a new universal organization. During the sermon Smuts delivered to the Plenary Session on 1 May 1945, he explained his viewpoint regarding the adoption of the Preamble and stated that "[t]he new Charter should not be a mere legalistic document for the prevention of war. I would suggest that the Charter should contain at its very outset and in its Preamble, a declaration of human rights and of the common faith which has sustained the Allied peoples in their bitter and prolonged struggle for the vindication of those rights and that faith… We have fought for justice and decency and for the fundamental freedoms and rights of man, which are basic to human advancement and progress and peace."[147]

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[145] Christof Heyns, "The Premable of the United Nations Charter: The Contribution of Jan Smuts," *African Journal of International and Comparative Law* 7, no. 2 (1995): 333.

[146] Christof Heyns and Willem Gravett, "To Save Succeeding Generations from the Scourge of War: Jan Smuts and the Ideological Foundations of the United Nations," *Human Rights Quarterly* 39, no. 3 (2017): 574-575.

[147] Documents of the United Nations Conference on International Organization San Francisco 1945, Volume I (New York: United Nations Information Organizations, 1945), 425.

Subsequently, the South African delegation proposed a new version of the Preamble that reaffirmed the inclusion of human rights.[148] In the final iteration of the Preamble, the human rights essence was retained, and the centrality of human rights was highlighted in paragraph two.[149] In the ultimate copy, the initial phrase of the Preamble underwent a substantial change. Whereas the Smuts Proposal commenced with 'We, the United Nations', and the South African Proposal began with '[t]he High Contracting Parties', the approved final version commenced with '[w]e the peoples of the United Nations determined'. It is imperative to find out the referent of the pronoun 'we'. The pronoun does not denote personal pronoun, nor convey the state's arrogance or modesty; instead, it signifies the homogenous consciousness of human societies and organizations.[150] According to this fact, the UN Charter distinguishes itself from other treaties or legal documents because its interpretation and implementation should be driven by the principles and rules existing in the UN's system rather than the desires of individual Member States.[151] The source of 'we' is 'peoples', not the states. The plural form of 'people' symbolizes the acceptance and recognition of polarity and equality among nations despite differences.[152] The verb 'determined' indicates that 'the peoples' are the original framers of the UN Charter, and humanity (the peoples) acts as the *modus operandi* of the Organization. They have entrusted their governments with the duty of representing them in order to foster cooperation between each other on the axis of human 'dignity'. As the last paragraph of the Preamble states:

> *"our respective Governments, … have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations".*

In this context, the phrase 'do herby' indicates that 'peoples' are the *raison d'être* of the UN, not states. Consequently, the Preamble establishes a hierarchical structure within the UN Charter, demonstrating the role of governments as representatives of the peoples. States are

[148] Documents of the United Nations Conference on International Organization San Francisco 1945, Volume III, Dumbarton Oaks Proposals Comments and Proposed Amendments (New York: United Nations Information Organizations, 1945), 476.
[149] Heyns and Gravett, "To Save Succeeding Generations from the Scourge of War," 592.
[150], Hedayatollah Falsafi, "United Nations and the apotheosis of humanity," *legal research quarterly* 35-36, no 5 (2002): 9.
[151] Ibid.
[152] Ibid.

signatories to the UN Charter owing to their status as subjects of international law.[153] The Preamble promises a system wherein its organs and policies revolve around the transcendent value of human dignity.[154] In Articles 1 and 2, the blueprint for attaining this goal is portraited. Article 1 marks the convergence of two historical streams (north and south), aiming to advance global peace, i.e., the renunciation of war and the implementation of human rights. Due to the experiences of wars, notably the Second World War, the UN Charter emphasized the connection between war and human rights violations. Because grave human rights violations are not only the consequences of war but can also be a cause of war.[155] Article 1 of the UN Charter stipulates that members shall refrain from waging war and shall establish their relationships "based on respect for the principle of equal rights and self-determination of peoples". Because of the potential obstacles that could weaken or hinder these relationships, members are required to cooperate "in solving international problems of an economic, social, cultural, or humanitarian character". It is important to note that these problems are primarily a matter of concern for the people and not for the governments. By this point, it becomes evident that the UN Charter is designed to advocate the interests of 'the peoples 'of' through respecting and promoting their fundamental rights and freedoms without discrimination. As a point of clarification, the author does not perceive the UN Charter as an international humanitarian instrument, instead emphasis is placed on highlighting the central values underpinning the foundation of the UN system.

3.3.3. Obligations Arising from the Connotation of Peace

Achieving the full realization of the UN Charter appears to be a distant dream. Therefore, the UN Charter prioritizes the process of moving in this direction over the utopian ideal of full realization. In this context, the UN Charter placed a wide array of obligations on both its organs and Member States, including obligations concerning human rights. The UN Charter articulated human rights obligations in the Preamble, Articles 1, 8, 13, 55, 56, 62, 68 and 76. According to these Articles, Member States should cooperate with each other to promote and respect human rights, as well as to fulfill their separate individual obligations. Refraining from participating in

[153] Farrokh Jhabvala, "The drafting of the human rights provisions of the UN Charter," *Netherlands International Law Review*. no. 1 (1997): 8.
[154] Falsafi, United Nations and the apotheosis of humanity, 9.
[155] Ram Manikkalingam, *Is There a Tension Between Human Rights and Conflict Resolution? A Conflict Resolution Perspective*, Armed Groups Project, Working Paper 7 (Calgary: University of Calgary, 2006), 1.

UN arrangements 'to promote observance' would constitute a violation of the UN Charter.[156] The GA, in the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960, adopted unanimously, declared that:

> *"[a]ll States shall observe faithfully and strictly the provisions of the Charter of the United Nations".*[157]

During the San Francisco negotiations concerning Article 1 of the UN Charter, the American delegation asserted that it is "binding on the Organization, its organs and its agencies, indicating the direction their activities should take and the limitations within which their activities should proceed".[158] Similarly, Hersch Lauterpacht argued that the UN Charter imposes a legal obligation on its members to respect and protect fundamental human rights and freedoms. [159] Sohn pointed out that the UN Charter "provisions express clearly the obligations of all members and the powers of the organization in the field of human rights. While the provisions are general, nevertheless they have the force of positive international law and create basic duties which all members must fulfil in good faith".[160] Human rights obligations can be categorized into three clusters: a) Publicity Obligations of the UN Organs; b) Cooperative Obligations for Both the UN Organs and Members; and c) Executive Obligations of Member States

3.3.3.1. Publicity Obligations of the UN Organs

In compliance with the provisions outlined in Articles 8, 13, 62, and 68 of the UN Charter, different organs are tasked with working on matters pertaining to human rights. Article 8 stipulates that the UN shall employ labor force based solely on eligibility and equality, with the underlying principle of non-discrimination. Article 13 mandates the GA to aid Members in achieving 'the realization of human rights and fundamental freedoms' through discussions and recommendations. Members can seek the GA's assistance in resolving human rights issues, and by utilizing its capacities and expert teams, the GA can propose viable solutions to the challenges Members face concerning human rights. Moreover, the GA has the power to launch an *ex officio* inquiry into domestic obstacles impeding the implementation of human rights. In

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[156] Louis B. Sohn, "The human rights law of the charter," *Texas International Law Journal* 12, no. 2-3 (1977): 131.
[157] (A/RES/1514(XV)) 14 December 1961.
[158] Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents*, 25.
[159] Lauterpacht, *International Law and Human Rights*, 147.
[160] Sohn, "The Human Rights Law of the Charter," p 133.

pursuit of this end, it should be capable of evaluating the extent to which Member States adhere to human rights standards. A task such as this would be meaningful for the GA if Member States are already obligated to comply with human rights obligations; otherwise, its actions would be *ultra vires* and futile. Under Article 68, the Economic and Social Council is tasked with establishing commissions for the promotion of human rights. A parallel concern is discussed in Article 62. The repetition in a separate article aims to emphasize the concrete realization of human rights promotion. This goal can only be accomplished if Member States collaborate to implement the resolutions, plans, and agenda recommended by the competent organ. At this point, it is crucial to recall the obligation to cooperate in good faith under Article 2. An interpretation suggesting that the Economic and Social Council holds a merely consultative position, allowing members to exercise discretion in disregard, would be contrary to the essence principle of good faith.

3.3.3.2. Cooperative Obligations for Both the UN Organs and Members

Article 1 states that one of the UN's purposes is to 'respect for human rights and freedoms for all". The commitment of Member States to collaborate with the UN in promoting human rights empowers the organization with the necessary legal power to conduct substantial efforts to define and codify these rights.[161] In the advisory opinion concerning Namibia, the ICJ held that:

> *"to establish ... and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national' or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter".*[162]

Additional insights into the quality of collaboration are mentioned in Article 55, and it is essential to consider this article in conjunction with Article 1. Namely, cooperation in Article 1 shall give rise to the parameters of Article 55.[163] Regarding the purpose of Article 55,

[161] Thomas Buergenthal, "The normative and institutional evolution of international human rights," *Human Rights Quarterly* 19, no. 4 (1997): 708.

[162] Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports, Advisory Opinion of 21 June 1971, para 131.

[163] Article 55 provides: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
a. higher standards of living, full employment, and conditions of economic and social progress and development;

Stavrinides wrote that it "contains a statement which connects three ideas: (A) the promotion of respect for human rights; (B) the creation of conditions of stability and well-being; and (C) the establishment of peaceful and friendly relations among nations. Indeed, there is a strong suggestion that the justification of (A) is that it conduces to (B), and that of (B) is that it conduces to (C)".[164]

3.3.3.3. Executive Obligations of Member States

According to Article 56, every Member is directly obligated to actively work towards fulfilling the requirements outlined in Article 55. In case there is any ambiguity regarding whether the UN Charter focused solely on cooperation without expecting specific outcomes, Article 56, by referencing the 'achievement of respect for, and observance of', explicitly imposes the duty to attain tangible results. A noticeable feature of the article is its language. When it comes to fulfilling obligations, the article employs the active voice. It does not declare that Member States are obligated; instead, it asserts that Members 'pledge themselves', spotlighting the need for adopting concrete measures. In its ordinary sense, the word 'pledge' denotes "solemn promise or undertaking" and it is "used as a term at least as 'strong' as the word undertake[165] which vividly to some extent imposes legal obligation on the Members. [166] Furthermore, concerning the term 'separate action', Schluter argued that it is difficult to construe this commitment as implying a mere overall cooperation with the UN system and its agencies.[167] In the same vein, Schachter wrote that the framers of the UN Charter did not intend to confine 'pledge' to merely cooperation with the UN along with discretionary power, and such interpretation would render the Article ineffective and meaningless.[168] While the UN Charter imposes human rights obligations on Member States, it refrains from enumerating specific rights. This omission arises from a deliberate choice, as a detailed list within the UN

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

[164] Zenon Stavrinides, "Human rights obligations under the United Nations Charter," *The International Journal of Human Rights* 3, no. 2 (1999): 41.
[165] Oscar Schachter, "The Charter and the Constitution: The Human Rights Provisions in American Law," *Vanderbilt Law Review* 4, no. 3 (1951): 648.
[166] Bernhard Schluter, "The Domestic Status of the Human Rights Clauses of the United Nations Charter," *California Law Review* 61, no. 1 (1973): 121.
[167] Ibid.
[168] Schachter, "The Charter and the Constitution: The Human Rights Provisions in American Law," 649-650.

Charter would cause challenges. Because the inclusion of certain rights might impede the acknowledgment of emerging rights under the UN Charter framework.

3.3.4. The United Nations Practice in Meeting Peace Requirements: Case Analyses

The UN symbolizes the culmination of persistent endeavors dedicated to the realization of international peace. Drawing on historical lessons, the UN Charter devised a thorough mechanism for peace preservation. This framework extracted the rule of peace from the norm of peace. The UN Charter established a clear system: if any state endangers or disrupts peace, a collective security response will be triggered. The adoption of the UN Charter elucidated the thesis of peace as an axiological maxim that instigated substantial transformations in international law. The UN founders chose peace as a lodestar and equipped the Charter with all feasible means of maintaining peace. The following cases illustrate how the structure of international law has been influenced by peace-oriented requirements.

3.3.4.1. Case Concerning North Korea

Article 4 of the UN Charter provides that membership in the UN "is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations". Article 4 originally referred to those states which had entered into war against the Axis Powers, were non-Fascist regimes or received support from the Axis Powers.[169] It has been commented that the peace-loving criterion implies consideration of both past and present behavior of a state.[170] At the San Francisco Conference, states were evaluated as peace-loving based on their international conduct, "including compliance with UN resolutions, guaranteeing innocent passage in territorial waters, settling border disputes peacefully, and respecting the principle of non-intervention".[171]

In its pursuit of a peaceful world, the UN Charter, as a legally binding multilateral treaty, represents a historic breakthrough as it marks the first instance in international history where the use of force at the international level is prohibited. The idea of prohibition evolved during

[169] Cecilia M. Bailliet, "Introduction: Researching International Law and Peace," in *Research Handbook on International Law and Peace*, ed. Cecilia M. Bailliet (Cheltenham: Edward Elgar Publishing, 2019), 12.
[170] Ulrich Fastenrath, "Ch.II Membership, Article 4," in *The Charter of the United Nations: A Commentary*, Volume I, ed. Bruno Simma and others, 3rd edition (London: Oxford University Press, 2012), 349.
[171] Ibid, 348.

the preliminary stages of establishing the UN, notably in the Atlantic Charter of 1941. In their meeting, Roosevelt and Churchill agreed to "make known certain common principles in the national policies of their respective countries on which they base their hope of a better future for the world".[172] The Atlantic Charter accommodates eight common principles, in which the United States and the United Kingdom mutually agreed that "(…) all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force"[173]. On January 1, 1942, 26 states signed a 'Declaration by United Nations', formally expressing their commitment to the principles of the Atlantic Charter. In line with the scheme, Article 2(4) of the UN Charter requires Member States to refrain from using force except in cases of self-defense or authorization by the SC. As pointed out by Mónica García-Salmones, "the maxim of 'peace through law' goes, structurally, hand in hand with the maxim of 'war through law' ".[174] Without a watchdog of peace, the fate of the UN would resemble that of the League of Nations. Therefore, the SC institution was designated. It was evident from the outset that the SC, at times due to the use of the veto power, might face impasse in fulfilling its duties. This matter came into focus when North Korea launched armed attack on South Korea. As a result of the USSR's Veto, the SC was unable to take any effective measures to restore peace. At this stage, the UN Members had to decide whether to refrain from taking executive action to restore peace and leave the situation as it was or find a viable solution. If the Member States chose the former, they would adhere to the UN Charter, as executive measures can only be adopted through the SC and meddling with executive measures by the GA would be a derogation to the UN Charter. [175] Article 11 provided that "Any such question on which action is necessary shall be referred to the Security Council by the General Assembly". Nevertheless, the GA opted for the second option and adopted the resolution "Uniting for Peace". At that time, under Article 14, it was conceived that the GA could assume a subsidiary responsibility regarding international peace and security.[176] In light of this interpretation, Resolution 377 A (V) authorized collective action, including the use of force. The use of force by the GA is clearly

[172] Julius Stone, "Peace planning and the Atlantic Charter," *The Australian Quarterly* 14, no. 2 (1942): 5.
[173] Joint Declaration by the President of the United States and The Prime Minister of The United Kingdom, 14 August 1941. Available at: <https://avalon.law.yale.edu/wwii/atlantic.asp> (Accessed 28 November 2022).
[174] Mónica García-Salmones, "Walther Schücking and the Pacifist Traditions of International Law," *European Journal of International Law* 22, no 3 (2011): 867.
[175] Christian Tomuschat, "Uniting for Peace"— Ein Rückblick nach 50 Jahren," *Die FriedensWarte* 76 (2001): 3.
[176] Ibid.

ultra vires and in violation of Article 11 of the UN Charter. As Dinstein pointed out, The GA "is incapable of placing any forcible measures employed on a new juridical footing".[177] Fundamentally, the UN Organs have no authority to exempt Member States from their international obligations law or to annul the legal validity of an existing law.[178] despite supporters of a resolution justifying their position based on the UN Charter,[179] it is unclear why similar decisions involving collective action have not been repeated until now.[180]

The author believes that the legitimacy of the resolution stemmed from its foundation on the maxim of peace as a centralized norm of international law. It should be noted that the UN Charter is not the creator of peace; rather it functions as a mechanism for the preservation of peace. The rules governing the mechanism must remain valid as long as they function efficiently in favor of peace; otherwise, another mechanism could be substituted. The sponsors of the Uniting for Peace resolution were concerned about potential future chaos- if the resolution were not justified according to the UN Charter, it could weaken the UN and adversely affect its efficiency. This deviation from the UN Charter cannot be deemed unwarranted except when justified on the basis of peace requirements. Section A of the resolution stated that where "the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security, the General Assembly shall seize itself of the matter".[181] The American delegation communicated to the GA that "The Charter gives the General Assembly crucial functions to perform in the field of international peace and security, including the right to discuss any question relating to this field and the right to make recommendations. The experience of the United Nations in the five years since the Charter came into force has demonstrated the value of the Assembly's role. In the view of the United States, the Assembly's contribution can be enhanced both with respect to the avoidance of conflicts and with respect to the restoration of peace if need arises. The General Assembly should be enabled to meet on very short notice, in case of any breach of international peace or act of aggression, if the Security Council, because of lack of unanimity of the

[177] Yoram Dinstein, *War, Aggression and Self-Defence*, 6th ed (Cambridge: Cambridge University Press, 2017), 275.
[178] Kay Hailbronner and Eckart Klein, in *The Charter of the United Nations: A Commentary*, ed. Bruno Simma and others, 2nd edition (London: Oxford University Press, 2002), 738.
[179] B. N. Goswami, "The Commonwealth and the" Uniting for Peace" Resolution: A Study of the Legal Stand of Some Commonwealth Countries," *International Studies* 3, no. 4 (1961): 451-460.
[180] Tomuschat, "Uniting for Peace"— Ein Rückblick nach 50 Jahren," 3.
[181] (A/RES/377(V)) 3 November 1950.

permanent members, is unable to discharge its primary responsibility for the maintenance of peace and security. To this end, the United States proposes that the Assembly should make provision for emergency special sessions to be convoked in twenty-four hours …".[182]

3.3.4.2. Case Concerning Spain

Contrary to the present time, in its early years, the membership of the UN did not include nearly all states. It should be noted, however, that the UN Charter addressed both Member and non-Member States. Incorporating all nation-states into the UN Charter demonstrates a peace-oriented international legal order, and that the matter of peace is a concern for all. Peace has an inviolable nature, akin to a river. A muddy portion of the river can contaminate other parts. The founders of the UN, representing the majority of the international community, were acutely cognizant of this fact. Hence, the UN system includes non-parties, as well. Article 2(6) provided:

> *"[T]he Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security".*

According to Verdross "For the purpose of the United Nations is not only to maintain peace within the organization but within the whole international community."[183] In the early years, the UN tackled the situation in Spain, although Spain was not a member of the organization. By listing numerous facts including recent Spanish troop movements along the French frontier, the significant presence of Nazis and war criminals on Spanish soil, and allegations of Spain's involvement in atomic research and production, the Polish delegation suggested that the situation should be recognized as a threat to international peace and security pursuant to Article 34 of the UN Charter[184], and by invoking Article 2(6) requested the inclusion of the Spanish question in the SC's agenda.[185] Similarly, the delegations from Belgium, Czechoslovakia, Denmark, Norway, and Venezuela requested the GA to include the question in its agenda for the second part of the first session. On the other hand, during the debate in the First Committee,

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[182] Note from the head of the US delegation to the UN Secretary General, 5 UNGAOR, 279th plenary meeting, Annexes (Agenda Item 68) 2–3, (A/1377) 20 September 1950.
[183] Alfred Verdross, "General international law and the United Nations Charter," *International Affairs (Royal Institute of International Affairs 1944-)* 30, no. 3 (1954): 345.
[184] John A. Houston, "The United Nations and Spain," *The Journal of Politics* 14, no. 4 (1952): 687.
[185] Repertory of Practice (1945–1954), volume 1, para 9. Available at: <https://legal.un.org/repertory/art2/english/rep_orig_vol1_art2_6.pdf> (Accessed 18 November 2023).

a few delegations cited Article 2(7) as the basis on which the UN lacks the jurisdiction to intervene in Spain's situation.[186] Ultimately, both the SC and GA seized the case.

According to Kelsen's reasoning, the UN Charter specified that UN bodies must take appropriate measures against non-member states if their actions contradicted UN principles, and by this approach indirectly compelled non-Member States to adhere to the UN Charter.[187] Verdross at one with Kelson argued that: "Article 39 of the Charter obliges the Security Council to determine the existence of an act of aggression, any other breach of the peace or of any threat to the peace, irrespective of whether it has been committed by a Member of the United Nations or not. Consequently, the measures of enforcement taken by the Security Council are not restricted to Members."[188] In the Korean conflict, such an interpretation was employed as the basis for actions. In response to North Korea's armed attack on the Republic of Korea, the SC discerned the situation a breach of peace in Resolution 82 "called for the immediate cessation of hostilities, called upon all Members to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities".[189] By resolution 84, the SC "recommended that Members should furnish such assistance to the Republic of Korea as might be necessary to repel the armed attack and to restore international peace and security in the area".[190] In resolution 84 the SC recommended that all Members, providing military forces and other assistance pursuant to the aforesaid resolutions, should make such forces and assistance available to a unified command under the United States, requested the latter to designate the commander, and authorized the unified command at its discretion to use the United Nations flag in the operations against North Korea.[191] It is important to note that the resolutions targeted North Korea, despite it not being a UN Member State.[192] It is indisputable that the UN Charter had in mind to require Non-Member States to refrain from threatening or using force against the territorial integrity or political independence of any state in their international relations. [193]

[186] Ibid, para 13.
[187] Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems: with supplement*, 106.
[188] Verdross, "General international law and the United Nations Charter," 346.
[189] (S/RES/82) 25 June 1950.
[190] (S/1511) 7 July 1950.
[191] (S/1588) 7 July 1950.
[192] Salo Engel, "The Changing Charter of the United Nations," in *The Year Book of World Affairs*, ed. G.W. Keeton and G. Schwarzenberger (London: Institute of World Affairs, 1953), 84.
[193] Verdross, "General international law and the United Nations Charter," 346.

3.4. Conclusion

As a result of the calamities of the Second World War, international society felt the need for an extensive revision of international legal order. The previous order to maintain international peace was deficient, as peace did not enjoy the status in the hierarchy of norms that it should have. Therefore, following the Second World War, peace was elevated to the status of a legal axiom, a fundamental principle superior to other principles concerning the protection of sovereignties, such as reciprocity. A comprehension of peace characterized by this nature has prompted a transformation in the structure of international law. Actions once regarded lawful before the Second World War have been labelled illegal. The Nuremberg and Tokyo Tribunals stand out as salient examples in this context. The crime against peace was included in the Charter of the Tribunals, even though it had not been criminalized in positive international law before. Its criminalization was justified under the rubric of peace. The UN is another indicator of a paradigm shift in the perception of peace. According to this document, peace is a matter that engages all subjects of international law. The UN Charter specifically calls on non-parties in Article 2(6) to harmonize their acts in accordance with its principles to maintain international peace and security. In this light, non-membership status was not a barrier to the UN and during the early workings of the Organization, both the SC and GA dealt with the case of Spain and North Korea, despite their non-member status. In the context of the new order, the credibility of the old rules of international law is contingent upon their compatibility with the peace axiom. Furthermore, the UN Charter makes specific promises about what peace is supposed to entail. To comprehend the concept of peace in the UN Charter, it is essential to distinguish between its form and connotation. According to the UN Charter, peace takes the form of a relationship between states, and its connotation is the respect for human rights. Human rights represent the legal embodiment of humanity, which is the *modus operandi* of the UN, standing outside the system and directing its operations. Thus, the founding of this chapter suggests that the SC is not entitled to define peace. The definition of peace is subject to its own parameters in the UN Charter. The UN Charter by elucidating the concept of peace, outlines the SC's jurisdiction, which it must adhere to.

Chapter IV: The Security Council's Powers: Limited or Unlimited?

4.1. Introduction

Once the SC is convinced that the commission of mass atrocities[194] by a state constitutes a threat to peace or a breach of peace, this organ may exercise a vast spectrum of powers conferred upon it by the UN Charter. With regard to this wide range of discretion, the crucial question is: what is the scope of SC's competence when performing its responsibility of maintaining international peace and security? A potential response to this query lies in two

[194] The term "mass atrocities" is laden with conceptual challenges from multiple perspectives, including the legality of the term, its applicable domain, the scale and level of execution, numerical thresholds, time frame, types of crimes involved, and the type of perpetrator and victims (Anna Khalfaoui, "Mass Atrocities: Definition and Relationship with Development," in *Peace, Justice and Strong Institutions*, ed. Walter Leal Filho and others(Switzerland: Springer, 2021), 539**;** Scott Straus, "What is being prevented? Genocide, mass atrocities, and conceptual ambiguity in the anti-atrocity movement," in Reconstructing Atrocity Prevention, ed. Sheri P. Rosenberg and others (New Yourk: Cambridge University Press, 2016), 17).
Khalfaoui defined mass atrocities as "consist of extreme violence inflicted on a large scale or in a deliberate manner, particularly on civilians and noncombatants, by State or non-State actors. Mass atrocities encompass the international crimes of genocide, crimes against humanity, war crimes, and aggression (Khalfaoui, "Mass Atrocities: Definition and Relationship with Development," 17). For Anderson, mass atrocities are episodes of large-scale violence committed against unarmed populations (Charles H.Anderton and Jurgen Brauer, "Mass atrocities and their prevention," *Journal of Economic Literature* 59, no. 4 (2021): 1240).
However, the term "mass atrocities" is commonly used to describe the three legally defined international crimes: genocide, crimes against humanity, war crimes, and often also includes the crime of ethnic cleansing within the framework of the Responsibility to Protect (United Nations Framework of analysis for atrocity crimes – a tool for prevention (2014), Available at:<https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf> accessed 07 June 2024; Straus, "What is being prevented? Genocide, mass atrocities, and conceptual ambiguity in the anti-atrocity movement," 23).
For the purpose of this dissertation, without engaging with definitional issues, the author of this thesis refers to "mass atrocities" as grave violations of any human rights.

realms of international law and the UN Charter. Paragraph one of Article 1 of the UN Charter is the point where further elaboration is warranted. The language of the Article is somewhat ambiguous and has sparked debates over whether the UN Charter allows the UN a certain level of discretion and exemption in implementing international law rules or not. Due to the SC's designation as the executive organ of the UN, the debate about the exemption was naturally directed to this body of the UN when acting to maintain international peace and security. Some commentators have interpreted the Article as granting *carte blanche* to the SC. In other words, when the SC is dealing with matters of peace and security, the mandatory nature of international law could fade and become optional (Exceptional Interpretation). On the other side of the spectrum, there are scholars who critically evaluate their arguments and present the viewpoint that all UN organs, including the SC, are obligated to comply with international law (Integral Interpretation). According to integral interpretation, certain rules of international law are binding upon all subjects of international law without exception. They are known as General International Law (GIL). Scholars use the term General International Law in various contexts; hence, there is no consensus on its definition, and each scholar provides evidence to justify their specific interpretation of the concept. Some scholars view GIL as a set of customary rules of international law, while others consider it a synthesis of customary and general principles of law. Additionally, certain scholars define it based on the number of subjects it covers; if a significant number of states are parties to a treaty or are enmeshed in a custom, GIL would be the applicable rule.

According to the author's argument, GIL has been utilized as an expression of fundamental norms in contemporary international law. GIL is used in this sense in Article 53 of the Vienna Convention on the Law of Treaties and in certain practices of international courts. In this context, GIL does not correspond to the main sources of international law reflected in Article 38 of the Statute of the ICJ; instead, it pertains to *infra*-legal matters. It refers to the principles that underpin modern international law, upon which the field has been constructed and developed. These principles emanate from the complexities of international relations and function as a response to the requirements of states' communal existence. Given states' commitment to forming an international community, as they indeed do, they are bound to comply with the prerequisites of societal organization. Considering that the international society is a dynamic phenomenon, the principles of GIL are dynamic as well. Hence, GIL is

legal translation of requirements of international community. GIL cannot be equated to a treaty, custom, general principles of law, or their synthesis. However, it can be mirrored in these sources, and in that case, these sources become declarative of GIL rather than constitutive. It is important to note that there is no consensus on the sources of international law. Some commentators extend the sources beyond what is listed in Article 38 of the Statute of the ICJ, including decisions of international organizations, unilateral acts of states, *jus cogens*, etc., while some diminish all sources to international customary law. GIL, however, operates at an entirely different level. It is not sourced from agreements between states, instead, its origins are rooted in the very foundations of international law. A decent testament to this fact is Article 53 of the Vienna Convention, as well as judicial precedents that establish that GIL is distinct from treaties, customs, or general principles of law. In Article 53, GIL cannot be deemed as a treaty for the reason that treaties cannot generate rights and obligations without the consent of states. GIL does not fall in the category of international customary law since the article does not recognize practice as a constituent element of *jus cogens*. Finally, GIL cannot be general principles of law, since general principles refer to those recognized by civilized nations (domestic legal systems). Even some examples of GIL identified by international courts are the subject of the question of whether they are general principles of law. What sets GIL apart from other sources of international law is the question of state consent. Unlike obligations arising from conventional sources, obligations stemming from GIL do not necessarily require the consent of states. A positivist critic might argue that interpreting GIL in this way does not accord with the positivist nature of international law due to the absence of state consent. In response to this argument, the practice of the ICJ is intriguing because, in certain cases, the ICJ clearly disregarded the will of states, such as in the cases of the legal personality of the United Nations or the advisory opinion on genocide. GIL consists of two categories of principles, axiomatics and axiological. The former embodies rational principles drawn from the logic of nature and structure of both international law and society, whereas the latter flows from the values of the international community. Lastly, having a broad scope of application is not a constituent element of GIL but rather it is an inevitable consequence of it. GIL concerns itself with the importance of a norm's merit. Since GIL constitutes the fundamental building blocks of international law and ensures collective existence, it must be universally applicable to all subjects of international law. The significance of GIL lies in its capacity to impact and constrain

the autonomy of states, a manifestation can be observed in the evolution of international treaties and customs. In the realm of treaties, *jus cogens* restricts the freedom of action for states, and in instances of breaches in other areas of international law, *erga omnes* can be invoked as secondary rules against the violator.

The purpose of this chapter is to examine the extent of the SC's powers in international law, aiming to explore the limits defined by the UN Charter and international law regarding the SC's actions concerning an offending state. The discussion commences with an exploration of the Exceptional Interpretation of Article 1, followed by an analysis of GIL in its novel sense in positive international law, where it enjoys binding authority over all international subjects and the way it limits the SC. The chapter concludes with a discussion of the convergence between the powers of the SC and *jus cogens* and *erga omnes*.

4.2. UN Charter Article 1: Exception or Integral to International Law?

The question of the SC's competence has been the subject of intense debate since the San Francisco negotiations. In terms of maintaining international peace and security, it is crucial to illuminate whether there are any limitations on the SC's competence. In the Lockerby case, Judge Shahabuddeen, in his separate opinion wrote that "[i]n the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? 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?"[195] The same question is raised in Judge Weeramantry's dissenting opinion that "does … the Security Council discharge[…] its variegated functions free of all limitations, or is there a circumscribing boundary of norms or principles within which its responsibilities are to be discharged?" [196]

To answer this question, one must delve into the UN Charter, but not exclusively. Article 1 of the UN Charter is the most relevant article to the given question. It provided:

[195] Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), ICJ report, Order of 14 April 1992, Provisional measures, Separate Opinion of Judge Shahabuddeen, 33.
[196] Ibid, Dissenting Opinion of Judge Weeramantry, 61.

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

4.2.1. Exceptional Interpretation

By invoking to the UN Charter, some scholars argue that when the SC acts to maintain international peace and security, it is not subject to any restrictions by international law and enjoys *carte blanche*. The proponents of this argument anchor their stance on the first paragraph of Article 1 of the UN Charter, which they interpret as encompassing two distinct yet complementary aspects of the SC's mandate. In their view, this article is structured around two key pillars: the first section addresses the SC's authority in safeguarding international peace and security through the implementation of collective measures, while the second section focuses on the SC's role in facilitating the peaceful settlement of disputes, upholding the principles of justice and international law. However, this latter condition does not necessarily apply to all collective measures.[197] To sum up, they content that under normal circumstances, all relations within the international community are governed by justice and international law but if international peace and security are at risk, the SC is not obligated to observe justice and international law in in its pursuit of restoration or maintenance of peace and security. This is because extraordinary circumstances necessitate extraordinary measures. The exceptional approach compartmentalizes the SC's actions into two distinct categories: those geared towards peaceful dispute resolution and those aimed at maintaining and restoring international peace and security under Chapter VII. As far as the former is concerned, the SC is required to observe justice and international law, while regarding the latter, it is not. This derogation to justice and

[197] Schweigman, *Authority of the Security Council under Chapter VII of the Un Charter: Legal Limits and the Role of the International Court of Justice*, 29; Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems: with supplement*, 730; Martenczuk, "The Security Council, the International Court and judicial review: what lessons from Lockerbie?," 544-545; Whittle, "The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action," 680; Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents*, 27-28; Lemos, "Jus Cogens Versus the Chapter VII Powers of the Security Council: With Particular References to Humanitarian Intervention and Terrorism," 31-32; Talmon, "The Security Council as world legislature," 184.

international law is considered justifiable under the extra-legal model.[198] This approach establishes a nexus between the circumstances and the authority wielded by the SC. Under ordinary circumstances, the SC is bound to operate as a subject of international law, but in exceptional situations, it enjoys the liberty to act in pursuit of peace in the name of peace. Whittle recognized that such a scenario clearly falls outside the scope of law; thus, he invoked the doctrine of mitigation defense.[199] Under this theory, ordinary law maintains its consistent application even during emergencies, however, violations by the executive may be deemed justifiable upon assessment through a political, moral, and extra-legal process, shielding the executive from the standard legal ramifications associated with such unlawful actions.[200] An executive's subsequent exoneration does not alter the existing legal order, nor does it signify a deviation, but the executive is absolved of any responsibility for any wrongful action arising from an emergency situation.[201] The extra-legal measures model justifies unlawful action in light of the values deemed to be protected by law.[202] In this line of reasoning, Whittle wrote that "when the UNSC acts under the Chapter VII, it could be argued that it enters an 'exceptional' phase of action, governed by a limited form of law different to the normal legal order".[203] He comprehended the ramifications of the doctrine that could readily legitimizes any illegal action and paving the way for potential abuses of powers. Hence, he stipulated that the extra-legal measures by the SC under chapter VII must meet two prerequisites: first of all, the SC must explicitly acknowledge the extra-legal nature of the action and second, the action must be judged and assessed by the international community.[204] In a more stringent stance, Rosand contended that when the SC performs under Chapter VII, the principles and purposes outlined in the UN Charter do not govern the SC's actions, and this includes principles preventing the UN from intervening in matters essentially falls in the domestic jurisdiction, as well as the

[198] Whittle, "The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action," 680.
[199] Ibid, 681.
[200] Oren Gross, "Chaos and rules: Should responses to violent crises always be constitutional," *Yale Law Journal* 112, no. 5 (2002): 1096-1106.
[201] Oren Gross, "Extra-Legality and the Ethic of Political Responsibility," in *Emergencies and the Limits of Legality*, ed. Victor V. Ramraj (Cambridge: Cambridge University Press, 2008), 62.
[202] Gross "Chaos and rules: Should responses to violent crises always be constitutional," *Yale Law Journal* 112, no. 5 (2002): 1096-1106; Nomi Claire, Lazar *States of Emergency in Liberal Democracies* (Cambridge: Cambridge University Press, 2009), 5.
[203] "The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action," 686.
[204] Ibid.

requirement to comply with international law and justice. He further elaborated that, even if the latter does exert any limiting influence on the SC's competence, it solely circumscribes the actions under Chapter VI in terms of exercising dispute resolution powers, and then he concluded that "the measures the Council seeks to impose to address threats to peace and security need not be consistent with existing international law and may touch upon issues of largely domestic concern".[205] At his most radical position, Miguel Lemos contended that when the SC is engaged in preserving international peace and security, it is not only exempt from the obligation to obey justice and international law but also enjoys the leeway to disregard *jus cogens*. He argued that in accordance with Article 1, the application of justice and international law does not extend to the SC's Chapter VII actions, and since *jus cogens* is an integral component of international law, he concludes that the SC is not compelled to obey to *jus cogens*.[206] Otherwise, the measures taken to maintain international peace and security would not be 'effective' (as per Article 1) or 'prompt and effective' (as per Article 24).[207] In response to the argument that Article 53 of the Vienna Convention on the Law of Treaties (VCLT), which stipulates that any international agreement conflicting with peremptory norms of general international law is void, has altered the traditional legal order and serves as a limitation on the SC[208], Lemos presented two counterarguments: Firstly, he emphasized that Article 103 of the UN Charter prioritizes obligations arising from the UN Charter over other international obligations, as evidenced in Articles 30, 52, and 75 of the VCLT, and secondly, he pointed out that Article 4 of the VCLT explicitly states that it "applies only to treaties which are concluded by States after [its] entry into force".[209] Hence, VCLT alone is not sufficient to strengthen the idea that the SC is bound by *jus cogens*. Regarding the connection between the UN Charter and *jus cogens*, he wrote that "[it] suggests that the superiority of any jus cogens norm—irrespective of whether such norm was already in existence at the time of the adoption of the Charter or it was created only at a later stage—has to be reconciled with the superiority of Chapter VII decisions of the SC. Reconciliation is easy: as jus cogens norms exist in an

[205] Eric Rosand, "The Security Council as Global Legislator: Ultra Vires or Ultra Innovative," *Fordham International Law Journal* 28, no. 3 (2005):556.
[206] Lemos, "Jus Cogens Versus the Chapter VII Powers of the Security Council: With Particular References to Humanitarian Intervention and Terrorism," 36.
[207] Ibid, 32.
[208] Ibid.
[209] Ibid, 32-33.

international system the primordial objective of which is the maintenance of international peace and security, their superiority is only absolute to the extent that such superiority does not conflict with the primordial objective". [210] Lastly, Lemos and scholars who share same perspective cite the preparatory works of the UN Charter as evidence that the drafters deliberately did not restrict the SC's power to act in accordance with international law and justice.[211] In this regard Schweigman expressed that "[t]he obligation to act in conformity with international law is only prescribed for the latter category, and the negotiating history of the Charter reveals that this was done deliberately. An amendment that would have extended the obligation to act in conformity with the principles of justice and international law to measures taken by the Council pursuant to its responsibility for the maintenance of international peace and security, was rejected by the major powers as curtailing the Council's freedom of (swift) action".[212]

4.2.2. Integral Interpretation

The UN Charter is primarily an international treaty and should be interpreted in accordance with the rules of treaty law. Regarding the general rule of interpretation, Article 31(1) VCLT provided "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and in 31(3)(c) stated that: There shall be taken into account, together with the context: (…) (c) any relevant rules of international law applicable in the relations between the parties". It follows, therefore, that the interpreter of a treaty should not only inspect the object and purpose of the agreement, but also the context of insertional law. Although Article 4 of the VCLT restricts its binding effect to the parties to the Convention without retroactive application, a set of interpretative rules also exists in customary law which operates alongside the interpretation guidelines outlined in Articles 31, 32, and 33. These rules of international custom are identical to those specified in the VCLT.[213] Hence, Articles 31-33 of the VCLT should be viewed as indicative not only of the interpretative principles governing the Convention among its parties

[210] Ibid, 33.
[211] Ibid; 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," 29.
[212] Ibid.
[213] ULf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer, 2007), 7.

but also as reflective of the interpretative norms prevailing in customary international law.[214] The authors argue below that an integral interpretation of Article 1(1) is consistent with the context of international law rather than exceptional interpretation. Employing the integral interpretation, the author contends that in accordance with Article 1 of the UN Charter, the SC remains bound by international law when exercising its Chapter VII powers to maintain international peace and security. It is true that Article 103 of the UN Charter confers a degree of supremacy on the decisions of the SC, nonetheless, there are certain fundamental norms in international law that limit the SC's powers, from which no derogation is permitted. These norms are categorized under the term GIL.

4.2.2.1. General International Law and positive International Law

Article 53 VCLT stipulated that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. […]", and Article 64 provided that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." The 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA) in Articles 26, 40 and 50 speak of the "obligation arising under a peremptory norm of general international law". Articles 26, 41 and 53 of the 2011 Draft Articles on the Responsibility of International Organizations enshrined the same discourse and, in both drafts, peremptory norms are considered to be rooted in general international law. In the Pulp Mills case the ICJ held that,

> *"under general international law to undertake an environmental impact assessment when there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context"*.[215]

While in the case concerning the Certain Activities carried out by Nicaragua in the Border Area, the ICJ, with finely tuned nuances, considered an obligation to conduct an environmental impact assessment under a treaty or customary law, rather than GIL. [216] In the Iron Rhine case, arbitration pointed out that:

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[214] See more about the customary character of Articles 31-33 among states, scholars, and international courts in: ibid, endnotes 21, 22, and 23 on page 24.
[215] Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ Reports, Judgment of 20 April 2010, para 204.
[216] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), ICJ Reports, Judgment of 16 December 2015, paras 106, 104.

"where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm […] This duty, in the opinion of the Tribunal, has now become a principle of general international law".[217]

In the Indian Waters Kishenganga arbitration, environmental impact assessment was considered under general international law and the ICJ's approach was reaffirmed once again.[218] In the Chagos case, similar to the ICJ, the tribunal based its reasoning on general international law when constructing its arguments about international environmental law. The arbitration held that:

"As a general matter, the Tribunal has little difficulty with the concept of procedural constraints on State action, and notes that such procedural rules exist elsewhere in international environmental law, for instance in the general international law requirement to carry out an environmental impact assessment in advance of large-scale construction projects". [219]

It is noteworthy that in these cases, international courts and tribunals approached the relevant rules through the lens of GIL rather than evaluating them under the chapeau of treaties or customary law. The use of such phrasing in international instruments and by international courts evinces GIL as a novel concept in positive international law.

4.2.2.2. General International Law: A New Face of International Law

Regarding the legal precedents set by international courts and the aforementioned instruments, the issue surrounding GIL remains contentious. Hence, it is crucial to grasp the dissenting opinion on GIL before exploring the novelty involved in GIL.

4.2.2.2.1. Dissenting Opinion on General International Law

Some scholars believe that GIL is not a novel concept in international law,[220] and view it as a synonymous with customary law or a synthesis of customary law and general principles of

[217] Permanent Court of Arbitration, Iron Rhine (Belgium v. Netherlands), Case 2003-2, Award of 24 May 2005, para 59.
[218] Permanent Court of Arbitration, Indian Waters Kishenganga (Pakistan v. India), Case 2011-01, Award of 20 December 2013, paras. 450–451.
[219] Permanent Court of Arbitration, Chagos Maritime Protected Area Arbitration (Mauritius v. United Kingdom), Case 2011-03, Award of 18 March 2015, para 322.
[220] Grigory Tunkin, "Is General International Law Customary Law Only?," *European Journal of International Law* 4, no. 4 (1993): 541; Josef L. Kunz "General International Law and the Law of International Organizations," *American Journal of International Law* 47, no. 3 (1953): 457; Prosper Weil, "Towards relative

law. Sir Michael Wood, the Special Rapporteur of the International Law Commission (ILC) for the topic of identifying customary international law, rejected the concept of GIL and noted that this concept lacks intellectual lucidity, its usage is confusing, and at most it is equivalent to customary international law, or in a broader sense, customary international law combined with general principles of law. He wrote that "The term 'general international law' is commonly used but needs some explanation. ICJ, and the Commission itself, have used the term in a variety of contexts and with a variety of meanings. Its use to mean only customary international law can be confusing. At times the term is used to mean something broader than general customary international law, such as customary international law together with general principles of law, and/or together with widely accepted international conventions. It is desirable that the specific meaning intended by this term be made clear whenever the context leaves the meaning unclear". [221]

These scholars believe in the traditional classification of sources of international law which are mainly manifested in Article 38 of ICJ' Statute.

4.2.2.2.2. GIL: an infra-legal concept in the geometry of modern international law

The world was fundamentally transformed in the aftermath of the Westphalian Treaties, because the Treaties paved the way for the establishment of a foundational legal framework designed to regulate the interactions between sovereign states. It is essential to note that this legal order was not enforced upon states by a dominant or super-state authority. Instead, it emerged due to the requirements of coexisting in the international society. As Paul wrote, "[t]he international order insists that states bear certain duties by their very nature of existing in an international system, independent of any manifestation of assent to the obligation". [222]

Considering the experiences of interference and aggression among states, they collectively established a legal mechanism to constrain the unfettered actions of international actors, safeguarding the security of all parties. States approached international law not due to humility or faith in a common good, but rather because it was their sole option to satisfy their interests.

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normativity in international law?," *American Journal of International Law* 77, no. 3 (1983): 437-439; Frederick Alexander Mann, *Further Studies in International Law* (Oxford: Clarendon Press, 1990), 401.

[221] First report on formation and evidence of customary international law, UN doc. A/CN.4/663, 17 May 2013, p 18, para 42.

[222] Paul B. Stephan, "The Political Economy of Jus Cogens," *Vanderbilt Journal of Transnational Law* 44, no. 4 (2011): 1078.

Thus, after many years, the international forum transformed into an international society, comprised of two elements: states and law.[223] It is important, however, to avoid overestimating the impact of this legal framework. Despite the constraints imposed by international law, states persist in challenging it, disregarding legal norms whenever their interests dictate, and only conforming to the law when it serves as the most efficient strategy for achieving their targets. The generality of law that arises in this context does not stem from a common good or common interest; instead, it is inherently nourished by reciprocity. In this light, international law merely orchestrates the freedom to act, and specifies the associated obligations.[224] In this context, the characteristic of generality implies the creation of a system harmonizing individual rights, rather than epitomizing a common good. The detrimental impact of the private law nature of international law is readily apparent in inevitable consequences such as regional wars, colonialism, and particularly in the two destructive World Wars. Confronted with these facts, members of the international society became determined to reform the prevailing international law. In doing so, they embarked on a process to restructure the old system, aiming to create a new universal legal order conducive to collective life. Therefore, states moderated the private nature of international law by incorporating the public interest into it in order to form an international community. This phase signifies a pivotal trajectory in the history of international law: the move from traditional to modern law. However, achieving this transformation is a challenging step. Owing to a common historical heritage, linking and unifying elements are inherent of national societies, whereas the international society lacks these factors. Furthermore, states are reluctant to subordinate their individual interests to promote the interests of the international community. In this respect, modern international law was established with the ambition of achieving the common good by fostering interconnectedness and unifying elements among states. To this end, the international community, aiming for the common good, is perceived as a fiction whose realization depends on establishing prerequisites for collective life. These prerequisites reincarnate into general principles that differ from general principles of law. While the latter is a formal source of law[225], the former is *infra*-legal principles that constitute

[223] Hermann Mosler, *The International Society as a Legal Community* (Dordrecht: Kluwer Academic, 1980), 18-19.
[224] Hedayatollah Falsafi, *International law of Treaties*, Fifth Edition (Tehran: Nashr Now, 2016), 28.
[225] For a detailed analysis, look at: Gábor Sulyok, "General Principles of Law and International Law-Making," in *Rethinking International Law and Justice*, ed. Charles Sampford and others (Farnham: ASHGATE, 2016): pp. 313-331.

corpus of general international law. In the words of Judge Cançado Trindade, there are principles in international law that "pertain[s] to the *substratum* of all international legal norms, and, accordingly, to the very foundations of the international legal system."[226] These principles are characterized as "fundamental principles of law which identify themselves with the very foundations of the legal system, revealing the values and ultimate ends of the international legal order, guiding it, protecting it against the incongruencies of the practice of States, and fulfilling the necessities of the international community".[227] The GIL is composed of two types of principles: axiomatic principles derived from the rational requirements of membership in the international community, and axiology-based principles, rooted in international values. The principles of GIL are applicable to all subjects of international aspiring to join the fiction of the international community. As Mosler pointed out: "principles and rules derived from the specific nature of the international community".[228] In the pursuit of a utopian international community governed by the rule of law, states shall accept its concomitant requirements. As such, the term 'general' in GIL implies the potential universality embedded in the substance of these principles, as well as their status, i.e., their rank, and importance within the system of international law.[229] Lastly, it should be noted that due to the dynamic nature of the international community, additional principles can be incorporated as deemed required.

4.2.2.3. General International Law and Sources of International Law, with Special Regard to the ICJ's Statute

The sources of international law establish one of the most important patterns that provide the framework for international legal discourse as well as legal claims.[230] Scholars have long agreed that the sources of international law often cause disagreements and controversies surrounding these sources will prevail.[231] The source of international law here refers to formally recognized sources. According to a fundamental rule, only those sources that are formally

[226] Antônio Augusto Cançado, Trindade *International law for humankind: towards a new jus gentium* (Leiden: Brill, 2010), 63.
[227] Ibid, 59
[228] Mosler, *The international society as a legal community*, 130.
[229] Falsafi, *International law of Treaties,* 45.
[230] Samantha Besson and Jean D'Aspremont, "the Source of International Law an Introduction, in "*The Oxford Handbook on The Sources of International Law*," ed. Samantha Besson and Jean D'Aspremont (London: Oxford University Press), 2-3.
[231] Ibid, 6-7; Géza Herczegh, *General Principles of Law and the International Legal Order* (Budapest: Akadémiai Kiadó, 1969), 57.

recognized can be referred to or relied upon as creative sources of international law. Hence, an allusion to Article 38 of the ICJ Statute is inevitable in this context.[232] With regards to Article 38, it should be stressed that it delineates the legal framework for the judicial function of the ICJ, and outlines the sources through which disputes should be resolved. Consequently, it does not provide an exhaustive list of international law sources. As Pellet noted, the list of Article 38 is undoubtedly incomplete, and with time, its lacunae appeared; hence, he argues that "general reference to international law in the opening sentence suffices to enable the Court to have recourse to other sources of international law whenever it deems this necessary". [233] Additionally, Article 38 does not suggest that it covers all international law sources, nor does it indicate that the state-parties intend to exclusively base their relationships on the sources mentioned in this article. In this respect Klabbers pointed out that "this already suggests that the list is not exhaustive; it is possible that there are sources of law not mentioned in article 38 Statute ICJ". [234] Tomuschat contented, "even by simple logical inference, one can conclude that Article 38 does not set forth an exhaustive regulation of all and any conceivable sources of international law".[235] Late Crawford wrote, "in the context of international relations, however, the use of the term 'formal source' is misleading since it conjures up notions associated with the constitutional machinery of law-making within states. No such machinery exists for the creation of international law". [236]

However, commentators commonly discuss the sources of international law in the framework of Article 38 of the statute of the ICJ, which enumerates them as international treaties, international customs, and general principles of law. In this context, Tomuschat analyzed whether GIL is equivalent to the three aforementioned sources or if it constitutes an independent concept. The assumption he made for his analysis is that "[t]he concept of GIL presupposes that there exist legal rules which address every subject of international law".[237] Regarding treaties, he bases his argument on the principle of *pacta tertiis nec nocent nec*

[232] Hugh Thirlway, *The Sources of International Law*. 2nd edition (London: Oxford University Press, 2019), 8.
[233] Alain Pellet "Article 38," in The Statute of the International Court of Justice: A Commentary, ed. Andreas Zimmermann and others, 2nd edition (London: Oxford University Press 2012), 1421-1422.
[234] Jan Klabbers, *International law*, 2th ed. Cambridge: Cambridge University Press ,2017, 24.
[235] Christian Tomuschat, "General International Law: A New Source of International Law?," in *Global Justice, Human Rights and the Modernization of International Law*, ed. Riccardo Pisillo Mazzeschi, and Pasquale De Sena (Cham: Springer Nature, 2018), 188.
[236] James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (London: Oxford University Press, 2012), 20.
[237] Ibid, 189.

prosunt, which applies to conventions, including those whose implementation benefits the entire international community.[238] He proceeds that according to the principle of equality of sovereignty, a treaty cannot confer rights or impose obligations without the consent of the states.[239] Moreover, the rejection of a treaty is not always due to the incompatibility of a norm with national interests.[240] It could be the case that states are unwilling to subject themselves to the mechanisms of the treaty in question, even if they agree with its norms.[241] Hence, categorizing international treaties as GIL is not feasible. Let's consider a scenario where almost all members of the international community ratified a treaty concerning particular human rights. In such a situation, can the corresponding norm be regarded as a part of GIL? Based on the initial presumption, the given norm cannot qualify as GIL since it lacks the authority to compel all subjects of international law to comply with it. Without the consent of the third party, there exists no legal foundation to obligate that party. Another scenario is that all states have ratified a treaty featuring a withdrawal clause. Under these circumstances, the given norm can be recognized as a part of GIL during the entire duration of all states' membership. However, what happens if certain states withdraw from the treaty? Given the fact that they are no longer bound by the norm, there is no valid foundation for applying the treaty to them under any classification, whether it falls under the category of GIL or any other. Consequently, due to the loss of universal membership, the specified treaty does not meet the criteria for GIL and hence, cannot be enforced upon the third party. It is possible to argue that a third state is bound by the given rule, since the latter had become a customary rule of international law. As a result, this argument may only be valid if the state was not a persistent objector. There was wide ratification of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG), but it was not universally adopted. If a non-party, who is also a persistent objector, violates the Genocide Convention, then no one should have the right to interrogate the state concerned[242] while the ICJ in Genocide case held that norms of the Convention are binding on States, even

[238] Ibid.
[239] Ibid, 190.
[240] Ibid.
[241] Ibid.
[242] By invoking the concept of jus cogens, one can offer another rationale for nullifying the legal impact of persistent objectors. Since genocide is outlawed under jus cogens, the persistent objector rule becomes inconsequential in this context. Report of the International Law Commission on the Work of Its Seventy-First Session, UN GAOR, 74th Sess., Supp. No. 10, pp. 1-2, paras. 1, and 3, UN Doc. A/74/10, 16 September 2019, pp. 144-145.

without any conventional obligation[243]. In this light, Byers argued that treaties merely generate obligations between involved parties and lack the capability of establishing a rule of GIL. This is because, firstly, treaties cannot force parties to alter them in the future or absolve them from their obligations, and secondly, despite the universal applicability and binding nature of *jus cogens* norms, none of the international treaties incorporating these norms have been universally ratified.[244]

In respect of international customary law, Articles 53 and 64 of the VCLT appear to indicate that GIL does not fall in the cluster of international customary law, as it does not recognize practice as a constituent component of *jus cogens*; instead, it suggests that the consensus of the international community as a whole determines which norm should be considered *jus cogens*.[245] Thirlway raised an intriguing question in this regard that "[i]f jus cogens norms exist without the custom-generative process being followed, then why class them as custom at all: why not recognize them as something different?"[246]

Finally, regarding the general principles of law, Tomuschat maintained that "general principles of law and GIL remain alien to one another. In all the cases that constitute the testing ground for the present considerations, where the concept of GIL was resorted to, the requisite broad scope of the norm concerned as a 'principle' was visibly absent. In the Pulp Mills case, the concept of environmental impact assessment denotes a complex procedure with well-known specificities, the fruit of some environmental principles whose legal nature has not yet been fully established under international law, the principle of prevention and the precautionary principle. Accordingly, to range an environmental impact assessment among the general principles of law pursuant to Article 38(1)(c) ICJ Statute would amount to a misleading systematization of that procedure, hardly compatible with the original understanding of general principles".[247] Relying on the ICJ's methodological approach in Bosnia-Herzegovina vs. Serbia and Montenegro and Croatia vs. Serbia, he reinforced his argument. In fact, "rules on interpretation of treaties, on State responsibility and on succession in respect of obligations that

[243] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports, Advisory Opinion of 28 May 1951, 23.
[244] Michael Byers, "Conceptualising the Relationship Between Jus Cogens and Erga Omnes Rules," in *Globalization and Common Responsibilities of States*, ed. Koen De Feyter (London: Routledge, 2017), 220-221.
[245] Tomuschat, "General International Law: A New Source of International Law?," 195.
[246] Thirlway, *The Sources of International Law*, 178-182.
[247] Tomuschat, "General International Law: A New Source of International Law?," 193.

have arisen as a consequence of the commission of an internationally wrongful act […] are in principle straightforward rules that do not require lengthy deductions from a general principle" and therefore, the ICJ's method implied a specific place for GIL.[248] In his analysis of ICJ case practices, Tomuschat noted that the ICJ occasionally used GIL and customary law interchangeably, as seen in the Fisheries case (UK vs. Norway). However, in cases like the Pulp Mills case and the Corfu Channel case, the ICJ employed GIL in a manner that diverged significantly from international customary law. He expressed that "[t]he rule proclaimed [in the latter cases] is not inferred from the accumulation of practice by way of induction but is deduced from axiomatic premises of the international legal order. ICJ preferred … to invoke GIL without attempting to show that its approach was supported by that kind of consistent practice which, in theory, it views as a condition for the existence of a rule of customary law".[249]

Last but not least, due to the absence of a hierarchical structure among treaties, general principles of law and custom, if GIL is regarded as interchangeable with any or all of these, it allows two or more subjects of international to conclude a treaty or establish a customary that contradicts a peremptory norm originating from GIL.[250]

The author argues that GIL operates on an entirely distinct level, even though it maintains a connection with the sources. GIL does not fit into the sources category, and it should be assessed in accordance with the nature of the international legal system and the requirements of the international community. The axiomatic (rational) principles of GIL arise from the structure of the international legal system, which is an indivisible component of the legal system like *pacta sunt servanda*. In essence, these principles are legal fictions that serve as the basis for a legal system to operate and make sense. Additionally, the requirements of the international community gave rise to axiological principles stemming from the evolution of the international community, centered on the axis of humanity. This interpretation of the GIL is consistent with Article 53 of the VCLT, which identifies the GIL as the birthplace of peremptory norms.

The scope of application of GIL also needs clarification. A wide realm of implementation is not a constitutive factor of GIL [251] but rather an inevitable consequence of it. GIL concerns the

[248] Ibid, 194.
[249] Ibid, 200.
[250] Michael Akehurst, "The Hierarchy of the Sources of International Law," *British Year Book of International Law*, 47, no. 1(1975): 274.
[251] Anastasios Gourgourinis, "General/particular international law and primary/secondary rules: unitary terminology of a fragmented system," *European Journal of International Law* 22, no. 4 (2011): 1011.

intrinsic value of a norm. Given that GIL forms the foundational building blocks of international law and serves as a safeguard for collective life, it must be universally applicable to all subjects of international law in a comprehensive manner. As Tunkin wrote: "… general international law, which is die foundation of the whole system of international law".[252] GIL manifests itself in the sources of international law as peremptory standards.

4.2.2.3.1. Unraveling General International Law in the ICJ's Reasoning

As the author discussed earlier, the axiomatic principles of GIL are *a priori* principles by which the establishment and sustainability of a society would be possible. They are directly derived from societal requirements. The ICJ reasoning in this context, particularly in the cases of Military and Paramilitary Activities in and against Nicaragua, and the legal personality of the UN in the Reparation cases, is noteworthy.

In the case concerning the Nicaragua, Nicaragua, among other accusations, charged the United States with violating Article 2(4) of the UN Charter, customary international law, and general principles of international law. In its jurisdictional objection, The United States contends that the Vandenberg Amendment bars the ICJ from pursuing the case under the UN Charter. Because this reservation excludes "disputes arising under a multilateral treaty, unless (1) all Parties to the treaty affected by the decision are also Parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction".[253] By invoking the reservation, the United States argued that due to the non-acceptance of compulsory jurisdiction by the affected member states of the UN Charter, the ICJ lacks jurisdiction to proceed.[254] The ICJ found the defense acceptable; however, it proceeded to examine whether the prohibition of the use of force under customary international law had been violated. To determine whether the prohibition of force is a customary rule, the ICJ must identify both *opinio juris* and practice. The ICJ confirmed the United States' *opinio juris* by noting its consent expressed in various conventions and numerous resolutions that contain prohibitions on the use of force.[255] In terms

[252] Grigory Tunkin, "Is general international law customary law only," *European Journal of International Law* 4, no. 4 (1993): 538.
[253] Declaration of the United States of America recognizing as compulsory the jurisdiction of the court, in conformity with Article 36, para. 2 of the Statute of the International Court of Justice, UN Treaty Series, Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, Vol. I, (1946-1947), 10.
[254] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Reports Judgment of 27 June 1986, para. 173.
[255] Ibid, paras. 188-189.

of discerning the practice, the approach employed by the ICJ is intriguing. The ICJ did not recognize any specific practice of the US. In principle, pinpointing a particular act as a customary rule is challenging, let alone identifying the omission of an act as a constituent element of customary law, especially concerning the use of force. This difficulty arises due to the proliferation of such incidents since the adoption of the UN Charter. Nevertheless, the ICJ adopted an innovative approach. Instead of concentrating on practice, it once again emphasized *opinio juris*. The ICJ held that:

> *"The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule".*[256]

The reasoning of the ICJ regarding the identification of practices is challenging. According to the ICJ's findings, if a state's conduct generally complies with the rule, it can be regarded as practice. However, it is unclear to what specific practice the ICJ was referring. It can be inferred that if the ICJ were focused on identifying practices, the background of the international community would be filled with recourse to war, although not on the scale of two World Wars. Thus, it is probable that there is no established customary rule in to speak of. Although the ICJ drew attention to the practice, it shed light on the legal position of states, showing that they consistently justified their application of use of force under the exceptions provided in the rule. Hence, it seems the ICJ once more emphasized the *opinio juris* of states over actual state practice.

In the Reparation case, the ICJ underscored the impact of the evolving requirements of international life on the development of international law and affirmed that international legal principles are influenced by the advancement of societal dynamics. The ICJ interestingly held:

[256] Ibid, para 186.

"The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States".[257]

The ICJ subsequently delineated the foundation on which the UN enjoys international objective legal personality, as follows:

"[T]he Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims".[258]

It may appear at first glance that the UN Charter is a treaty and therefore, it cannot affect third states or be enforced against them under the principle of *res inter alios acta alteri nocere non debet*. However, the ICJ ruled that the UN possesses objective international personality, enabling it to exercise its duties and rights even against non-member states. The ICJ did not link the recognition of legal personality of the UN to the will of state parties. In other words, the ICJ rejected the notion that the mere fact that the framers represent the majority of the international community allows them to confer legal personality upon a newly formed entity. If international legal personality were contingent upon the state's will, it would result in a subjective rather than objective form of international legal personality. The UN was established by fifty states, but its legal personality does not derive from their will. As the UN aims to protect the common good of all members of the international community, it must have rights and duties under international law that can be opposable to all. Therefore, the requirements of achieving common good, for which the UN is founded, necessitate objective legal personality. The will of fifty states, representing the international community, serves as evidence of such personality.

[257] Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports, Advisory Opinion of 11 April 1949, p. 178.
[258] Ibid.

If the UN does not enjoy an independent personality, it will be incapable of fulfilling its vocations.

Regarding the axiological principles of GIL, the author argues that GIL revolves around the axis of humanity. In the Genocide case, the ICJ ruled that adherence to the principles outlined in the Genocide Convention is not contingent upon the consent of states. The ICJ held that

> *"The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the CO-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)".*[259]

4.3. Interaction Between the Security Council and General International Law

Moving on now to consider the interaction between the SC's competence and GIL. Throughout the examination of GIL, it has been conclusively established that its inherent connection to the requirements of collective life and its position as the cornerstone of an international legal system mandate the binding nature of its principles upon all subjects of international law [260] Accordingly, following the legal personality of the UN, which makes this organization as a subject of international law, the SC is subject to GIL.[261]

In the post-Second World War era, *opinio juris* became a legitimate basis for conduct, leading to the replacement of the absolute will of states by the rule of law. Consequently, the rule of law resulted in the allocation of competence among subjects of international law and the restriction of their freedom of action to the extent determined by international law. There is no exception to this rule and the SC is bound by the legal order under which it came to exist. As the International Criminal Tribunal for the Former Yugoslavia (ICTY) held:

> *"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*

[259] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports, Advisory Opinion of 28 May 1951, p 23.
[260] Kunz, "General International Law and the Law of International Organizations," 456.
[261] Ibid, 458.

under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, …".[262]

It seems improbable to infer based on this context that the SC enjoys the authority to disrupt the international legal order in order to establish international peace and security given the intrinsic connection between peace and security and the international legal order. Lauterpacht, who was opposed to the absolute liberty of the SC, stated that "[t]he concept of jus cogens operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between a Security Council resolution and jus cogens. Indeed, one only has to state the opposite proposition thus—that a Security Council resolution may even require participation in genocide—for its unacceptability to be apparent".[263] Contemplating that the SC is not bound by international law would undermine the foundation of the rule of law in the international community and would transform the SC into a super-state— a possibility that the ICJ explicitly rejected. The ICJ held that:

"Still less is it the same things as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its right and duties must be upon the international plane, anymore that all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, …".[264]

Some commentators who advocate for the SC's liberty from international law refer to the process of drafting the UN Charter during the San Francisco negotiations. They argue that the Norwegian government's proposal to incorporate specific rules of conduct for the SC into the UN Charter was rejected. According to this perspective, the rejection implies that the framers did not intend to constrain the SC within the bounds of international law. However, another interpretation exists regarding the preparatory work. Several commentators have observed that

[262] ICTY, Prosecutor v. Dusko Tadic aka "Dule", Trial Chamber in the Trial Chamber Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1-T, 10 August 1995, para 28.
[263] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) ICJ Reports, Order of 13 September 1993, Separate opinion of Judge *ad hoc* Lauterpacht, para. 100.
[264] Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports, Advisory Opinion of 11 April 1949, p 179.

the legislative history of the UN Charter raises doubt about the SC's authority to adopt measures that do not conform to international law.[265] It should be noted that Norway was primarily concerned with the political independence and equality of states. Its proposed amendment aimed to provide assurance regarding the "independence, territorial integrity [and] of their [states] continued existence as political entitles".[266] The aim of the Norwegian government was to thwart the SC from wielding the authority of a super-state. If one assumes that the rejection of the amendment implies the SC's leeway from international law, one must consider the *contrario* argument of the amendment: that the SC has the power to target a state's political independence and territorial integrity. But this interpretation obviously contradicts both the UN Charter and the foundation of international law.

The question remains as why is the international community striving to build their relationships based on the rule of law to ensure international social order, while at the same time, they created the SC exempt from international law, granting it unlimited powers that allow it to violate all norms in the pursuit of maintaining peace and security?

4.3.1. General International Law GIL: The Provenance of *Jus Cogens*

The incorporation of peremptory norms (*jus cogens*) into Article 53 of the Vienna Convention promised the establishment of a hierarchy in positive international law that cannot be overridden by bilateral or multilateral agreements. In the case of agreements already concluded, such norms render them null and void of legal effect. Over the course of time, the draft Articles pertaining to the responsibilities of States and International Organizations incorporated references to *jus cogens*. Additionally, international courts have frequently acknowledged instances of peremptory norms. So, as it is discernible, in the realm of international law, *jus cogens* enjoys widespread acceptance.[267] Any legal system, be it international law or any other system, cannot attain sense and sustainability without the presence of peremptory norms. These norms are intricately linked to the fundamental pillars upon which legal systems are built.[268] Hence, as long as international law exists, no agreement

[265] Rüdiger Wolfrum, "Ch. I Purposes and Principles, Article 1," in *The Charter of the United Nations: A Commentary*, ed. Bruno Simma and others, 3rd edition, Volume. I (London: Oxford University Press, 2012), 114.
[266] Documents Of The United Nations Conference On International Organization San Francisco, Volume XI (New York: United Nations Information Organizations 1945), 378.
[267] Johann Ruben Leiß and Andreas Paulus, "Article 103," in *The Charter of the United Nations: A Commentary*, 2th edition, ed. Andreas Paulus and others, Volume II (Oxford: Oxford University Press, 2002), 2119.
[268] Falsafi, *International Law of Treaties*, 405.

can cross the boundaries of *jus cogens.* Is it possible, for example, to validate and support an agreement between a group of states that disqualifies another group from concluding a treaty? Or would it be possible to ignore *pacta sunt servanda*, a fundamental norm often discussed as a ground norm by commentators[269], which lies at the root of every treaty's enforcement?

4.3.2. *Jus Cogens* and the Public Interest of the International Community

In every society, there exist regulations crafted to safeguard public values and interests. These core values and interests, which are susceptible to societal transformation and bear high status, serve as peremptory norms that cannot be disregarded. The array of international values and interests is extensive and occasionally challenging to establish a unanimous consensus upon. Nevertheless, there are certain concepts that blatantly epitomize such interests and values in international society. For instance, among the common interests is the independence of states which provides the foundation for international law. International law applies exclusively to a community of independent states. In addition to specific public interests discernible through the structure and nature of international law, there are other values that have been integrated into the corpus of international law in response to the evolving international community. These values revolve around humanity. An exemplification of such values is the common heritage (*res omnium communes*), which proves unresolvable through mere consensus among a coalition of states.[270]

4.3.3. The Function of *Jus Cogens* in International Law

By establishing rules of conduct, a legal system both permits and forbids, thereby defining the competence among its subjects. A legal norm serves as a criterion through which actions of legal persons are classified as either lawful or unlawful. Regardless of the development stage of any legal system, this categorization is indispensable; without it, there would be no legal system.[271] Legal systems can exist without peculiar institutions, centralized sanctions, or a well-established hierarchy of norms. However, in the absence of a clear distinction between legal

[269] Kelsen, *Pure Theory of Law*, 323-324.

[270] Article 137 of The United Nations Convention on the Law of the Sea provided: " (…) 2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. …". 1833 United Nations Treaties Series, 397, 10 December 1982.

[271] Falsafi, *International law of Treaties*, 408.

and illegal acts, fundamentally, there is no legal system. If such a distinction is not upheld, an established legal system ceases to exist. International law is *par excellence* in this regard; despite its shortcomings, it continues to function. Although international law expressly forbids specific actions, it has struggled to establish an effective sanctioning mechanism to enforce its regulations. Nevertheless, this challenge does not imply that international law is incapable of delineating the distinction between lawful and unlawful conducts. In international law, *jus cogens* and *erga omnes* serve this function. Taking this point into consideration, it is necessary to acknowledge the existence of *jus cogens* in international law restrict legal subjects from freely entering a treaty with any objective of their preference. Thus, *jus cogens* stand as a criterion for distinguishing valid agreements from invalid ones in the realm of treaties.

4.3.3.1. The Legal Effects of Jus Cogens

Article 53 of Vienna convention provided "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". A treaty of this nature would not come into existence and would not have any legal effect. In the event of its conclusion "States shall cooperate to bring to an end; no State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation".[272]

4.3.3.2. Impacts of Jus Cogens on the Security Council's Competence

The primary objective of law is to establish 'a public order of human dignity' in every national legal system.[273] Dession defined public order as "measure of peace and observance of basic value patterns of a culture upon which the fruitful pursuit of legitimate interests in the given society depends".[274] For Siegel and Vogl it is "the operations of society and the ability of people to function efficiently".[275] In the words of Walker, public order is the quality of peaceful

[272] United Nations, International Law Commission, Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), Article 41.
[273] Winston P. Nagan and Andrew R. Willard, "Lasswell/McDougal Collaboration: Configurative Philosophy of Law," in *The Philosophy of Law: An Encyclopedia*, ed. Christopher Berry Gray (New York: Garland Publishing, 1999), 482.
[274] George H. Dession, "Sanctions, Law and Public Order," *Vanderbilt Law Review* 1, no. 1 (1947): 8.
[275] Larry J. Siegel, and Joanne Marie Ziembo-Vogl, *Criminology: Theories, Patterns, and Typologies* (Belmont: Wadsworth Publishing, 2010), 426.

collective living among members of a society.[276] Any society, irrespective of the interpretation applied to the concept of public order, cannot endure threats sabotaging its structure and stability. Law is entrusted with the responsibility of protecting and ensuring the peaceful flow of life. The legal principles specifically designed to address public order are denoted *as jus cogens*. *Jus cogens* is prominently manifested in criminal law, where stringent punishments are imposed for the gravest offenses. In private law, it constrains the freedom of contract, ruling that even with mutual agreement, individuals are prohibited from forming agreements that violate *jus cogens* norms. Due to the institutionalization of law in national societies, *jus cogens* enjoy a robust sanctions regime, making it effective in penalizing perpetrators. This effectiveness is achieved through the compulsory jurisdiction of courts, which interpret and determine the legal content of *jus cogens*.[277] As a concept that enters international law from domestic law, *jus cogens* have not been well received by the international community, unlike other legal concepts such as *pacta sunt servanda* or *bona fide*. The international community is not adequately equipped to establish a hierarchical order with the priority of *jus cogens*[278], as international law lacks a specific legal mechanism that explicitly or implicitly defines examples of *jus cogens*.[279] Additionally, there is no international court with universal compulsory jurisdiction to interpret and apply *jus cogens*. Lastly, states view *jus cogens* as a challenge to their sovereignty. Nevertheless, states have recognized that their survival hinges on upholding the principles of peaceful coexistence, embodied into the international legal system and applicable to all members of the international community.[280] It is evident that international law lacks the identical mechanisms of enforcement akin to domestic legal systems but due to imperative needs, the international community reached a consensus that *jus cogens* cannot be violated. Accordingly, when states as a primary subject of international law are unable to deviate from peremptory norms, *a fortiori*, international organizations are likewise bound by the same constraint. The International Law Commission (ILC) has addressed peremptory norms

[276] David M. Walker, *Oxford Companion to Law* (London: Oxford University Press, 1980), 1015.
[277] Falsafi, *International law of Treaties*, 391-392.
[278] Prosper Weil, "Towards relative normativity in international law?." *American Journal of International Law* 77, no. 3 (1983): 423-430; Repertory of practice of United Nations organs. Supplement no. 4, volume 2, Articles 55-111 of the Charter, covering the period 1 September 1966 to 31 December 1969, p 369, at 25.
[279] Egon Schwelb, "Some aspects of international jus cogens as formulated by the International Law Commission," *American Journal of International Law* 61, no. 4 (1967): 948.
[280] Georges Abi-Saab, B. S. Murty, G. Schwarzenberger, and E. Suy. *The Concept of jus cogens in International Law* (Geneve: Carnegie Endowment for International Peace, 1967), 61-75.

in Articles 26, 41, and 53 of the Draft articles on the responsibility of international organizations. In Article 26, the ILC articulated that: "nothing in this Chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law". The term 'international organization' is employed in its comprehensive sense and covers all international organizations without any exclusion. The ILC explicitly stated that Article 26 shares the same character as what was discussed regarding State Responsibility. Consequently, there can be no valid justification in the event that an international organization fails to abide by the *jus cogens* principle.[281]

4.3.3.2.1. Jus Cogens and Article 103 of the UN Charter

Article 103 of the UN Charter provides that "[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". One may question whether *jus cogens* fall in the domain of 'obligations under any other international agreement'? It has been argued that according to the drafters, the primary aim of the Article is to ensure the effectiveness of UN's action in maintaining peace. [282] It is important to note that Article 103 does not solely speak of the decisions of the SC, but also encompasses all the UN Charter's norms, predominantly elucidated in Articles 1 and 2. Hence, any interpretation of the Article concerning the SC must align with the other principles articulated in the UN Charter. In the Repertory of Practice of United Nations Organs, the potential conflict between Article 103 and *jus cogens* was deliberated upon and participants primarily examined the Article in the context of Articles 1 and 2 of the UN Charter. According to the delegations, the mentioned Articles are considered 'uncontestable norms of international public law', and Article 103 was crafted to safeguard these norms from potential override by subsequent state treaties.[283] Interestingly, the essentiality of Article 103 was justified in light of

[281] Yearbook of the International Law Commission, report of the commission to the general assembly on the work of its s sixty-third session, vol. II, Part Two, 2001, A/CN.4/SER.A/2001/Add.1 (United Nations: New York, 2007), 75.
[282] Robert Kolb, "Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 64, no. 1 (2004): 21.
[283] Repertory of practice of United Nations organs. Supplement no. 4, volume 2, Articles 55-111 of the Charter, covering the period 1 September 1966 to 31 December 1969, 368, at 17.

the significance and importance of the Preamble, Articles 1, 2 in international law.[284] The UN Charter did not establish these norms; rather, they already existed in international law. In fact, it is widely acknowledged that certain purposes and principles articulated in the Preamble, Articles 1 and 2 of the UN Charter are unquestionably included within the rules of *jus cogens*.[285] The principles enshrined in the UN Charter are not fundamental merely due to their inclusion in this document. Their significance stems from the core values of the international community and the international legal order. The SC is tasked with responsibility of maintaining international peace and security to safeguard the norms of the UN Charter. In this context, SC is not a source of obligations but rather a guardian with the power to adopt appropriate measures that must always align with *jus cogens*, otherwise it would be a defeat of purpose. In scholarly discourse, it is generally acknowledged that if there is a conflict between the UN Charter Law and *jus cogens*, the Charter Law should leave the scene.[286] As Tomuschat reckoned: "[Article 103] does not refer to general international law. General international law reflects the consensus of the international community. On the other hand, Art. 103 is designed to override specific national peculiarities. It has a totally different purpose and would be used contrary to its meaning if applied against general international law". In the same vein, Lauterpacht, in his separate opinion in the *Genocide* case, stated that "The concept of jus cogens operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot - as a matter of simple hierarchy of norms - extend to a conflict between a Security Council resolution and jus cogens. Indeed, one only has to state the opposite proposition thus - that a Security Council resolution may even require participation in genocide - for its unacceptability to be apparent". [287] Article 103 aims to excel the expediency of the UN Charter by removing obstacles in 'ordinary treaty norms' that could thwart the fulfillment of obligations arising from the UN Charter[288], while concurrently adhering to the requirements of *jus cogens*. Therefore, Article 103 should be interpreted in favor of *jus cogens*.

[284] Ibid, 369, at 27
[285] Repertory of practice of United Nations organs. Supplement no. 4, volume 2, Articles 55-111 of the Charter, covering the period 1 Sept. 1966 to 31 Dec. 1969, p 369, at 27.
[286] Johann Ruben Leiß and Andreas Paulus, "Article 103," 2119
[287] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Order of 13 September 1993, Separate opinion of Judge ad hoc Lauterpacht, para 100.
[288] Johann Ruben Leiß and Andreas Paulus, "Article 103," 2123.

4.3.3.2.2. Divergent Functions of Article 103 and Jus Cogens

Due to the absence of a hierarchical structure in the formal international legal sources, states may establish new obligations, either through treaties or customary rules, thereby superseding prior commitments. Accordingly, through subsequent legal actions, states can neutralize the legal effects of the UN Charter norms or SC's decisions[289] and thereby stripping the UN of its teeth and subjecting it to the similar fate of the League of Nations. Hence, the framers devised a mechanism to guarantee the enforcement of the UN Charter by emphasizing the priority of obligations arising from it. The ILC made it clear that "[t]he lower-ranking rule is merely set aside to the extent that it conflicts with the obligation under Article 103. (…). [T]he very language of Article 103 makes it clear that it presumes the priority of the Charter, not the invalidity of treaties conflicting with it."[290] Therefore, Article 103 functions merely as rule of conflict and lacks the authority to nullify any legal measures that are in contradiction with the UN Charter.[291] It simply denotes primacy. The Article does not grant *carte blanche* to the SC, nor does it empower the UN's organs to invalidate agreements between states. In contrast, *jus cogens* pertain to merits and render any legal action contrary to the core values of international law, including the UN system, null and void. Article 103 grants this privilege to the UN, in order to enable the organization to uphold the very norms (Articles 1, 2 and the Preamble) on which its establishment rests. In the preamble, 'faith in fundamental human rights' is reaffirmed. As part of the UN's purposes, Article 1 speaks of 'equal rights', 'self-determination of peoples', and respect for 'freedoms for all without distinction as to race, sex, language, or religion'. As one of the prerequisites for achieving the purposes of the UN, Article 2 stipulates the prohibition of the use of force. All these norms are *jus cogens* and *erga omnes* in nature.[292]

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[289] Andreas Paulus, "Jus cogens in a time of hegemony and fragmentation-an attempt at a reappraisal," *Nordic Journal of International Law* 74, no. 3 (2005): 319.

[290] Koskenniemi, Matti, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission,
Document A/CN.4/L.682 and Add.1 (2006), 170, para 333.

[291] Paulus, "Jus cogens in a time of hegemony and fragmentation-an attempt at a re-appraisal," 317; Andreas Paulus, ed. *The Charter of the United Nations: A Commentary*, Volume 1 (Oxford: Oxford University Press, 2002), 1297-1298; Rain Liivoja, "The scope of the supremacy clause of the United Nations Charter," *International and Comparative Law Quarterly* 57, no. 3 (2008): 584.

[292] The following norm was included in the list of non-exhaustive jus cogens provided by the ILC at its seventy-first session: "(a) The prohibition of aggression; (b) The prohibition of genocide; (c) The prohibition of crimes against humanity; (d) The basic rules of international humanitarian law; (e) The prohibition of racial discrimination and apartheid; (f) The prohibition of slavery; (g) The prohibition of torture; (h) The right of self-determination". Report of the International Law Commission on the Work of Its Seventy-First Session, UN GAOR, 74th Sess.,

Moreover, the supremacy granted to the SC's decisions by Article 103 is based on the widely accepted assumption that the SC operates within its authorized competence. Accordingly, "if the Security Council adopts a resolution beyond its legal authority (ultra vires), no obligation is generated under the resolution"[293] Similarly, Kitharidis pointed out, "where the UNSC breaches a permissive norm, there can be no conflict capable of allying under Article 103; ultra vires resolutions cannot exist within obligations that may fall under the scope of Article 103. Ultra vires resolutions cannot authorize states to violate their other international law obligations, (…)."[294] As a result, there is no clash between Article 103 and *jus cogens*, and any action taken by the SC must be filtered through the prism of *jus cogens*.

4.3.3.2.3. Article 103 and the Principle of Nemo Dat Quod Non Habet

As a final point, it is worth examining the question of whether states can, in principle, endow the SC with the power to supersede *jus cogens*. Article 103 of the UN Charter does not entail *jus cogens*; it merely emphasizes the primacy of Charter law- the SC's decisions- in relation to other international agreements. The central question in this context is whether a SC's decision can be categorized as *jus cogens* or not. Indeed, the SC cannot be equated with the 'international community as a whole', given its composition of fifteen members, and even unanimous participation of all members is not obligatory for decision-making.[295] Moreover, in the discourse concerning examples of *jus cogens*, the ILC expressed that it is on states to 'establish or recognize peremptory norms'.[296] Consequently, the SC is not qualified to establish *jus cogens*. One could make the argument that the SC may serve as a representative of the international community of states, thus potentially justifying its ability to transgress *jus cogens*

Supp. No. 10, at 1-2, paras. 1, 3, UN Document A/74/10, (2019) 147; Also, in Draft Articles on State Responsibility, Commentary on Article 40, paras. 4-6 in Official Records of the General Assembly, Fifth-sixth Session, UN Document, A/56/10 (2001), 283-284.

[293] Kjetil Mujezinovic Larsen, *The human rights treaty obligations of peacekeepers* (Cambridge: Cambridge University Press, 2012), 323; Alexander Orakhelashvili, "The impact of peremptory norms on the interpretation and application of United Nations Security Council resolutions," European *Journal of International Law* 16, no. 1(2005): 69.

[294] Sophocles Kitharidis, "The Power of Article 103 of the un Charter on Treaty Obligations: Can the Security Council Authorise Non-Compliance of Human Rights Treaty Obligations in United Nations Peacekeeping Operations?," *Journal of International Peacekeeping* 20, no. 1-2 (2016): 122; Orakhelashvili, "The impact of peremptory norms on the interpretation and application of United Nations Security Council resolutions," 69.

[295] Charter of the United Nations, 1945, Article 27.

[296] the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February– 21 March 1986, UN Document A/CONF.129/16/Add.1, Vol. II (New York, United Nations publication: 1995), 39.

in accordance with Article 103 on their behalf. In this regard it is worth to recall Article 53 of the VCLT which bolds two characteristics of *jus cogens*: they are recognized by the international community of states as a whole, and no deviation from it is permissible. The article firmly establishes that any violation of these peremptory norms is entirely prohibited. It remains ambiguous how states can delegate powers to the SC that they inherently lack. The matter was deliberated upon during the ILC's fifty-eighth session, and leaded to the following conclusion: "[i]f United Nations Member States are unable to draw up valid agreements in dissonance with jus cogens, they must also be unable to vest an international organization with the power to go against peremptory norms. Indeed, both doctrine and practice unequivocally confirm that conflicts between the United Nations Charter and norms of jus cogens result not in the Charter obligations' pre-eminence, but their invalidity."[297] Moreover, the ILC noted that although international organizations enjoy independent legal personality, they are creations of states, and it is challenging to comprehend that states could bypass adherence to *jus cogens* by establishing an international organization.[298] There must be a prerequisite that an international organization cannot violate peremptory norms, as any such act would be *ultra vires*.[299] The UN and its Member States are equally bound by the norms of international law, and are required to comply with its obligations.[300] In this regard, Judge Fitzmaurice, in his dissenting opinion in the Namibia Advisory Opinion expressed that "the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual members are." [301] In line with this, Liivoja wrote that "if jus cogens norms are, by definition, norms from which no derogation is possible, it would be nonsensical to stipulate that Security Council resolutions are an exception-this argument would involve a complete discarding of the very concept of jus cogens."[302] In the *Kadi* case the CJEU spelled out that:

[297] International Law Commission, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006, A/CN.4/L.682 (2006), 176, para 346.
[298] United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Volume II, 1986, p 39.
[299] Orakhelashvili, "The impact of peremptory norms on the interpretation and application of United Nations Security Council resolutions," 68.
[300] 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?," *International & Comparative Law Quarterly* 46, no. 2 (1997): 320.
[301] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) ICJ Reports, Advisory Opinion of 21 June 1971, Dissenting Opinion by Judge Gerald Fitzmaurice, p 294, para. 115.
[302] Liivoja, "The scope of the supremacy clause of the United Nations Charter," 610.

"International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of jus cogens. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community." [303]

4.3.3.2.4. The Practice of International Courts

Case concerning Nada v. Switzerland: After the bombings of the US embassies in Nairobi (Kenya) and Dar es Salaam (Tanzania) on 7 August 1998 by Osama bin Laden and his network, the SC passed Resolution 1267 (1999) under Chapter VII of the UN Charter. This resolution was designed to impose sanctions against Taliban and to form a committee comprising all SC members to oversee its implementation (known as the Sanctions Committee). On 2 October 2000, in accordance with the aforementioned Resolution, the Swiss Federal Council (the federal executive) enacted an Ordinance titled 'Enforcing Measures Against the Taliban'. Subsequently, on 19 December 2000, the SC expanded sanctions to include Osama bin Laden, the al-Qaeda organization, and high-ranking officials and advisers of the Taliban through Resolution 1333. After the adoption of Resolution 1333 (2000), the Swiss government revised the Taliban Ordinance on 11 April 2001, prohibiting entry and transit through Switzerland for unspecified individuals and entities. Mr. Nada (the applicant) was later included in the Sanctions Committee's list on 9 November 2001. Subsequently, his name was appended to the list in an annex to the Taliban Ordinance on 30 November 2001. On 16 January 2002, the SC passed Resolution 1390 (2002), initiating a prohibition on entry and transit for "individuals, groups, undertakings and entities associated with them [Taliban], as referred to in the list created pursuant to Resolutions 1267 (1999) and 1333 (2000)". From May 1, 2002, the Taliban Ordinance was modified to include a ban on entry and transit for everyone mentioned in Annex 2, including the applicant. The applicant claimed that this ban, imposed after his name was added to the list in the Federal Taliban Ordinance, violated his freedom (Article 5) and his rights to privacy, family life, honor, and reputation (Article 8) when it came to entering or passing through Switzerland. Furthermore, he contended that this ban constituted not only mistreatment as per Article 3 but also a violation of his freedom to practice his religion and beliefs (Article

[303] Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, judgment of the Court of first instance, Case T-315/01, 21 September 2005, para 230

9), along with an absence of adequate remedies for these grievances (Article 13). Prior to being taken to the European Court of Human Rights, the matter was brought before the Federal Court of Switzerland. The latter, grappled with a challenging question: in situations where conflicts emerge between SC resolutions and the protections outlined in the European Convention on Human Rights and the International Covenant on Civil and Political Rights, which side should prevail. Despite the Court's initial stance, invoking Article 103 of the UN Charter and emphasizing the need to harmonized enforcement of UN sanctions, the European Court of Human Rights subsequently ruled that the obligation to comply with the SC's resolutions was constrained by *jus cogens* norms, such as the right to life, safeguard against torture and cruel or degrading treatment, prevention of slavery, prohibition of collective punishment, the principle of individual criminal responsibility, and the non-refoulement principle.[304]

Case concerning Yassin Abdullah Kadi. In the process of executing SC Resolutions, [305] Kadi's assets (the applicants) were frozen following European Community regulations. The Court of First Instance reiterated *jus cogens* as a fundamental principle of international law, from which no deviation is allowed, and emphasized that these norms are "binding on all subjects of international law, including the bodies of the United Nations".[306] In addition, the Court held that although the "resolutions of the Security Council have binding effect: they must respect the fundamental peremptory provisions of jus cogens".[307] At the appeal stage, the European Court of Justice[308] indirectly tackled the matter, and stated that the Court lacks the power to conduct a judicial review of SC resolutions, however, no legal rule prevents the Court to assess whether the states' execution of the resolution is consistent with the norms of *jus cogens*. The Court held that:

> *"it is not for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the*

[304] Nada v Switzerland, Merits and just satisfaction, European Court of Human Rights; Grand Chamber, App no. 10593/08, 12th September 2012, paras. 45-47.
[305] Resolutions (S/RES/1267) 15 October 1999, (S/RES/1333) 19 December 2000, and (S/RES/1390) 16 January 2002.
[306] Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, judgment of the court of first instance, Case T-315/01, 21 September 2005 , para. 226.
[307] Ibid. para. 230
[308] For the interaction between international law and the European Court of Justice, look at: Ádány, Tamás Vince. "International Law at the European Court of Justice: A Self-Contained Regime or an Escher Triangle" *Hungarian Yearbook of International Law and European Law* 1 (2013): 165-179.

compatibility of that resolution with jus cogens, but rather to review the lawfulness of the implementing Community measure". [309]

4.3.2. General International Law: The Provenance of *erga omnes*

As *erga omnes* pertain to the common interest of the international community, the obligations arising from it are enforceable against any subject of international law, regardless of whether the consent of the subject has been expressed or not.[310] *Erga omnes* norms are emanate from GIL[311] and because of this reason they are associated with *jus cogens*. While the latter protects the merit of GIL within the realm of treaties, the former aims to achieve the same in other areas of international law by raising the issue of responsibility for the violation of correlative obligations.

4.3.2.1. Erga Omnes in International Law: An Historical Overview

International courts and tribunals have invoked communitarian norms long before the articulation of *erga omnes* in contemporary international instruments.[312] Before the ICJ's *dictum* in the Barcelona Traction case, attempts had been made to regulate the common interests of states through treaties, ensuring that rights and obligations could potentially be applicable to all states or, at the very least, to a broader cycle of states than those involved in the specific treaty.[313] The cases of the Aaland Islands and Wimbledon are *par excellence* of this effort.

The Aaland Islands. For six centuries, Finland had been a region in Sweden. But, after the war between Sweden and Russia in 1808-1809, Finland became independent from Sweden.

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[309] Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, judgment of the court (Grand Chamber), Cases C-402/05 P and C-415/05 P, 3 September 2008, para. 4.

[310] Gaetano Arangio-Ruiz, Fourth Report on State Responsibility, Vol. II (1), Year book of ILC 34, A/CN.4/444/Add.1 (Geneva: United Nations, 25 May 1992), para. 92; Robert Ago, Fifth Report on State Responsibility, Vol. II (1), Yearbook of ILC 29, A/CN.4/SER.4/1976/Add. 1 (Part 2), (Geneva: United Nations, 3 May-23 July 1976), para. 89; Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge: Cambridge University Press, 2015), 352-353; Antonio Augusto Cançado Trindade, "Jus Cogens: The Determination and The Gradual Expansion of Its Material Content in Contemporary International Case-Law," *Revista do Instituto Brasileiro de Direitos Humanos* 9, no. 9 (2009): 6.

[311] Christian J. Tams, *Cambridge Studies in International and Comparative Law: Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005), 100, 114, 121-122.

[312] James Crawford, "Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts," in *From Bilateralism to Community Interest: Essays in honour of Judge Bruno Simma*, ed. by Ulrich Fastenrath and others (Oxford: Oxford University Press, 2011), 21.

[313] Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Oxford University Press, 1997), 41.

Before this independence, the Aland Islands were under Finland's administration, and they continued to be a part of Finland after the separation. The Aland Islands are located in the northern Baltic Sea, between Finland and Sweden, near the Gulf of Bothnia. Historically, these islands were under Swedish ownership until 1809, after that they belonged to Russia until 1917, and since 1917, they have been an autonomous Swedish-speaking district under Finnish sovereignty.[314] The Aland Islands hold strategic and geopolitical importance for both Sweden and Finland, as well as major military powers, to control over the region. During negotiations involving Britain, France, and Russia, the Aland Islands were demilitarized according to the Paris Convention of 30 March 1856. This agreement was later integrated into the Paris Peace Treaty of 1856, which marked the end of the Crimean War. With this annexation, the Convention gained greater strength as well as broadened the parties and made it binding upon the other parties to the Peace Treaty, namely Austria, Prussia (Germany), Sardinia (Italy), and the Ottoman Empire (Turkey).[315] According to the Convention, parties are forbidden from fortifying or establishing military or naval facilities on the Aland Islands. Finland's independence posed a significant question about validity of the 1856 Convention. The Finnish government argued that agreements made prior to their independence are divest of any legal force for Finland, and hence, Finland decline to recognizes the demilitarization obligations outlined in the 1856 Convention as legally binding upon its nation. The Swedish government, on the other hand, regarded the obligation of the 1856 Convention as a servitude, and therefore, binding on Finland. In 1920, a Commission of Jurists was established by the League of Nations to determine the legal effect of the Convention on Finland. According to the Commission, the 1856 Convention is still valid and has been established in the 'European interest', therefore, every interested state is entitled to ask for the implementation of the Convention. Consequently, any state that has control over the Aland Islands is subject to its provisions.

It is crucial to note that that Russia even after recognizing Finland, remained obligated to adhere to the convention. In addition, Sweden had the right to demand Finland's compliance with the Convention, despite Finland not being a party to it. The legal experts did not rely on principle of *res inter alios acta or quid pro quo* in international law; instead, they asserted that

[314] Lauri Antero Hannikainen, "The continued validity of the demilitarised and neutralised status of the Åland Islands," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 54, no. 3/4 (1994): 614.
[315] Holger Rotkirch, "The Demilitarization and Neutralization of the Åland Islands: A Regime'in European Interests' Withstanding Changing Circumstances," *Journal of Peace Research* 23, no. 4 (1986): 360.

the Convention bound Finland regardless of its non-party status. According to the Commission, the demilitarization obligations of the islands, "(…) laid down in European interests. They constituted a special international status relating to military considerations, for the Aaland Islands. It follows that until these provisions are duly replaced by others, every State interested has the right to insist upon compliance with them".[316] The Commission connected demilitarization with European interests and concluded that the Convention applies to non-state parties as well. However, the Commission did not provide further details on the concept of European interests. Regarding the potential equivalence of European interests to *erga omnes*, Ragazzi noted "(…) that the obligations relating to the demilitarization of the Aaland Islands exceed mere considerations of reciprocity and affect a circle of States wider than the contracting parties; the difference is that these obligations concern a number of directly interested States, and not *all* States as is the case of obligations *erga omnes*."[317]

Wimbledon Case**.** In the midst of a war with Russia, the British steamship (named Wimbledon), owned by a French corporation, was tasked with transporting advanced supplies and ammunition to Poland. Germany declined to allow the ship to pass through the Kiel Canal due to its location within German territory. Germany, having declared a stance of neutrality in the war, argued that permitting the passage would compromise its neutral position. On the other hand, opponents argued that Article 380 of the Treaty of Versailles, a binding agreement for Germany, guarantees the right to free passage. The dispute was taken to the Permanent Court of International Justice (PCIJ) by Britain, France, Italy, and Japan against Germany. The goal was to determine whether the Kiel Canal and its status should remain free and open to vessels of commerce from all nations at peace with Germany under terms of complete equality. Although Italy and Japan were not individually injured states, they were recognized as standing parties by the PICJ. The PICJ held:

> *"… each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags".*[318]

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[316] Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question, League of Nations-Official Journal, Special Supplement No 19. London: Harrison & Sons, 1920.
[317] Ragazzi, *The concept of international obligations erga omnes*, 33.
[318] Case of the SS 'Wimbledon' (Great Britain and others v Germany) PCIJ Reports, Judgment of 17 August 1923, Series A, No 1, 15, 33.

In this case, the PCIJ by making bridges between the freedom of navigation and the interests of the applicants, ruled that because the Kiel Canal 'has been permanently dedicated to the use of the whole world',[319] Italy and Japan have an interest in the Kiel Canal and may therefore present themselves as standing states with the right to request compliance with the international treaties. The PCIJ, however, did not clarify precisely what it meant by dedication.

4.3.2.1. Erga omnes in positive international law

Certain scholars contest the existence of *erga omnes* obligations in positive international law. Accordingly, they argue that the ICJ's mention of *erga omnes* in the Barcelona Traction case is divest of any legal consequences. For Hugh Thirlway, *erga omnes* obligations are purely theoretical, and he considers the ICJ's *dictum* to be nothing more than an 'empty gesture'.[320] Alfred Rubin viewed *erga omnes* obligations as stemming from "the wishful thinking of some publicists who have no money to spend, no troops to send, no children likely to in a military action".[321] Having been said that, it is generally agreed that positive international law recognizes the existence of *erga omnes*. The concept of *erga omnes,* akin *to jus cogens,* is no longer a fantasy notion and has firmly secured its position in positive international law. In the Barcelona Traction case, the ICJ established the existence of obligations owed to the international community as a whole, known as *erga omnes* obligations. The ICJ announced:

> *33. "(…) an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, al1 States can be held to have a legal interest in their protection; they are obligations erga omnes.*
>
> 34. Such obligations derive, for example, in contemporary international law, from *the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into*

[319] Ibid.
[320] Thirlway, Hugh. "The Law and Procedure of the International Court of Justice 1960-1989: Part One." *British Year Book of International Law* 60, no.1 (1989): 100.
[321] Alfred Rubin, "Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations erga omnes?." in *The Future of International Law Enforcement. New Scenarios - New Law?: Proceedings of an International Symposium of the Kiel Institute of International Law March 25 to 27, 1992*. Ed. Jost Delbrück (Berlin: Duncker & Humblot, 1993), 172.

the body of general international law others are conferred by international instruments of a universal or quasi-universal character."[322]

The rules of *erga omnes* found application in subsequent cases adjudicated by the ICJ such as Namibia, Nicaragua, East Timor, Genocide, Gabekov-Nagymaros, Armed Activities (Congo vs. Rwanda), Israeli Wall and the Chagos Islands. Furthermore, compilations of international instruments incorporate the rules of *erga omnes*.[323] It is worth mentioning, *inter alia*, the work of ILC regarding the international responsibility of states and international organizations. The Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) provided that: 'Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (b) the obligation breached is owed to the international community as a whole.'[324] The Draft Articles on the Responsibility of International Organizations (2011) elucidates that the obligations these entities can undertake also include those owed to the international community as a whole[325], and in terms of invoking the responsibility of an international organization, any state or international organization as an injured party may to do so if the breach of an obligation is owed to the international community as a whole.[326]

4.3.2.3. Erga omnes Definition

From the Barcelona Traction case onwards, there has been an intense debate surrounding the definition and content of *erga omnes*. In their study, scholars attempted to identify distinct features of *erga omnes* that differentiate them from other international obligations. In Zemanek's view, *erga omnes* norms serve to safeguard common values or interests among a diverse set of states.[327] James Crawford named *erga omnes* 'communitarian norms' and defined them as "multilateral rights and obligations, established in the interest of and owed to the

[322] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962) ICJ Reports, Judgment of 5 February 1970, paras. 33-34.
[323] For instance, Article 8 of Convention to Suppress the Slave Trade and Slavery, Article 38 of Convention Relating to the Status of Refugees, Article 22 of International Convention on the Elimination of All Forms of Racial Discrimination, and Article 33 of European Convention for the Protection of Human Rights and Fundamental Freedoms.
[324] article 48(1)(b). International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.
[325] Ibid, Article 33.
[326] Ibid, Article 43.
[327] Karl Zemanek, "New Trends in the Enforcement of erga omnes Obligations," *Max Planck Yearbook of United Nations Law* 4, no. 1 (2000): 6.

international community as a whole, entailing a recognized legal interest of each of its members to invoke compliance with it".[328] In Ragazzi's words, *erga omnes* imply "a legal interest is deemed to be vested in all States by operation of general international law". [329] According to Linderfalk, *erga omnes* obligations are owed by a legal subject to the international community as a whole.[330] Posner reckoned "*erga omnes* norms facilitate collective enforcement of norms that create public goods …".[331] Tzevelekos wrote that "it is argued here that obligations *erga omnes* do develop a certain type of sui generis material hierarchy, which is of course closely linked, and indeed derived from their material importance, that is to say, from the fact that they have been set to protect important societal values (human rights) or common interests (environmental protection) that, inevitably, affect everyone's life within the community".[332]

A common aspect of any exploration of this concept involves its opposability to all. Prior to the ICJ's passage, the term 'being against all' was a topic of discussion in the field of treaty law, denoting obligations that are opposable to all parties (*erga omnes partes*). The work of the ILC on the Law of Treaties indicated that treaties could be categorized into three clusters based on the nature of the obligations they encompass: a) reciprocal treaties, which "consist of a mutual and reciprocal interchange of benefits and concessions between the parties"; b) interdependent treaties, which, by reason of the character of the treaty, are necessarily dependent on a corresponding performance by all the other parties"; and c) absolute treaties, in which the performance of one party is not dependent on the performance of the other party.[333] This categorization heavily depends on reciprocity. When the criteria of give and take govern the obligations, the given treaty will be reciprocal or interdependent; otherwise, it will be absolute or integral. The obligation involved in all three clusters is against all (*erga omnes*), but what makes difference lies in the nature of the obligation. A question may arise as to whether

[328] Crawford, Responsibility for breaches of communitarian norms: an appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, cit., 229.
[329] Ragazzi, *The concept of international obligations erga omnes*, 24.
[330] Ulf Linderfalk, "International Legal hierarchy revisited–The Status of obligations Erga omnes," *Nordic Journal of International Law* 80, no. 1 (2011): 10.
[331] Eric A. Posner, "Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law," *Journal of Institutional and Theoretical Economics* 165, no. 1 (2009):134.
[332] Vassilis P. Tzevelekos, "Revisiting the Humanisation of International Law: Limits and Potential: Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation," *Erasmus Law Review* 6, no. 1 (2013): 71.
[333] Yearbook of the International Law Commission 1957, Volume II : documents of the 9th session including the report of the Commission to the General Assembly, A/CN.4/SER.A/1957/Add.1 (New York: United Nations, 1957), 53.

erga omnes in the ICJ's passage merely enjoy the characteristic of being opposable against all or if the passage signifies a broader implication. In this regard, Tams pointed out that " 'Erga omnes' could notably be taken as a reference to the circle of States bound by the primary obligation in question. As a consequence, an obligation would be 'owed to all others' (or 'erga omnes') if it applied between all States. A brief glance at the passage as a whole however reveals that, in Barcelona Traction, the term erga omnes was not used in this sense. Had the Court merely wished to describe the circle of States between which the obligation applied, all obligations of general international law would qualify as obligations erga omnes, and the Barcelona Traction dictum would hardly deserve much attention."[334]

While it may be argued that only important treaties with large parties are *erga omnes*, still the question remains on what legal basis can a treaty impact third parties and be opposable to all without their consent? If the ICJ intended to refer to *erga omnes partes*, it does not entail a novel achievement in international law, as it already existed. However, it appears that the ICJ aimed to introduce a fresh interpretation of *erga omnes,* aligning it directly with *jus cogens* in terms of its origin, legal consequences, and instances in positive international law. The author contends that the *erga omnes* concept cited by the ICJ pertains to GIL and functions as a secondary rule safeguarding GIL norm.

4.3.2.3.1. The Constituent Elements of *Erga Omnes*

In order to categorize an obligation under the rubric of *erga omnes*, the ICJ in the Barcelona Traction case outlined the following criteria: a) It is the obligation of a state towards the international community as a whole; b) It concerns all states; c) The importance of the rights involved; d) There is a legal interest in protecting it for all states. Among these features, three key terms are identifiable and need clarification: international community, importance of the rights and legal interest.

The International Community. In addition to the ICJ's ruling, the term 'the international community' appears in the Draft Articles regarding the responsibilities of states and international organizations, the Preamble to the statute of the International Criminal Court (ICC), and the Vienna Convention on the Law of Treaties. The precise definition of this term remains ambiguous in all these texts, except to some extent in the Preamble of the ICC.

[334] Tams, *Cambridge Studies in International and Comparative Law: Enforcing Obligations Erga Omnes in International Law*, 102.

Upon initial consideration, the term 'the international community' seems to refer to states. If interpreted this way, it implies that states are the originators of *erga omnes* and *jus cogens*. Following this interpretation, when grave crimes occur, states would be the only entities perceived as injured parties in such situations. Additionally, if states are considered the creators, it implies that they could potentially have the authority, for example, to establish new *erga omnes* obligations permitting acts such as slavery or genocide, or to impose reservations on obligations classified as *erga omnes*. However, the human rights committee does not endorse this interpretation. The Committee stated that.

> *"… the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. (…) The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant."* [335]

In two ways, the Committee separated human rights obligations from ordinary state obligations. First, the Committee shifted from considering the will of states parties to assessing the 'objects and purposes' of the ICCPR as the foundation for interpretation.[336] Consequently, the Committee excluded the incorporation of agreements made between parties in the interpretation of the Covenant. Although the absence of objections from treaty parties when making a reservation is typically viewed as an indication of approval and validity, the Committee asserted that concerning human rights obligations, the acceptance by the parties does not validate the reservation in question. In the Genocide advisory opinion, when confronted with a conflict between the practice of making reservations, which symbolizes the exercise of sovereignty, and the humanitarian nature of human rights conventions, the ICJ prioritized the humanitarian aspect and gave it greater weight. The ICJ held:

> *"It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application*

[335] General comment adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights. CCPR/C/21/Rev.1/Add.6, 11 November 1994.
[336] The ICJ applied the same test in the Genocide case.

of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention". [337]

This perspective evinces that human rights conventions are not founded on or tied to sovereignties in any way. As the ICJ clarified

> *"The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law". (...). The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis".* [338]

The general comment and the advisory opinion imply that if states lack the authority to approve a reservation which has restricted legal consequences, *a fortiori*, they should not be permitted to enter into a treaty allowing human rights violations even if a majority agrees through consensus. When analyzing human rights treaties, it is essential to note that states do not establish human rights. Instead, human rights treaties represent inherent entitlements that states are obligated to uphold for their people. The purpose of these treaties is to arrange collaboration among states, [339] ensuring the respect and implementation of human rights. In this regard, ICJ clarified that

> *"the principles underlying the Convention [genocide] are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".* [340]

Taken together, these premises indicates that the term "international community" does not refer to sovereignties.

The question remains, nevertheless: if sovereignties do not constitute the international community, then to whom does the term refer? In this context, the Preamble of the Statute of the ICC is helpful in addressing this issue. The Preamble of the ICC's Statute begins by affirming humanity as its primary goal, and evoking the historical suffering, pain, and oppression endured by human beings. Subsequently, the Statute defines the ICC as an

[337] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports, Advisory Opinion of 28 May 1951, 24.
[338] Ibid 23- 24.
[339] Ibid, 23.
[340] Ibid.

institution created to prosecute 'the most serious criminal offenses of concern to the international community as a whole'.[341] While the precise definition of *erga omnes* might be a topic of debate, there is a unanimous agreement on certain examples of *erga omnes*, such as the prohibition of genocide, slavery, and racial discrimination, all of which also fall under *jus cogens*. All these instances exclusively relate to human beings. There is no doubt that the most serious crimes victimize humans, not states. Therefore, the term 'international community' signifies humanity, and indicates that *erga omnes* obligations are owed to humanity as the essence of the international community.

Concern of All States. According to the ICJ's passage, *erga omnes* obligations concern all states due to the 'very nature of' these obligations. The focal question at this point is what is of concern to all states in this context.

The term 'international community as a whole' cannot be contended the reference point for what concerns all states. This assertion is grounded in the preceding sentences, which were utilized to categorize international obligations into two distinct types: one pertaining to the obligations of a state to another state and the other to the international community as a whole. In the judgment, it was, then, stated that the fundamental reason for the concern of all states lies in the 'very nature' of these obligations. In legal discourse, when a legal matter pertains to a legal entity, it unequivocally involves the matter of rights and obligations. Therefore, the most plausible interpretation of the phrase 'concern of all states' implies that *erga omnes* obligations are universally binding upon all states or the rights that every state is entitled to.

Another implication of the phrase 'concern to all' is associated with the scope of *erga omnes*, which accentuates their universal applicability.[342] This aspect was reaffirmed in the case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, where the ICJ highlighted the universality of *erga omnes* obligations in international law.[343] Although universality serves as an indicative measure, relying solely on its

[341] Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9.
[342] Crawford, "Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts," 229.
[343] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) ICJ Reports, Judgment of 11 July 1996, para. 31.

application is insufficient to identify *erga omnes* obligations.[344] For instance, a coastal state has the prerogative to establish rules concerning its territorial sea or Exclusive Economic Zone, which are opposable to all, but, these rules do not qualify as *erga omnes*.

The Importance of the Involved Rights. The most challenging aspect of *erga omnes* obligations lies in the importance of the rights involved, a factor intrinsically linked to their merit. The ICJ stressed the importance of specific rights and promised the potential development of a hierarchical structure among rights. However, the ICJ did not provide any guidance on how to identify or recognize these specific rights. Thus, this issue remains ambiguous and lacks clarity in the domain of international law.

Erga omnes obligations embrace importance because they are directed towards preserving 'the fundamental values of the international community'.[345] *Erga omnes* are of great importance to Crawford because they represent 'the common interests of the international community as a whole'.[346] Tams and Tzanakopoulos believe that *erga omnes* are 'special set of rules protecting fundamental values'.[347] However, despite all the discussions, the term 'importance of rights' is vague, and one may question what the criteria are for determining which rights are important. Tams suggests two methods for identifying important rights in his book: the material method and the structural method. In the latter model, which is based on the Barcelona Traction passage, an obligation is *erga omnes* if it is neither reciprocal nor bilateral.[348] According to his analysis, this approach lacks credibility as it overlooks the 'Court's frequent references to rights' and, additionally, rested on a simplistic interpretation of multilateral obligations.[349] He elaborates that it also unduly broadens the scope of *erga omnes* to accommodate absolute obligations (including the duty of states to harmonize national laws, to prohibit specific forms of conduct, or to adopt other forms of conduct within their respective jurisdictions) and interdependent obligations (such as demilitarization of specific regions or a disarmament agreement among a

[344] Giorgio Gaja, "Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts," in *International crimes of state: a critical analysis of the ILC's draft article 19 on state responsibility* ed. Joseph Weiler (Boston: Walter de Gruyter, 2011), 153.
[345] Giorgio Gaja (Rapporteur), Obligations Erga Omnes in International Law, Fifth Commission Obligations and Rights Erga Omnes in International Law, Justitia Et Pace Institut De Droit International, Krakow Session, 2005.
[346] James Crawford, *The International Law Commission's articles on state responsibility: introduction, text and commentaries* (Cambridge: Cambridge University Press, 2002), p. 244, para. 7.
[347] Christian J. Tams and Antonios Tzanakopoulos, "Barcelona traction at 40: the ICJ as an agent of legal development," *Leiden Journal of International Law* 23, no. 4 (2010): 792.
[348] Tams, *Enforcing obligations erga omnes in international law*, 129.
[349] Ibid, 131.

group of states), whereas none of these obligations meet the criteria for being *erga omnes*.[350] Based on the material method, an obligation may be deemed if it protects important values.[351] He concluded that, despite its widespread acceptance, the material approach has proven extremely challenging to apply in practical scenarios due to its dependence on the inherently vague and imprecise concept of 'importance' in the context of international obligations.[352] In demonstrating the limitations of the material method, Linderfalk's perspective is noteworthy. When employing this approach, he pointed out that states must first establish a consensus on prioritizing specific values and interests before determining the obligations to be imposed for protection.[353] In light of this rationale, Linderfalk concludes that "the explanation of the assumed superior status of norms expressing obligations erga omnes would then lie not in the values and interests protected by those norms but in the priorities made by international law-makers among the values and interests protected by international law".[354] He furthered that as states evidently have varying criteria for evaluating a norm's importance, reaching a consensus on the specific criteria to be employed in identifying important interests and values becomes impossible.[355] Concerning the recognition of important values and interests, Linderfalk raised a fundamental question: '[m]ore important for whom?'. In reply, he made reference to states.

The author of this thesis concurs with Linderfalk's question but disagrees with the provided answer. It is imperative to recall that *erga omnes* obligations are owed to the international community as a whole. Consequently, the important values and interests in question revert to the international community as a whole. Thus, it is the international community that ultimately determines which values and interests enjoy higher importance. As previously analyzed, the international community functions to represent humanity and the values that are associated with it. In this context, rights inherently connected to human existence and dignity carry paramount importance, and any violation of these rights would be deemed intolerable by the international community.

It has been argued that if human rights are regarded as viable candidates for classification as important rights in the sense of the passage, owing to their inherent indivisibility, then all human

[350] Ibid, 132-133.
[351]Ibid, 129.
[352] Ibid.
[353] Linderfalk, "International Legal hierarchy revisited–The Status of obligations Erga omnes," 8.
[354] Ibid.
[355] Ibid, 9.

rights norms ought to be categorized as *erga omnes* obligations, while there is no unanimous consensus on this submission.[356] While it is true that not all human rights are currently recognized as *erga omnes* obligations in international law, this fact does not impinge the author' submission. To illustrate this perspective, the author intends to draw upon a principle from the realm of international responsibility law. In the law of international responsibility, justifying wrongful acts does not absolve the wrongful act itself but only eliminates the subsequent legal consequences. In this realm, there are also certain wrongful acts for which their commission can never be justified under any circumstances. A comparable argument can be extended to specific sets of human rights norms that demand unwavering respect irrespective of the prevailing circumstances. These rights adhere to a policy of zero tolerance, where no justification is deemed acceptable. In the event of a violation, swift corrective action should be taken to promptly rectify the breach. The ICJ described this body of human rights as "the moral and humanitarian principles"[357],"essential principles of contemporary international law"[358], and "the preservation of an element of international order".[359] Considering this body of human rights as *erga omnes* would not allow the violation of other rights; but rather it merely the matter of allocating sufficient time for the situation to be rectified in accordance with the relevant rights. Categorizing specific human rights as *erga omnes* does not jeopardize their indivisibility. Furthermore, the option to include new norms under the *erga omnes* category remains available, and it is quite possible that the circle will be expanded in the future.

Legal Interests of All States. In accordance with the ICJ's passage, it is affirmed that all states possess a legal interest in safeguarding *erga omnes*. The implications of this criterion are a matter of scholarly discourse and deliberation. Crawford perceived it as the prerogative of all sovereign states to summon compliance with *erga omnes*.[360] In the words of Ragazzi, legal interest refers to the functioning of international law rules.[361] Distefano measured it in terms of

[356] Tams, *Enforcing obligations erga omnes in international law*, 133.
[357] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) ICJ Reports, Judgment of 11 July 1996, para. 22.
[358] East Timor (Portugal v. Australia) ICJ Reports, Judgment of 30 June 1995, para. 29.
[359] The Secretary-General of United Nations, quoted in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, advisory opinions, ICJ Reports, Advisory Opinion of 28 May 1951, 22.
[360] Crawford, "Responsibility for breaches of communitarian norms: an appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts," 229.
[361] Ragazzi, *The concept of international obligations erga omnes*, 24.

states' compliance with *erga omnes*.[362] According to Gaja, as *erga omnes* obligations are related to safeguarding common interests in the international community, they are pertinent to a substantial number of states, thus, each state is entitled to demonstrate a vested interest in *erga omnes*.[363] Tzevelekos asserted that *erga omnes* obligations signify a legitimate interest, which transformed into legal rights, and necessitates every state to actively engage in safeguarding collective interests.[364] According to Tams, the ICJ's mention of legal interest was meant "to describe specific features of the secondary rules governing the invocation of responsibility for violations of obligations called 'erga omnes' ".[365] In summary, considering the views of commentators, the legal interest of all states can be defined as a state's capacity to undertake remedial actions in response to violations of *erga omnes*.

In analyzing the constituent elements of *erga omnes*, one may criticize the author's argumentation that a clear indication of states' role in the geometry of *erga omnes* is missing. It should be noted that, firstly, scholars refrained from defining legal interest based on individual states' interest, but rather they construed the concept as a responsibility to protect *erga omnes* obligations. Secondly, the author aims to highlight that what emerged after the Westphalia treaties was not merely states but nation-states. If there is any skepticism regarding this assertion, the adoption of the UN Charter unequivocally eradicated such uncertainty. As expressed in the Preamble of the UN Charter, it is the peoples enjoy originality, and collaborate with one another through their respective governments. In the realm of *erga omnes*, the peoples entrust their states with the duty of safeguarding *erga omnes* obligations. Consequently, legal interest bestows *locus standi* upon every state. This rationale finds substantiation in the rulings of the ICJ. The ICJ denoted that

> *"In such a convention [genocide] the contracting States do not have any interests of their own ; they merely have, one and au, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention".*[366]

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[362] Giovanni Distefano, *Fundamentals of Public International Law: A Sketch of the International Legal Order* (Dordrecht: Brill, 2019), 261.
[363] Gaja, "Obligations erga omnes, international crimes and jus cogens: a tentative analysis of three related concepts," 151.
[364] Tzevelekos, "Revisiting the Humanisation of International Law: Limits and Potential: Obligations Erga Omnes," 67.
[365] Tams, *Enforcing obligations erga omnes in international law*, 102.
[366] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports, Advisory Opinion of 28 May 1951, 23.

Additionally, in the Habré case the ICJ pointed out

> *"The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party".* [367]

4.3.2.4. The Function of erga omnes in international law

Different facets of *erga omnes* are open to discussion, but there is consensus that the international community has the capacity to respond to the violation of important rights under the rubric of *erga omnes* (*locus standi*). As a result, in the event of a breach of *erga omnes* obligations, the international community becomes the injured party in the sense of Article 48 of the Draft Articles.[368] Hence, the commentators primarily examined *erga omnes* from the window of international responsibility law and interpret it as a procedural right that empowers states to 'invoke its application on behalf and for the benefit of the international community as a whole'.[369] A rationale behind the expansion of this power lies in the fact that *erga omnes* obligations encapsulate the common or foundational values of the international community,[370] and they are instituted to safeguard the international community's interests[371], thus, there is a need to broaden the application of 'technical rules of locus standi' to effectively facilitate the

[367] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) ICJ Reports, Judgment of 20 July 2012, para. 69.
[368] Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 48: Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole. 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
[369] Crawford, "Responsibility for breaches of communitarian norms: an appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts," 227.
[370] Santiago Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats*. Paris: Graduate Institute Publications, 2005, 104, quoted in Tanaka, Yoshifumi. "The Legal Consequences of Obligations Erga Omnes in International Law." *Netherlands International Law Review* 68, no. 1 (2021): 9.
[371] Crawford, *The International Law Commission's articles on state responsibility: introduction, text and commentaries*, 277.

protection of these communal interests[372]. In brief, *erga omnes* obligations have predominantly been perceived as a facet of state responsibility.[373]

Once *locus standi* has been established, the issue of remedial measures for breaches of *erga omnes* should be explored. In the above discussion, it was concluded that *erga omnes* is analogous to *jus cogens* in terms of its legal consequences. However, it remains to be seen what types of measures could be employed to address unlawful situations beyond non-recognition and non-assistance. In the Wall case, the ICJ ruled that all states must cease all consequences arising from the construction of the wall in accordance with the UN Charter and international law.[374] The passage implies that the remedial measures should be lawful. One possible interpretation of lawfulness is that the international community is proscribed from violating international obligations to rectify breaches of *erga omnes*. This perspective necessitates the adoption of exclusively lawful countermeasures such as the severance of consular and diplomatic ties or the reduction of economic transactions. Lawfulness may also be interpreted to imply that, in response to a wrongful act, resorting to actions that would otherwise be deemed unlawful is permitted in the framework of countermeasures. Consequently, while the action taken remains unlawful, it is devoid of the legal consequences typically associated with a wrongful act due to the relevant circumstances. The practice of states confirms the latter interpretation, and on numerous occasions, states have asserted their right to suspend treaties, freeze foreign assets, or impose embargoes in response to breaches of *erga omnes*.[375] For instance, the oil boycott by Arab countries in 1973-1974 in response to Israel's occupation of the West Bank and Jerusalem; the freezing of funds of the Federal Republic of Yugoslavia (Serbia) and the non-fulfillment of bilateral aviation agreements by EU member States in reaction to human rights violations in Kosovo in 1998; as well as the freezing of assets of members of the Zimbabwean government by EU members and other States in response to human rights violations in 2003.[376]

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[372] Tams and Tzanakopoulos, "Barcelona traction at 40: the ICJ as an agent of legal development," 792.
[373] Stefan Kadelbach, "Chapter II. Jus Cogens, Obligations Erga Omnes and Other Rules-the Identification of Fundamental Norms," in *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes,* ed. Christian Tomuschat and Jean-Marc Thouvenin (Leiden: Brill, 2006), 26.
[374] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports, Advisory Opinion of 9 July 2004, para. 159.
[375] Tams and Tzanakopoulos, "Barcelona traction at 40: the ICJ as an agent of legal development," 795.
[376] Erika De Wet, "Invoking obligations erga omnes in the twenty-first century: Progressive developments since Barcelona Traction," *South African Yearbook of International Law* 38, no. 1 (2013): 11.

4.3.2.5. The Legal Effects of Erga Omnes

In continuation of the analysis regarding the definition of *erga omnes* in the ICJ's passage, the legal effects of obligations deemed *erga omnes* should be examined. In its work to codify articles pertaining to state responsibility for internationally wrongful acts, the ILC did not utilized the term '*erga omnes'* but addressed them in the Commentary under Articles 41 and 48. These Articles are outlined in Chapter three under the heading 'serious breaches of obligations under peremptory norms of general international law'. The ILC did not provide explicit indications about *erga omnes*; instead, it centered its discourse on the ICJ's practice. The ILC cited the ICJ's opinions concerning violations of *erga omnes* obligations as instances illustrating the legal consequences associated with peremptory norms in international law. Initially, it seems that the work of ILC does not offer any new insights into *erga omnes*. However, it does convey a subtle message by equating the legal repercussions of breaches of *erga omnes* with those of peremptory norms in general international law. According to the ILC's commentary, violations of *jus cogens* and *erga omnes* obligations yield identical consequences. The consequences of a serious breach of a peremptory norm in the Draft Articles are numerated as follows:

> *"1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.*
>
> *2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.*
>
> *3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law."* [377]

It is difficult to identify a definitive ruling by the ICJ that explicitly states that the legal consequences of a breach of erga omnes obligations are akin to peremptory norms. However, in its practice, the ICJ has identified certain rights as erga omnes and extended the legal consequences associated with the violation of peremptory norms upon these rights. In the Namibia case, the ICJ, by recognizing the principle of self-determination as *erga omnes*, asserted that

[377] Article 41, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

"(...) no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof The Mandate having been terminated by decision of the international organization in which the supervisory authority over its administration was vested, and South Africa's continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with those decisions".[378]

In the Wall advisory opinion, the ICJ reaffirmed the right to self-determination as *erga omnes* and employed all the stipulations outlined in Article 41 of the Draft in the given case and delivered its advisory opinion accordingly.

"159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory(...). They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, al1 the States parties ... are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by lsrael with international humanitarian law as embodied in that Convention.

160. ... United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, ..."[379]

Regarding this passage, Crawford pointed out that the ICJ derived these conclusions directly from the inherent *erga omnes* nature of the violated obligations, without addressing the associated rights and obligations in the light of peremptory norms.[380] Therefore, it is feasible to

[378] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) ICJ Reports, Advisory Opinion of 21 June 1971, para. 126.
[379] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports, Advisory Opinion of 9 July 2004, paras. 159-160.
[380] Crawford, "Responsibility for breaches of communitarian norms: an appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts," 233.

deduce that the legal consequences for violating *erga omnes* obligations and *jus cogens* norms are identical in positive international law.

4.3.2.5.1. Impacts of *Jus Cogens* on the Security Council's Competence

No need to extend this discussion further; international organizations, as secondary subjects of law, are subject to international law, including *erga omnes*. Nevertheless, the UN occupies a *sui generis* position in the realm of international organizations. Beyond its substantial global influence, the UN accommodates the SC, the most authoritative body, which makes the most significant contributions to maintaining international peace and security. This impact extends not only within the UN system but also surpasses the efforts of other international organizations. It is important to analyze in instances where there is a conflict between decisions made by the SC and *erga omnes*, determining which obligation carries precedence. The resolution of this question is intricately linked to the discourse surrounding the stature of *erga omnes* obligations in positive international law. In other words, the question revolves around discerning whether the rights involved in *erga omnes* obligations manifest a hierarchical structure or if they are comparable to ordinary rights and obligations under international law. Up to now, commentators have tended to focus on the legal effects of *erga omnes* rather than its hierarchical implications. The prevalent belief is that, since *erga omnes* holds an equal position with other ordinary rules, it cannot override the latter. On the other hand, under Articles 25 and 103 of the UN Charter, the decisions of the SC take precedence over other international agreements. In this line of reasoning, Crawford noted that entwining important rights within *erga omnes* does not confer a higher normative effect compared to other norms.[381] According to Distefano, *erga omnes* obligations horizontally broaden the scope of states involved, coupled with legal interests in compliance.[382] For this group of scholars, *erga omnes* obligations are seen as a 'method of sustaining coherence in its own right',[383] facilitating the collective enforcement of norms that promote public goods[384]. In the Fragmentation of International Law report, the ILC refrained from outrightly dismissing the concept of *erga omnes* supremacy, but the report

[381] Crawford, *The International Law Commission's Articles on State Responsibility: introduction, text and commentaries*, 244.
[382] Distefano, *Fundamentals of public international law: a sketch of the international legal order*, 261.
[383] Bruno Simma, "Universality of International Law from the Perspective of a Practitioner." *European Journal of International Law* 20, no. 2 (2009): 272.
[384] Posner, "Erga omnes norms, institutionalization, and constitutionalism in international law," 13.

clarified that *erga omnes* obligations do not confer a hierarchical superiority akin to Article 103 of the UN Charter or *jus cogens* norms.[385] To sum up, in this approach, *erga omnes* obligations correspond to secondary rules of international law that address violations of primary rules and allow implementing a variety of significant measures. The caveat in their reasoning resides in their exclusively concentration on the importance of the rights involved and neglecting to explore these rights as a bridge between fundamental values and peculiar legal consequences. Moreover, they did not elucidate the rationale behind the selective assignment of specific legal consequences to particular rights, not to all. The author argues that due to the similarity between the acknowledged rights in *erga omnes* and those in *jus cogens*, they ought to be regarded with a similar gravity. Hence, *erga omnes* imply a hierarchical structure of norms in the domain of international law as well. *Erga omnes* and *jus cogens* both share a similar level of merit. The latter protect the important rights in the area of treaties and have a preventive character, whereas the former protect the important rights in other areas of international law and have a remedial character. To date, all acknowledged instances of *jus cogens* and *erga omnes* norms have pertained to matters concerning human beings. The status of *erga omnes* in international law stems from the importance of maintaining norms from which *erga omnes* obligations flow.[386] As such, any opinion on *erga omnes* is accompanied with a discussion of the importance of the rights involved. Scholars examining the concept of *erga omnes* in the realm of state responsibility primarily rationalized its peculiar legal consequences by emphasizing the importance of the rights involved. It is generally agreed that *erga omnes* rights function as the manifest of the foundational values and interests endorsed by the international community. At this point, the *erga omnes* become intricately linked with *jus cogens*, as the latter embodies the fundamental values and interests of the international community as well. In this regard, Weatherall pointed out that "erga omnes obligations derive from jus cogens as obligations, concerning the enforcement of peremptory norms, owed by each State to the international community as a whole".[387] Considering that Article 53 of the Vienna Convention, which establishes that *jus cogens* norms originate from GIL, and that the Commentary by the ILC on

[385] Koskenniemi, Matti. Fragmentation of international law: difficulties arising from the diversification and expansion of international law: report of the Study Group of the International Law Commission, UN Documents A/CN.4/L.682, 13 April 2006, para. 380.
[386] Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge: Cambridge University Press, 2015), 10.
[387] Ibid, 11.

the law of treaties indicating the common origins of *jus cogens* and *erga omnes*, a logical deduction can be made that *erga omnes* emanate from the same source of *jus cogens*. This reasoning could be corroborated by the Barcelona Traction case, where the ICJ, after citing some examples of *erga omnes*, held that 'some of the corresponding rights of protection have entered into the body of general international law others are conferred by international instruments'. There are two possible interpretations of this passage: A) *erga omnes* rights are originated from GIL (in this context, general international law is referring to customary or general principle or more likely conflation of both) and international instruments. Given that *erga omnes* and *jus cogens* emanate from the same source, GIL in the Article 53 of Vienna convention must be understood in the sense of the source of international law, while the author discussed previously that GIL in Article 53 refers to an *infra*-legal concept and cannot be equated with customary rules, treaties, or general principles of international law. Lastly, this assumption leads to the conclusion that states are the creators of *erga omnes* rights, including those related to self-determination, slavery prohibition, and discrimination, while such a viewpoint is challenged and rebutted in the present chapter. B) *erga omnes* rights already exist in international law as *infra*-legal matter, known as GIL, and subsequently reincarnate in the form of treaties, customary rules or general principles, potentially a conflation of both, as well as international instruments. Such an interpretation is more consistent with the nature of *jus cogens* and *erga omnes*, especially given their common provenance. The Report of the ILC on the Study of Fragmentation of International Law supports this interpretation by stating that "the [formal]source of a norm cannot be said to be decisive on whether that norm does give rise to obligations erga omnes or not. It is rather the character of primary norms that determines the nature of secondary rules".[388] In addition, taking into account the articles of the Draft Articles of State Responsibility, which specify severe legal consequences for a breach of peremptory norms, and juxtaposing these provisions with the advisory opinion of the ICJ in the Wall case, along with the insights derived from the ILC Commentary on State Responsibility, it is rational to infer that the breach of *erga omnes* would entail identical legal consequences with *jus cogens*. Moreover, it is noteworthy that the instances of *jus cogens* and *erga omnes* recognized by both the ICJ and the ILC are the same, for example, right to self-determination, prohibition of

[388] Koskenniemi, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, para. 402.

genocide and slavery. In his Fourth Report on State Responsibility, the special rapporteur James Crawford stated that a substantial overlap exists between the two concepts.[389] Lastly, let us assume that *erga omnes* rights lack hierarchical indicative. Taking into account that there is a consensus regarding the status of the prohibition of slavery as an *erga omnes* example, it is conceivable that an agreement or unilateral action could contravene this prohibition. Under this assumption, the corresponding action would generate legally valid effects from its commencement until its conclusion. Such a conclusion does not seem to be substantiated by any authoritative source or scholar in the field.

Taking the above premises into consideration, one may safely conclude that the norms associated with *erga omnes* and *jus cogens* carry equal merit. Consequently, the rights in *erga omnes* enjoy a similar stature to those in *jus cogens*. Thus, *erga omnes* rights should prevail over other rules of international law in the event of a conflict. As a matter of logic, it seems inexplicable why a norm falling under the scope of *jus cogens* would indicate hierarchy, whereas the same norm in the ambit of *erga omnes* would not. The case of Nada v. Switzerland concerned with the question of whether Switzerland had violated the right to private and family life under Article 8, as well as the right to an effective remedy under Article 13 of the European Convention on Human Rights (ECHR) through the implementation of the UN SC Sanctions Regime. The opinion of the Grand Chamber of the European Court of Human Rights is noteworthy. The Grand Chamber ruled that if there is a conflict between a SC resolution and human rights obligations, states ought to 'to harmonizes the obligations that they regarded as divergent',[390] and Switzerland, in this case, failed to adopt the necessary measures to reconcile the SC resolution with human rights requirements. It should be noted that the Grand Chamber's judgment did not rest on the premise that because the rights involved in the case are *jus cogens* or *erga omnes*, they are obligatory, but the Court considered those rights an ordinary obligations. Accordingly, when these rights enjoy the authority to supersede the SC's resolutions, it logically follows that *erga omnes* rights would wield a similar legal influence, *a fortiori*.

[389] James Crawford (Special Rapporteur), State Responsibility, Fourth report on State responsibility, UN Documents, A/CN.4/517 and Add.1, 2 and 3 April 2001, 13.
[390] Nada v Switzerland, Merits and just satisfaction, European Court of Human Rights; Grand Chamber, App no. 10593/08, 12 September 2012, para. 197

4.4. Conclusion

Following World War II, a new legal order emerged, manifested by the adoption of the UN Charter, with the premise of the rule of law at the heart of the international legal system. In this framework, the SC, in alignment with the legal personality of the UN, is compelled to adhere to the requirements of the rule of law. It is recognized that certain principles of positive international law, known as GIL, constrain the jurisdiction of the SC, and in cases of conflict between these principles and Article 103 of the UN Charter, the former takes precedence and prevails. In contrast to the sources of international law, GIL does not emanate from the will of states; instead, it arises from the necessities of collective life. GIL comprises two clusters of principles: axiomatic and axiological. The former originates from the structure of international law and society, such as the prohibition of the use of force and *pacta sunt servanda*. The latter has evolved due to the values that govern the international community and revolve around the axis of humanity. In this context, *jus cogens* and *erga omnes* emerge from GIL. It is noteworthy that nearly all norms classified as *jus cogens* and *erga omnes* are human-centric. Given that *jus cogens* safeguard the foundation of contemporary international law in the realm of treaties, and *erga omnes* operate in various other spheres of international law, the SC, in fulfilling its responsibility to maintain international peace and security, is bound to the limitations stipulates by GIL. The crucial responsibility of maintaining international peace and security does not elevate the status of the SC to a *sui generis* organ fully exempt from any restriction. The SC, as an organ of the UN, is bound to carry out its mission in accordance with the norms of *jus cogens* and *erga omnes.*

Chapter V: The Competence and Powers of The Security Council Over Situations or Disputes Arising from Mass Atrocities by A State Under Chapter VI of The United Nations Charter

5.1. Introduction

The current chapter is centered on fostering amicable relations among nations based on the principles of equal rights and self-determination of peoples as one of the UN's primary purposes.[391] This aim inevitably requires establishing effective mechanisms for resolving conflicts and addressing any disputes that may arise between nations. According to the UN Charter, the SC can play a significant role in resolving international disputes, aligning with Article 1 of the UN Charter as This body carries the responsibility of maintaining international peace and security.[392] One of the key contributions of the SC to maintain international peace is through its power of settling disputes. Under Chapter VI of the UN Charter, the SC is tasked with responsibility for addressing international disputes and situations brought before this body and establishing a framework for their peaceful settlement. Following the ongoing process of humanizing international law, states accuse one another of violating human rights and hold the offending state responsible for such violations. Such a dispute now constitutes a significant proportion of international disputes. This chapter seeks to explore the powers enjoyed by the SC over a state perpetrating mass atrocities in the context of the international settlement of disputes under Chapter VI. It aims to analyze the magnitude of the SC's exertion of authority

[391] Ibid, Article 1(1).
[392] The Charter of United Nations (1945), Article 24.

and the legal effects thereof. Additionally, it aims to scrutinize the level of discretion granted to a perpetrator state in relation to the actions taken by the SC.

This study commences by examining different types of referrals to the SC, along with the powers the SC may exercise over them. Furthermore, it examines the legal consequences that may arise when an offending state fails to comply with SC resolutions under the UN Charter. Finally, it delves into the question of disagreements between the offending state and the SC regarding the SC's competence and the matter of authentic interpretation of the UN Charter.

5.2. Competence and Powers of the Security Council Over an Offending State Under Chapter VI of the UN Charter

Violations of human rights may give rise to international disputes or situations. According to Chapter VI of the UN Charter, the SC has the power to adopt appropriate peaceful measures to address disputes or situations that endanger international peace and security. However, this power does not grant the SC an unrestrained right to intervene, and any intervention shall fall in the predetermined jurisdiction of this organ. The SC may exercise its jurisdiction in four situations: a) referral by a Member State, b) referral by the SC *ex officio,* c) referral by the Secretary-General, and d) referral by the General Assembly. The powers of the SC may vary depending on the type of referral.

5.2.1. Procedures Initiated by a Member State

As part of their commitment to maintaining international peace and security, the UN Member States have pledged to settle their disputes peacefully among themselves, as outlined in Article 2(3) of the UN Charter. To facilitate and support this process, the UN system has established the option of resorting to the SC. In this type of referral, either party to the dispute or a third party may initiate the process.

5.2.1.1. Potential Conflict Between an Interceding State and an Offending State Over Human Rights Violations

Before delving into the procedures instituted by a Member State, it is crucial to assess whether a dispute might potentially give rise to a conflict between states regarding human rights violations. While there may be multiple issues that can lead to disagreements between states, the specific focus of this section is whether a dispute can arise between a state committing

human rights violations and an interceding state whose material interests or the well-being of its people have not been directly affected.[393] Throughout the history of international relations, there has been considerable controversy surrounding violations of human rights between offending states and interceding states, particularly during the eighteenth, nineteenth, and early twentieth centuries.[394] The case of Morocco serves as a prominent and relevant example in this regard. On August 10, 1909, the Sultan of Morocco imposed a severe punishment on rebels who had been captured. In response to the Sultan's actions, the joint consular offices of France, Great Britain, and Spain expressed their humanitarian concerns by sending a letter of protest on August 30, 1909, while none of these countries had religious or ethnic ties to the victims, nor could they invoke any treaty obligations.[395] The United States Department of State, in its 2022 Country Reports on Human Rights Practices of China, asserts that the Chinese Communist Party is responsible for engaging in acts of genocide and crimes against humanity targeting primarily Muslim Uyghurs and other ethnic and religious minority groups in Xinjiang.[396] Conversely, China maintains that the situation in the United States experienced a severe decline in 2022, representing a significant setback for human rights in the country. China accuses the United States of violating human rights on various fronts, including widespread racism, discrimination, slavery and inequality in labor, and rampant abuses against women and children.[397] On June 8, 2023, Canada and the Kingdom of the Netherlands initiated proceedings against the Syrian Arab Republic, alleging the systematic violation of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment by Syrian officials before the ICJ.[398] The existence of inter-state disputes in this regard is neither unusual nor

[393] For analysis of the different legal justifications that the intervening States invoked or could have invoked to preclude violating Article 2(4) of the UN Charter, look at: Kajtar, Gabor. "The Use of Force Against ISIL in Iraq and Syria-A Legal Battlefield." *Wis. Int'l LJ* 34 (2016): 535-584.
[394] Menno T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (Philadelphia: University of Pennsylvania Press 1992), 9.
[395] Kamminga, *Inter-State Accountability for Violations of Human Rights*, 14-15.
[396] The United States Department of State, 2022 Country Reports on Human Rights Practices: China (Includes Hong Kong, Macau, and Tibet), March 2023. Available at: <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/china/> accessed 28 June 2023.
[397] China's State Council Information Office, The Report on Human Rights Violations in the United States in 2022, released March 2023. Available at:<http://ge.chinaembassy.gov.cn/eng/xwdt/202303/t20230328_11050361.htm> accessed 28 June 2023.
[398] Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic), ICJ Reports, writing proceeding, Request for the indication of provisional measures, 8 June 2023.

unfounded, as the legal basis for such claims can be found in international treaties and the principles of international responsibility for wrongful acts.

5.2.1.1.1. Treaty-Based Human Rights Disputes

As a consequence of the global significance attributed to human rights, a multitude of treaties have been formed which in turn, impose legal obligations on nation-states concerning their respective citizens as well as in the context of international relations.[399] Treaties pertaining to human rights entail a legal obligation for states to respect and enforce the rights stipulated therein. As a result, any party may initiate a dispute against a state that violates the human rights of its people based on the argument that the state has failed to fulfill its obligations to the other states party to the relevant treaty.[400] The offending state cannot dismiss such complaints as interference in domestic affairs, as accepting a treaty entails relinquishing the plea of domestic jurisdiction regarding the matters covered by the treaty.[401] Pursuant to these treaties, state parties have a legal stake in ensuring that the rights enshrined in these treaties are upheld in the territories of each participating state.[402] In such a case, the complaining state is not required to demonstrate personal injury or a direct connection to the victims beyond their shared humanity in relation to the alleged violation.[403] Many international human rights instruments include provisions for inter-state complaints, enabling any party to initiate action against the offending state. One may refer to the American Convention on Human Rights (ACHR),[404] the African Charter Human and People's Rights (AFCHPR),[405] the Convention on the Elimination of All Forms of Racial Discrimination (CERD),[406] the International Convention on Civil and Political

[399] Scott Leckie, "The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?," *Human Rights Quarterly* 10, no. 2 (1988): 256.
[400] Ibid.
[401] P. H. Kooijmans, "Introduction to the International Systems of the protection of human rights" in Collection of Lecture Strasbourg, the Netherlands: 17 national Institute of Human Rights (Institut international des Droits de l'Homme, 1987), 9-10.
[402] Leckie, "The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?," 298.
[403] Ibid.
[404] Organization of American States (OAS), American Convention on Human Rights "Pact of San Jose", Costa Rica, 22 November 1969.
[405] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[406] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, I. Nos. 9454-9467.

Rights (ICCPR),[407] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).[408]

5.2.1.1.2. Disputes Arising from International Wrongful Acts

Article 48 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts[409] provides further evidence to support the argument that human rights violations can give rise to disputes between an offending state and a third state. It articulated that: 'Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (…) (b) the obligation breached is owed to the international community as a whole.' Article 48 aims, *inter alia*, to fulfil the demands of contemporary international law grounded in principles of humanity. The traditional rules of international law concerning state responsibility, which are based on the principle of reciprocity, cannot be directly applied to human rights regimes.[410] Although the direct impact of an international wrongful act is borne by an injured state and not a third state, the latter still holds a legal interest in ensuring compliance due to 'the importance of the rights involved'.[411] According to the International Law Commission (ILC), all states, as members of the international community, have the right to hold another state accountable for violating collective obligations that safeguard the interests of the international community as a whole.[412] As a consequence of this legal interest, a third state acquires *locus standi* and can invoke the responsibility of the offending state, which has violated an obligation owed to the international community as a whole. An act of a third state does not occur in its individual capacity as a victim, but in its capacity as a member of the

[407] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, No. 14668.
[408] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, No. 24841.
[409] Responsibility of States for Internationally Wrongful Acts (2001), Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.
[410] Dinah Shelton, *Remedies in international human rights law*, 3rd ed. (Oxford: Oxford University Press, 2015), 59.
[411] Annie Bird, "Third state responsibility for human rights violations," *European Journal of International Law* 21, no. 4 (2010): 883.
[412] Report of the International Law Commission on the work of its fifty-third session, 23 April - 1 June and 2 July - 10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10, UN Documents A/56/10, 127.

international community as a whole.[413] In its landmark judgment of Barcelona Traction, the ICJ supported the perspective of the ILC by affirming that every state holds a legal interest in upholding obligations to the international community as a whole, considering the significance of the rights at stake.[414] In this context, a third state would have a legal basis to lodge a complaint against another state if it can demonstrate that the rights in question are linked to *erga omnes* obligations. The interceding state, therefore, may bring a valid international claim against the offending state under the *erga omnes* obligations which incorporates human rights obligations.[415] As the ICJ in the Genocide Convention case ruled:

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.[416]

Quite possibly, the offending state will dispute this allegation as being legally unfounded. Without dwelling on this objection, it is worth mentioning that there exists at least a political dispute concerning this matter, because political disputes arise due to disagreements regarding the presence or absence of laws. The arguments presented in this section substantiate the assertion that a dispute can indeed arise between an offending state and an interceding state, both from a legal and political standpoint. Consequently, the SC has the authority to intervene and utilize its powers under Chapter VI.

5.2.1.2. Referral by a Member State

Article 37 of the UN Charter stipulates that if the parties involved in a dispute, as described in Article 33, are unable to resolve it by the means specified in that Article, they shall refer the dispute to the SC.[417] It is therefore acknowledged in the UN Charter that resorting to the SC is

[413] Bird, "Third state responsibility for human rights violations," 890.
[414] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ Reports, Judgment of 5 February 1970, paras. 33–34.
[415] Theodor Meron, "State responsibility for violations of human Rights," in *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 83, American Society of International Law, 1989, 381.
[416] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports, Advisory Opinion of 28 May 1951, 23.
[417] Accordingly, the Manila Declaration correctly states (without expressly mentioning Art. 37 (1)) that member States should be fully aware of 'their obligation to refer to the Security Council such a dispute to which they are

an alternative method for resolving disputes that becomes obligatory for parties unable to resolve their disputes through their own means.[418] The application of Article 37 is contingent on compliance with the provisions of Article 33. Hence, it is necessary to consider these two Articles in conjunction. Indeed, Article 33 of the UN Charter reaffirms the overall duty of Member States to resolve disputes through peaceful means. However, it specifically applies to disputes that have the potential to jeopardize international peace and security. Thus, if the parties involved in a dispute have been unable to reach a peaceful resolution through methods of their own choosing, they should turn to Article 37 of the UN Charter as a means to address the dispute. In accordance with Article 37, the SC may advance its proceedings solely when the dispute is deemed genuinely capable of jeopardizing international peace and security. For the SC to intervene, two conditions must be met: firstly, the continuation of the dispute due to the failure of the parties to settle it peacefully, and secondly, the SC's determination of the likelihood that the dispute would pose a threat to international peace and security.[419] On this matter, there may arise an inquiry into the criteria employed to designate a dispute as a peril to international peace. Evidently, the SC is vested with the authority to ascertain the parameters of a peril to international peace in the purview of the introductory provision of Article 24. However, the viewpoint or perspective of the involved parties should not be disregarded. If the parties involved in a dispute do not perceive it as a threat to peace, they are not eligible to invoke the provisions of Article 37. If both the parties involved in the dispute and the SC agree that it poses a threat to peace, there would be no obstacle in applying Article 37. It would constitute a predicament if the parties do not apprehend the dispute as a menace to international peace, while the SC diverges in its perspective. If such a scenario arises, it would fall in the exclusive jurisdiction of the SC, as stipulated in Article 24, to determine the state of peace, and any external matters would be treated as factual evidence presented before the SC. However, it would be perplexing if the SC wholly disregarded the perspectives of the parties involved. An additional predicament in this context pertains to whether Article 37(1) confers the authority upon one party to unilaterally initiate the reference, provided that the opposing party declines

parties if they fail to settle it by the means indicated in Article 33 of the Charter'. UN General Assembly, *Manila Declaration on the Peaceful Settlement of International Disputes*, 15 November 1982, A/RES/37/10.

[418] Thomas Giegerich, "'Ch.VI Pacific Settlement of Disputes, Article 37," in *The Charter of the United Nations: A Commentary*, Volume I, ed. Bruno Simma and others, 3rd edition, (London: Oxford University Press, 2012a), 1150.

[419] Ibid.

to acknowledge the unequivocal futility of the endeavors to reach a settlement. The commentators argued that considering the drafting history of the Article, as well as the objective and purpose of Chapter VI, it should be permissible for one party to refer the dispute in the event of the other party's objection, if the latter fails to fulfill its obligation to initiate the reference.[420] Nevertheless, unilateral references to the SC will not impose an obligation on this body to exercise its powers under Article 37(2). The discretion to determine whether their settlement attempts have indeed failed remains with the SC. Hence, in the event that the SC discerns the lack of effectiveness in the parties' attempts to reach a settlement, it has the option to initiate action as per Article 37(2) and propose terms of resolution if it deems such actions to be suitable.[421]

According to Article 35 of the UN Charter, every Member State of the UN enjoys the authority to bring a dispute or situation to the attention of the SC. In accordance with this provision, states are constrained from invoking the SC for all encompassing disputes or situations, but rather, they are exclusively permitted to invoke the SC's jurisdiction for those explicitly delineated in Article 34, which consist of circumstances that have the potential to engender international discord or instigate the emergence of a dispute. This justification, however, is so broad that it can substantiate any assertion. As mentioned earlier, it is the responsibility of the SC to ascertain the existence of the requirements. In the case of referring a dispute under Article 37, Article 37(2) stipulates that the SC can exercise its power only if the dispute indeed poses a threat to international peace and security. The same criterion seems to be applicable throughout Chapter VI, including Article 35. Consequently, the case at hand must indeed possess the potential to cause international discord or give rise to a dispute. The commentators perceived Article 35(1) as the embodiment of *actio popularis* in the framework of the UN Charter.[422] Undoubtedly, this Article aligns seamlessly with the concept of the universality of peace. Given that peace under the UN Charter is a matter of concern for all states, it follows logically that all states, regardless of their direct involvement in a situation or a dispute, can act as beneficiaries and advocate for the preservation of peace. The Article 35

[420] Ibid, 1151; Goodrich and Hambro. *Charter of the United Nations: Commentary and Documents*, 258; Benedetto Conforti, *The Law and Practice of the United Nations*, 3rd edn (Leiden: Brill Academia 2004), 168.
[421] Giegerich, "Ch.VI Pacific Settlement of Disputes, Article 37," 1152.
[422] Theodor Schweisfurth, "Ch.VI Pacific Settlement of Disputes, Article 35," in *The Charter of the United Nations: A Commentary*, Volume I, ed. Bruno Simma and others, 3rd ed. (London: Oxford University Press 2012a), 1113.

establishes a solid legal foundation for states to bring to the attention of the SC a claim of mass atrocity perpetrated by a state. Furthermore, in the event of uncertainty regarding whether one party involved in a dispute can refer the matter to the SC without the consent of the other party in accordance with Article 37, that party retains the option to bring the dispute before the SC under Article 35.

In terms of the power vested in the SC, Article 37 is designed to establish a genuine obligation on the parties involved in a dispute to refer the matter to the SC, rather than merely providing a dispute resolution option for the parties.[423] Having delineated the conditions for establishing the competence of the SC, Article 37 grants the SC the authority to either proceed in accordance with Article 36 or to make substantive recommendations regarding the appropriate terms of settlement. With respect to Article 36, the SC may 'recommend appropriate procedures or methods of adjustment'. According to the definition put forth by Conforti and Focarelli, substantive recommendations are defined as 'all those recommendations that pertain to the substance of the dispute, namely, the specific issues under contention between the parties'.[424] The power to intervene in the substance of a dispute is the most extensive authority granted to the SC under Chapter VI. Due to the SC's capacity to enter into the substance of disputes, this body is exclusively empowered to address the parties involved.[425] As part of its authority to issue substantive recommendations, the SC may advise the parties to adhere to provisional measures if they are deemed necessary to prevent the escalation of the dispute.[426] The power of the SC to address the substance of a dispute has been justified based on two arguments. Firstly, it is argued that when the parties involved in a dispute have already exhausted peaceful means of resolution, merely recommending adjustment methods again would be rendered meaningless, and secondly, considering that the dispute has been submitted to the SC with the consent of all parties, the SC enjoys a wider scope of powers and is thus capable of entering into the substance of the dispute.[427] A dispute being addressed in any other UN organ or outside the UN would not hinder the SC's ability to exercise the powers provided

[423] Conforti and Focarelli, *The Law and Practice of the United Nations*, 152.
[424] Ibid, 197.
[425] Giegerich, "Ch.VI Pacific Settlement of Disputes, Article 37," 1161.
[426] Thomas Giegerich, "Ch.VI Pacific Settlement of Disputes, Article 36," in *The Charter of the United Nations: A Commentary*, Volume I, edited by Bruno Simma and others, 3rd edition (London: Oxford University Press 2012b) 1135-1136.
[427] Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents*, 259-260.

in Article 37. The GA shall suspend its proceedings on a dispute or situation if the SC exercises its jurisdiction on the same matter under Article 12(1). Similarly, the proceedings of the ICJ would not prevent the SC from issuing recommendations in the same case. As established by the ICJ, every legal dispute comprises two dimensions: the legal and the political. As a judicial body, the ICJ has jurisdiction to address the legal aspects of a dispute.[428] Consequently, the SC has also the ability to tackle the political aspects of a dispute, and recommends a political settlement instead of a legal one, as long as the substance of the dispute remains in the ambit of the parties involved.[429] Additionally, if the ICJ or any other international judicial entity has already issued a judgment on the dispute, but the SC perceives that the threat persists, the principle of *res judicata* does not constrain the SC from taking action. This is because Article 94(2) does not subject the SC to the jurisdiction of the ICJ, and regarding other international courts or tribunals, neither the UN Charter nor international law mandates the SC to abide by their judgments. However, the author believes that such non-compliance is justifiable only if the rendered judgment is incapable of effectively resolving the dispute. In this context, the recommendations put forth by the SC serve as a complementary measure to those judgments, with the ultimate aim of achieving a peaceful settlement of the dispute. To categorize the SC as occupying an exceptional position in all scenarios would contravene both the principles enshrined in the UN Charter and the tenets of international law. Regarding the substance of the dispute, the SC possesses a significant level of discretion in formulating substantive recommendations. However, the SC is limited by the boundaries set by GIL as well as the objectives and principles outlined in the UN Charter, specifically Article 2(7). Lastly, it is important to emphasize that categorizing substantive recommendations does not grant them a higher level of binding force compared to procedural recommendations made in accordance with Article 36(1).

The SC owns the discretion to determine whether to examine the situation or dispute that has been presented to its attention in accordance with Article 35.[430] It should be noted that if the SC chooses to include a dispute on its agenda, it does not automatically signify that it will

[428] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports,
Judgment of 26 November 1984, para. 93.
[429] Giegerich, "Ch.VI Pacific Settlement of Disputes, Article 37," 1160.
[430] Schweisfurth, "Ch.VI Pacific Settlement of Disputes, Article 35," 1118.

take action in favor of the initiating state or endorse its assessment but rather, it implies that the SC has now taken up the matter for consideration.[431] Furthermore, unlike Article 37(2), which necessitates the SC to determine whether to take action under Article 36 or recommend settlement terms, Article 35 does not impose any obligation on the SC to undertake any specific course of action, even if the circumstances are similar. When the SC resolves to move forward, it has the discretion to invite the initiating state if it is not a party to the dispute, but it is obligated to invite the initiating state if it is directly involved in the matter.[432]

The UN Charter does not explicitly outline the powers the SC may wield in a scenario where it opts to proceed under Article 35. Under Chapter VI, the SC's power is confined to recommending appropriate methods of adjustment or recommending a substantive settlement of the dispute. It appears that the SC cannot delve into the merits of the matter when the initiating state is neither directly engaged in the dispute nor has brought it forth with the consent of all parties involved. Therefore, its role is limited to recommending adjustment methods. The Iraqi government, led by President Saddam Hussein, engaged in brutal suppression of dissents, particularly during the March 1991 uprising. Government forces responded to the uprising with widespread atrocities, including indiscriminate shootings in residential areas, executions of young people on the streets and in hospitals, mass arrests and killings during house-to-house searches, and helicopter attacks on unarmed civilians fleeing cities. The fate of thousands of who were captured during the uprising remains unknown. Many displaced Shi'a and Kurds remain in refugee camps or as internally displaced persons, unable to return home due to fear or destruction of their homes. In the southern marshes, Shi'a populations lack basic necessities and are at risk from military operations.[433] In a letter dated October 19, 1992, addressed to the president of the SC, Turkey heavily criticized Saddam Hussein for human rights violations and claimed that the Iraqi government forces deliberately drove the population toward Turkish borders, while also asserting that the behaviors of the Iraqi regime infringed all norms of international law with regards to the civilian population.[434] Similarly, on April 4, 1991, France

[431] Ibid.
[432] Rule 37 of the Provisional Rules of Procedure of the SC articulates the same implication. Repertoire of the Practice of the Security Council 25th Supplement 2022, Part II, Provisional rules of procedure and related procedural developments.
[433] Middle East Watch, *Endless Torment: The 1991 Uprising in Iraq and Its Aftermath* (New York: Human Rights Watch, 1992), 1-65.
[434] (S/22435) 3 April 1991.

called for an urgent meeting of the SC in response to the grave abuses being perpetrated against the Iraqi population.[435] During the SC's 2982nd meeting on April 5, 1991, the repression of Iraqi civilians in various regions of Iraq was condemned, and Iraq was demanded to promptly cease this repression.[436] During the early 1990s, as the unity of the Soviet Union weakened, Tajikistan experienced a rise in political competition and conflict. After declaring independence in September 1991, there was a relatively peaceful struggle for state power, although the capital witnessed frequent public demonstrations. In the subsequent election, a former leader of the communist party emerged victorious, but there was a lack of widespread agreement on the legitimacy of his presidency. This led to increased tension between government supporters and opposition parties, eventually escalating to the point where various factions resorted to armed conflict. Less than a year after gaining independence, Tajikistan found itself embroiled in a civil war.[437] On October 21, 1992, Kyrgyzstan characterized the situation in Tajikistan as a significant deterioration in social, political, and economic conditions, urging the SC to promptly address this matter.[438] On October 30, 1992, by adding the matter to the agenda, the President of the SC, on behalf of the SC, appealed to all parties involved in the conflict to cease hostilities, and urged the Government of Tajikistan, local authorities, party leaders, and other relevant groups to engage in a political dialogue aimed at achieving a comprehensive resolution of the conflict through peaceful means.[439] On October 23, 1956, students in Budapest marched in support of Polish demonstrators, advocating for political changes within Hungary, which was under Soviet influence at the time. As they reached the local radio station to express their demands, their peaceful demonstration was met with gunfire.[440] By the evening, protests and armed violence had escalated across the city.[441] In the early hours of October 24, Soviet forces entered the city, asserting that they were invited to restore order.[442] By letter dated 27 October

[435] (S/22442) 4 April 1991.
[436] (S/RES/688) 5 April 1991.
[437] Akiner Sharin and Catherine Barnes, "The Tajik civil war: causes and dynamics," in *Politics of compromise: The Tajikistan peace process*, ed. Kamoludin Abdullaev and Catherine Barnes (London: Conciliation Resources, 2001), 16.
[438] (S/24692) 21 October 1992.
[439] (S/24742) 30 October 1992.
[440] Csaba Békés and others (eds), *The 1956 Hungarian Revolution: A History in Documents* (Budapest: Central European University Press, 2002), XXXVI–XXXVII.
[441] Charles Gati, *Failed Illusions: Moscow, Washington, Budapest, and the 1956 Hungarian Revolt* (Stanford: Stanford University Press, 2006), 147.
[442] Békés and others, *The 1956 Hungarian Revolution: A History in Documents*, XXXVII.

1956, France, the United Kingdom and the United States jointly called for the inclusion of an agenda item in the SC, concerning the situation in Hungary. This request came in response to the actions of foreign military forces that had resulted in the violent suppression of the rights of the Hungarian people.[443] Due to a lack of consensus among the permanent members of the SC, this body faced obstacles in fulfilling its primary duty of upholding international peace and security. Consequently, the United States formulated a resolution calling for an emergency session of the GA to implement appropriate measures. The underlying essence of each blocked resolution was to affirm the Hungarian people's entitlement to a government that was responsive to their national aspirations and committed to their independence and welfare.[444]

5.2.2. Procedures Instituted by the SC *ex officio*

Articles 33(2), 34, and 36 of Chapter VI delineate several legal grounds that enable the SC to proactively consider the occurrence of mass atrocities perpetrated by a state. In accordance with one of the fundamental principles of the UN Charter, namely the peaceful resolution of disputes, Article 33(1) stipulates that parties involved in a dispute that may cause a threat to international peace and security should seek peaceful means of resolving their disagreements. If the dispute has the capacity to pose a threat to peace, the SC has the authority to consider the dispute under Article 33(2), and it is obligated to emphasize to the parties their duty to resolve the dispute peacefully as per Article 33(1), if deemed necessary.[445] From the text of Article 33(2), it seems that the SC lacks the authority to entering into the substantive dimensions of the case and is restricted to making recommendations to the parties to fulfill their obligation as outlined in Article 33(1) of the UN Charter. Although such power is stipulated in Article 33(2), its application is not confined solely to the provisions of paragraph 1 of that Article.[446] As stipulated in the Article, the SC has the authority to place any dispute on its agenda that has the potential to jeopardize international peace. Consequently, the parties involved in a dispute may not necessarily be limited to states but can encompass entities of various kinds. Thus, there is a

[443] (S/3690) 27 October 1956.
[444] Repertoire of the Practice of the Security Council, 108–111. Available at:<https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/en/sc/repertoire/56-58/Chapter%208/56-58_08-4-The%20situation%20in%20Hungary.pdf> accessed 19 June 2023
[445] Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents*, 243-244.
[446] Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems: with supplement*, 374; Rule 12 of the Provisional Rules of Procedure of the Security Council indicates that proceedings before the Security Council do not necessarily have to be initiated by an external factor

possibility that the SC may include a dispute on its agenda when one party represents the state and the other represents an opposition group within that state. However, it is essential that the dispute exhibits an international dimension in any given scenario. In this line of reasoning, Tomuschat argued that in the context of international peace and security, the SC may consider civil war as a relevant factor.[447]

Article 34 establishes further legal basis for the SC to take action on its own initiative. According to its own discretion, the SC has the power to conduct a preliminary investigation into any disputes or situations to ascertain the potential for international friction or dispute.[448] Article 34 provides a glimpse into the future. In this regard, it has a preliminary nature and can serve as a foundation for the exercise of any of the SC's powers related to the maintenance of peace.[449] In order to avoid confusion, the power to investigate should not be equated with the regular considerations and discussions of agenda items by the SC Members during the sessions.[450] In addition, a distinction should also be made between investigative power and observation. In the case concerning the dispatch of an observation group to Lebanon, the delegation of Panama pointed out during the SC meeting that, 'An observation committee is responsible for observing future events but does not have the authority to investigate causes and past incidents'.[451] Any definition of investigation must be based on the requirements of maintaining or restoring international peace and security. Investigation refers to the procedure initiated by a special decision of the SC and conducted thereafter to clarify a specific issue. This includes determining the facts of past incidents as well as current events that could impact the future.[452] Another notable aspect of Article 34 pertains to the extent of its applicability (*ratione materiae*) in terms of investigating disputes and situations. The terms 'disputes' and 'situations' are also utilized in other Articles of Chapter VI; however, no explicit definitions are supplied. The Permanent Court of International Justice defined a dispute as "a disagreement on a point

[447] Christian Tomuschat, "Ch.VI Pacific Settlement of Disputes, Article 33," in *The Charter of the United Nations: A Commentary*, Volume I, ed. Bruno Simma and others, 3rd edition (London: Oxford University Press, 2012.), 1083.
[448] Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents*, 245.
[449] Ibid, 247; Conforti, *The Law and Practice of the United Nations*, 155.
[450] Theodor Schweisfurth, "Ch.VI Pacific Settlement of Disputes, Article 34," in *The Charter of the United Nations: A Commentary*, Volume I, ed. Bruno Simma and others, 3rd edition (London: Oxford University Press, 2012b), 1096.
[451] Schweisfurth, "Ch.VI Pacific Settlement of Disputes, Article 34,"1097; (S/RES/128) 11 June 1958.
[452] Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents*, 189; Schweisfurth, "Ch.VI Pacific Settlement of Disputes, Article 34,"1096-1097

of law or fact, a conflict of legal views or of interests between two persons".[453] For Theodor Schweisfurth, 'a dispute exists if one party makes a claim against another party and the other party rejects the claim' and a situation means 'the entirety or sum total of events, circumstances, and relations between actors concerned'.[454] According to his perspective, a situation refers to a circumstance that is not yet classified as a dispute but has the potential to serve as a preliminary stage for a dispute or international tension.[455] Giegerich noted that a situation 'serves as a catch-all term for all kinds of tensions that have not given rise to a specific interstate dispute but are already serious enough to require the attention of the UN'.[456] For Conforti '(…) in a dispute a claim to the effect that others act in a certain way comes from one or from few States, whereas in a situation (especially in the case of a domestic situation in a country) there are more or many States or even the entire international Community involved.'[457] According to Goodrich, "it may be presumed that the term is used to describe a set of conditions slightly broader in implication than a dispute, which may be considered as a controversy in which the parties and the issues are capable of fairly definite determination. Every dispute arises from some situation, and any dispute may in turn give rise to new situations. A situation may or may not give rise to a dispute; it may, moreover, develop directly into a threat to the peace".[458] Kelsen believed that "whereas a dispute can exist only in the relationship between two or more definite states, a situation may have a more general character, not being restricted to definite States and not being confined to a definite territory. But it is not impossible to interpret the term 'situation' as meaning a concrete situation in which definite states are involved".[459] The Report of the Interim Committee of the General Assembly (1950) defined dispute as '[a] disagreement; in other words, there must be a controversy between the parties. This takes the form of claims, which are met with refusals, counterclaims, denials or counter-charges, accusations, etc'.[460] The mere

[453] Mavrommatis Palestine Concessions (Greece v. Great Britain) P.C.I.J, Objection to the Jurisdiction of the Court, Judgment of 30 August 1924, 11; Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), ICJ Reports, Judgment of 5 October 2016, para. 36.
[454] Schweisfurth, "Ch.VI Pacific Settlement of Disputes, Article 34,"1097-1098.
[455] Ibid, 1098.
[456] Giegerich, "Ch.VI Pacific Settlement of Disputes, Article 36,"1130.
[457] Conforti, *The Law and Practice of the United Nations*, 157-159.
[458] Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents*, 230.
[459] Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems: with supplement*, 388.
[460] Report of the Interim Committee of The General Assembly (Third Session: 16 January – 18 September 1950), Fifth Session Supplement No. 14 (A/1388), para. 10.

potential of causing friction and disputes in the future is adequate for the SC to commence an investigation[461] to ascertain whether international peace and security are jeopardized or not.

The SC enjoys the prerogative to employ the power of investigation prior to undertaking action in accordance with Article 35(1) or any other relevant Articles of the UN Charter, autonomously and of its own volition, with the aim of acquiring a more thorough comprehension of the facts and circumstances at hand before ascertaining whether the specific dispute presents a menace to international peace. At this point, it should be noted that since the Article does not make reference to particular categories of disputes, the SC has the authority to exercise its jurisdiction over both political and legal disputes.[462] As per classical distinction, legal disputes arise when parties disagree on the application and interpretation of existing legal rules, whereas political disputes occur when at least one party seeks to modify the existing legal framework (*lex lata*).[463] Regarding the international dimensions of a dispute or situation, commentators have suggested that a dispute would be considered international if it involves two or more states, but the concept of a situation cannot be limited by the same criteria.[464] The SC may invoke the authority granted by Article 34 solely in cases where the situation in question does not fall in the purview of domestic jurisdiction, and in the determination of whether an issue is internal or not, Article 2(7) becomes decisive. Considering all the definitions, there is no reason to exclude the commission of mass atrocities from the list of situations. Therefore, if a state perpetrates mass atrocities against its own population, the SC may initiate an investigation into the situation to ascertain whether it has the potential to turn into international friction or a dispute. Subsequently, the SC can make a decision based on the findings of the investigation. In the event that an investigation is conducted based on Article 34, the states involved are legally obligated to accept and implement this decision, especially to allow an investigative subsidiary organ to enter their territory. This is because a decision made under Article 34 is binding as per the provisions of Article 25.[465] In light of this inquiry,

[461] Schweisfurth, "Ch.VI Pacific Settlement of Disputes, Article 34," 1098.
[462] Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents*, 256.
[463] Ruth Lapidoth, "Some reflections on peaceful means for the settlement of inter-state disputes," Georgetown University Law Center' (n.d.), 7. Available at:< https://ciwr.ucanr.edu/files/186748.pdf> accessed 29 October 2023.
[464] Schweisfurth, "Ch.VI Pacific Settlement of Disputes, Article 34," 1099; Niels M. Blokker and Marieke Kleiboer, "The Internationalization of Domestic Conflict: The Role of the UN Security Council," *Leiden Journal of International Law* 9, no. 1 (1996): 7-35.
[465] Schweisfurth, "Ch.VI Pacific Settlement of Disputes, Article 34," 1098; Ernest L. Kerley, "The powers of investigation of the United Nations Security Council." *American Journal of International Law* 55, no. 4 (1961):

another question emerges regarding the degree to which the implicated state is bound to facilitate investigation into the alleged human rights transgressions attributed to it. In other words, is the accused state obligated to fully comply, or does it have the option to resist a comprehensive investigation, or is it obligated to cooperate to a certain extent and exercise discretion beyond that? Conforti reckons that in relation to cooperation, the UN Charter clearly highlights the imperative of making significant concessions when necessary, and as Article 34 does not specify the degree of cooperation required, it becomes necessary to find the answer in other provisions of the UN Charter.[466] Consequently, according to Article 2(5), the states involved are obligated to collaborate with the SC as a constituent part of the UN.[467] Nonetheless, if they can present a reasonable justification, they may seek exemptions from the investigation.[468] The author tends to disagree with this argument. This submission might be valid in most circumstances, but at least not in cases involving mass atrocities. A state's most acceptable justification for refusing an investigation unequivocally is to invoke a 'public emergency which threatens the life of the nation'. Under Article 4 of the ICCPR, the parties are not permitted to suspend the implementation of certain human rights even when the life of the nation is at risk.[469] Accordingly, when it comes to investigating infringements of those non-derogable rights, it is imperative that no justification be deemed valid *a priori* for declining collaboration with the investigative determination of the SC. When the SC decides to initiate an investigation into a dispute or situation, it is not a procedural decision according to Article 27(2), but rather a substantive decision that necessitates compliance with Article 27(3) in terms of its legality. This entails obtaining an affirmative vote from nine members, including the

897; Eduardo Jiménez de Aréchaga, *Voting and the Handling of Disputes in the SC* (Westport: Praeger, 1978), 89; Renata Sonnenfeld, "The Obligation of UN Member States' to Accept and Carry out the Decisions of the SC," *Polish Yearbook of International law* 8 (1976): 140-141; Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems: with supplement*, 388. For opposite view look at: Robert Kolb, *An introduction to the law of the United Nations* (Oxford: Hart Publishing, 2010), 58; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004), 38-40.

Conforti believes that "considering an investigation as a decision (mandatory prescription) or as a recommendation (desired outcome) is incorrect. An investigation should rather be seen as an operational resolution which does not lay down rules for conduct. As a result, instead of Article 34, attention should be directed to Article 2, para. 5, under which 'all Members shall give to the United Nations every assistance in any action it takes in accordance with the present Charter." Conforti, *The Law and Practice of the United Nations*, 159.

[466] Conforti, *The Law and Practice of the United Nations*, 159-160.

[467] Ibid.

[468] Ibid.

[469] Article 4(2) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that no exceptions or derogations are allowed from the provisions outlined in articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18.

concurring votes of all permanent members of the SC.[470] If the SC is unable to reach a consensus regarding whether the investigation order should be classified as a substantive decision under Article 34 or a procedural decision under Article 29, the decision is then subject to the unanimity rule as outlined in Article 27(3)[471] (double veto). In accordance with Articles 4 and 35 of the UN Charter, the Polish government formally appealed to the SC to include on its agenda the situation arising from the presence and operations of the Franco regime in Spain. This request was motivated by various factors, including the Franco regime's sheltering of a significant concentration of Nazi assets and personnel, as well as providing refuge for numerous war criminals. The SC made a resolution to conduct additional investigations with the aim of ascertaining whether the situation in Spain resulted in international tensions and posed a threat to international peace and security. In pursuit of this objective, the SC appointed a subcommittee tasked with reviewing the statements presented before the SC regarding Spain, collecting additional statements and documents, and conducting any necessary inquiries deemed essential by the subcommittee.[472]

Article 36 represents the final legal premise by which the SC can commence proceedings *ex officio*. This Article should be considered from the standpoint of the SC's foremost duty to maintain international peace and security as outlined in Article 24(1). In this context, Article 36 bestows the SC the authority to intervene in any dispute or situation on its own volition, without being bound by other stipulations within Chapter VI except for the criterion of posing a threat to international peace and security.[473] This Article does not restrict the authority of the SC to address specific disputes or situations, as its language is adequately comprehensive to indicate that its application encompasses both internal disputes or situations that may reach to a level where their persistence may endanger international peace and security.[474] Having such broad discretion seems to yield the following consequences. Firstly, it falls in the competence of the SC to intervene in situations where the right to self-determination is being violated or

[470] Schweisfurth, "Ch.VI Pacific Settlement of Disputes, Article 34," 1101; Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents*, 248; Conforti, *The Law and Practice of the United Nations*, 157. The issue of the legal significance of the Four Power Statement of 7 June 1945 is discussed by Gross. Leo Gross, "The Double Veto and the Four-Power Statement on Voting in the Security Council," *Harvard Law Review* 67 (1953): 251-280.
[471] Schweisfurth, "Ch.VI Pacific Settlement of Disputes, Article 34," 1102; Conforti, *The Law and Practice of the United Nations*, 39.
[472] (S/RES/4) 29 April 1946.
[473] Giegerich, "Ch.VI Pacific Settlement of Disputes, Article 36," 1124.
[474] Ibid, 1130.

when there are substantial human rights abuses taking place. It is crucial to note that, in this regard, due to the preventive nature of the Article, the SC is not obligated to establish an immediate threat to peace before taking action. Secondly, the states involved in a dispute lack the authority to unilaterally or collectively withdraw the dispute from the jurisdiction of the SC, as the SC is fulfilling its primary duty to maintain peace according to Article 36.[475] Thirdly, the Article does not incorporate the principle of subsidiarity, which would impose a specific time constraint on the SC. Consequently, the SC may act whenever it deems it necessary or advantageous. Lastly, in situations where there is ambiguity regarding the nature of the matter, whether it is classified as a dispute or a situation, the responsibility of determining the appropriate categorization rests with the SC. This issue falls in the ambit of Article 27(3), requiring the involvement of all the SC's Members.[476]

Once the SC has taken control of a case, it has the authority to propose either 'appropriate procedures' for resolving a dispute or 'appropriate methods of adjustment' for adjusting the situation. In making these recommendations, the SC can suggest to the parties involved a particular procedure that it considers fitting given the specific circumstances. Nonetheless, the SC is not empowered to evaluate the substance of the case and propose terms of settlement. On 20th December 2012, the President of the SC officially added the situation in Mali to the SC's agenda through a formal communication. During this meeting, the SC issued a presidential statement highlighting its deep apprehension regarding the escalating insecurity and rapidly worsening humanitarian conditions in the Sahel region.[477] The SC emphasized the significance of safeguarding the well-being of civilians and upholding human rights. It urged the rebels to promptly halt all acts of violence and encouraged all parties involved in Mali to pursue a peaceful resolution by engaging in relevant political dialogues.[478] In light of the alarming and extensive human rights violations occurring in the People's Republic of Korea, the members of the SC expressed their profound apprehension and requested the SC's President to officially include this situation on the SC agenda.[479]

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[475] Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems: with supplement*, 405; D.W. Bowett, "The United Nations and peaceful settlement," in *International disputes: the legal aspects: report of a study group of the David Davies Memorial Institute of International Studies*, forw. Claud Humphrey Meredith Waldock (London, Europa Publications, 1972), 183.
[476] Giegerich, "Ch.VI Pacific Settlement of Disputes, Article 36," 1131.
[477] (S/PV.6741) 20 December 2012.
[478] (S/PRST/2012/9) 4 April 2012.
[479] (S/2014/872) 5 December 2014.

5.2.3. Procedures instituted by the General Assembly

According to Article 10, the GA endowed the jurisdiction to deliberate upon any question or subjects falling in the ambit of the UN Charter. In this context, the UN Charter bestows upon the GA the authority to refer a situation that poses a potential threat to international peace or security to the SC, as stipulated in Article 11(3). Accordingly, the GA has the ability to regard mass atrocities committed by a Member State as a menace to international peace and security and present the matter to the SC for necessary measures. Through the adoption of Resolution 3376, the GA made a formal plea to the SC to scrutinize the matter pertaining to the full realization of the Palestinian people's inherent and inalienable rights.[480] Nevertheless, owing to the utilization of the veto power, the SC was unable to arrive at a definitive decision.[481] Similarly, the GA, having voiced its deep dismay over the persistent acts of aggression committed by Israel and denouncing the policies and actions that flagrantly infringe upon the human rights of the Palestinian people, called upon the SC to deliberate on appropriate measures aimed at safeguarding the protection of Palestinian civilians residing in the occupied territories.[482]

5.2.3. Procedures Instituted by the Secretary-General

According to Article 99, the SG has the authority to alert the SC to any matter that, in his judgment, could jeopardize the preservation of international peace and security. The wording of the Article suggests that the SG also possesses significant discretion in referring a dispute or a situation concerning mass atrocities to the SC. In a letter sent to the President of the SC, the SG expressed profound apprehension regarding the security, humanitarian, and human rights conditions prevailing in Myanmar's Rakhine State.[483] Subsequent to this correspondence, the SC issued a presidential statement that vehemently condemned the pervasive acts of violence and voiced serious distress over the accounts of human rights violations. The SC underscored the Government's paramount obligation to safeguard its population and urged it to prevent any further disproportionate employment of military force, and furthermore, urged the government

[480] Resolution 3376, 10 November 1975.
[481] Repertoire of the Practice of the Security Council, p 217. Available at:< 75-80_08-3 Items relating to the Middle East.pdf (un.org)> accessed 19 December 2023.
[482] (A/RES/47/64[E]) 22 March 1993.
[483] (S/2017/753) 2 September 2017.

to adhere to its human rights obligations.[484] Following the frightening war in the Gaza Strip and the humanitarian catastrophes caused by Israeli military operations, António Guterres wrote a letter to the SC and noted that " I am writing under Article 99 of the United Nations Charter to bring to the attention of the Security Council a matter which, in my opinion, may aggravate existing threats to the maintenance of international peace and security."[485]

5.3. Disobeying the Security Council's resolutions

Chapter VI deals with the peaceful settlement of disputes in international relations and, in doing so, empowers the SC to exercise a primarily conciliatory role. This study will now proceed to examine the legal repercussions that may arise from non-compliance with the recommendations under Chapter VI by a perpetrator state. It is true that the SC's recommendations under Chapter VI are not mandatory in the same sense as those under Chapter VII, but it does not mean that they lack any legal consequences. In contrast to the former, recommendations of a Chapter VI nature should be regarded as carrying a relative obligation. Given the circumstances, a Member State should thoroughly assess the recommendations and ascertain the appropriate measures to ensure compliance with them. Members States, therefore, cannot disregard these resolutions without providing a reasonable justification. Such an obligation stems from Article 2(5) of the UN Charter, which mandates Member States to cooperate with the UN in any action it takes in accordance with the present Charter. Additionally, Article 25 stipulates that 'the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. Accordingly, if the state in question disregards the SC's recommendation, which carries the presumption of legal validity, it would constitute a breach of the UN Charter, and the SC can resort to the remedies outlined in Articles 6, 11(2), and 39 of the UN Charter. Article 6 specifically addresses the legal consequences of a breach of the UN Charter. Pursuant to Article 6, the SC may deem non-compliance by a Member State as a violation of Article 2(5), which is an integral part of the UN Principles. As a result, the SC may recommend to the GA the expulsion of the concerned state. By referring to Article 11(2), the SC can bring a breach of the UN Charter to the attention of the GA. In turn, based on Article 14, the GA may recommend

[484] (S/PRST/2017/22) 6 November 2017.
[485] (S/2023/962) 6 December 2023.

measures for the peaceful resolution of any situation involving a violation of the provisions of the UN Charter that establish the Purposes and Principles of the UN. The caveat regarding a breach of the UN Charter is that the UN Charter itself does not specify the precise mechanism for initiating the examination of such a question. It is unclear whether the UN can address the issue *ex officio* or if it should be raised by Member States. There is another plausible possibility in which the SC may utilize the authority granted by Article 39 to determine that the disobedience constitutes a threat to peace, thus invoking the powers outlined in Chapter VII. One may critique this submission as it seems to assign mandatory characteristics to exhortatory recommendations that they do not possess, and moreover, if the situation is urgent and requires compliance with the SC's recommendations, the SC may initially invoke Chapter VII directly without attempting to treat disobedience of the recommendation as a threat to peace in order to seize control of the situation. This criticism is predicated on the assumption that resolutions under Chapter VI are merely exhortatory.

Having said that, the author argues that the SC's recommendation to address a human rights-oriented situation or dispute under Chapter VI is of a mandatory nature. This belief stems from the fact that Article 25 provided that Member States have agreed to comply with the decisions of the SC, without making a distinction between decisions under Chapter VII and decisions under other Chapters. Moreover, the UN Charter does not contain any provision indicating that the recommendations made by the SC are non-binding. As the ICJ has ruled, under Article 25, the enforcement element is not solely ascribed to enforcement measures adopted under Chapter VII of the UN Charter but applies to all decisions of the SC adopted in accordance with the UN Charter.[486] The consequence of non-compliance with the recommendations of Chapter VI is outlined in Article 39, whereby the SC may ascertain both the non-compliance, and specifically, the original dispute as a threat to peace. Therefore, the recommendation of the SC to parties involved in a human rights-based dispute to settle their conflict carries a *sui generis* character. While it is obligatory, states still retain a certain degree of flexibility in complying with it. In other words, the SC grants the states in question the option to either implement the recommendations of Chapter VI or await the invocation of Article 39 and the subsequent resolutions of Chapter VII. One can criticize the author's argumentation on this point. If the

[486] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, para. 113.

recommendations under Chapter VI are indeed compulsory, it raises the question of what distinguishes them from resolutions under Chapter VII, given that both are considered to carry the same legal enforcement. The author's response would be that this criticism does not appear to be correct since it assesses the recommendations under Chapter VI solely from the perspective of Member States, while the matter should be viewed from the perspective of the SC. Chapter VI establishes the duty of Member States to resolve disputes peacefully and outlines the powers of the SC in facilitating this process. Nowhere in Chapter VI does it suggest that the recipients of recommendations have the liberty to disregard them. The designations of resolutions as recommendations under Chapter VI do not stem from their non-binding nature, but rather from the fact that they do not constitute the ultimate determination of the SC in relation to the specific matter under consideration. This is due to the fact that the current state of the dispute or situation presents a potential endangerment to international peace and security, rather than a realized threat to peace. In contrast, resolutions under Chapter VII demonstrate the SC's conclusive determination to maintain or restore international peace in response to the presence of a threat to peace. Therefore, in the framework of the UN Charter, resolutions falling under Chapter VI have a binding effect on the involved parties. However, they are categorized as recommendatory resolutions when compared to the resolutions found in Chapter VII, which embody the quality of conclusiveness when addressing the specific matter at hand.

5.4. Do Member States Have the Right to Question the Competence of the Security Council?

It is essential to analyze the possibility of an objection to the SC's competence by the offending state after the SC seized an issue or exercised its powers in accordance with the UN Charter. Is the UN Charter conducive to Member States questioning the actions of the SC? According to the UN Charter, it remains mute and fails to offer any indication as to whether Member States have the right to dissent against the SC's actions in instances where it surpasses its prescribed competence. In international law, there is no general applicable rule that prohibits members of an organization from raising objections to a decision made by the acting body on the basis of exceeding their designated jurisdiction, unless such restrictions are explicitly outlined in the constituent instrument. In the case of the Legality of the Threat or Use of Nuclear Weapons in Armed Conflict, the World Health Organization (WHO) sought an advisory

opinion from the ICJ. However, the ICJ declined to provide an advisory opinion to the WHO on the grounds that the requested question lies beyond the scope of the organization's mandate. The ICJ held that "the request for an advisory opinion submitted by the WHO does not relate to a question which arises 'within the scope of [the] activities' of that Organization".[487]

One cannot dispute the implication of the passage which suggests that international organizations have the potential to exceed their given powers. Therefore, it would be incorrect to assume that the presumption of validity applies to all activities carried out by international organizations. In the Namibia case, the South African delegation contended that the SC had erred by categorizing Namibia as a 'situation' instead of a 'dispute', thereby contravening Article 32 of the Charter. The ICJ, however, dismissed this argument as not based on the SC's immunity from wrongful acts, but due to the expiration of the lapse of time. The ICJ stated:

> *Had the Government of South Africa considered that the question should have been treated in the SC as a dispute, it should have drawn the Council's attention to that aspect of the matter. Having failed to raise the question at the appropriate time in the proper forum, it is not open to it to raise it before the Court at this stage.*[488]

Furthermore, the SC does not possess the authority to determine its own jurisdiction (competence in competence), as it is not a judicial body, and also it is not explicitly vested with such a power under the UN Charter. It is widely recognized in theory and practice that international relations are based on the allocation of jurisdictions; however, the challenge lies in preserving rather than establishing international relations especially in the context of interactions between international organizations and their Member States.[489] An objection to the jurisdiction of the UN's political organs is an attempt to uphold the already established allocation of jurisdiction between the UN's organs and the Member States.[490] Hence, Member States are not constrained from contesting the activities of the SC, and they possess the prerogative to scrutinize the actions of the SC in case it surpasses the prescribed competence.

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[487] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Reports, Advisory Opinion of 8 July 1996, para 84.

[488] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports, Advisory Opinion of 21 June 1971, para. 25.

[489] Ciobanu, Dan, Preliminary Objections: Related to the Jurisdiction of the United Nations Political Organs (Leiden: Martinus Nijhoff 1975), p 48.

[490] Dan Ciobanu, *Preliminary Objections: Related to the Jurisdiction of the United Nations Political Organs* (The Hague: Martinus Nijhoff, 1975), 48.

5.4.1. Who Enjoys the Authority to Authentically Interpret the UN Charter?

Let us now move on to analyze the solution presented in the UN Charter to address disputes arising between an offending state and the SC regarding the interpretation and application of the UN Charter. The most frequently raised preliminary objection to the jurisdiction of the UN's political organs is *ultra vires*. In this context, the offending state asserts that the act of the SC is *ultra vires*, while the SC maintains that it is *intra vires*. For instance, in the Lockerbie situation, following the adoption of Resolution of S/RES/748 (1992) by the SC, which imposed specific embargoes on Libya, the League of Arab Nations, the Organization of Islamic Cooperation, the Non-Aligned Movement, and the Organization of African Unity declined to adhere to the sanctions, deeming them *ultra vires*. The latter organization considered the resolution to be in contravention of Articles 33 and 36(3) of the UN Charter. While it is widely understood that an *ultra vires* act refers to actions carried out by an international organization that exceed its designated sphere of competence,[491] there is disagreement among commentators regarding the entity holding the prerogative to deliver the authentic interpretation of the UN Charter. To arrive at an appropriate resolution to this dilemma, a range of perspectives will be analyzed. Before delving into these theories, it is important to have a clear understanding of the nature of the SC. The SC is a political body that operates on the basis of expediency rather than adopting a strictly judicial approach to political issues. In essence, practicality and expediency are fundamental characteristics of the political organs of the UN.[492] As a result of expediency, powers should be utilized in the most effective manner within a given situation, enabling the attainment of political opportunism in accordance with the prevailing circumstances.[493] In their collective dissenting opinion in the Admission case, Judges Basdevant, Winiarski, Sir Arnold McNair, and Read effectively exemplify the implementation of expediency by a political entity. They believe that "[t]he main function of a political organ is to examine questions in their political aspect, which means examining them from every point of view. It follows that the Members of such an organ who are responsible for forming its decisions must consider questions from every aspect, and, in consequence, are legally entitled to base their arguments

[491] Enzo Cannizzaro and Paola Palchetti, "Ultra Vires Acts of International Organizations," in *Research Handbook on the Law of International Organizations*, ed. Jan Klabbers and Åsa Wallendahl (Cheltenham: Edward Elgar, 2011), 365.
[492] Ciobanu, *Preliminary Objections: Related to the Jurisdiction of the United Nations Political Organs*, 13.
[493] Exchange of Greek and Turkish Populations (Greece vs. Turkey) Advisory Opinion, PCIJ Series B no 10, ICGJ 277 (PCIJ 1925), 21 February 1925, 25.

and their vote upon political considerations".[494] In the same line of reasoning, Judge Zoričić expressed that "[n]either the Charter nor the Rules of procedure of the Council or the Assembly contain anything as to what a Member may or should do when it votes and— a point of great importance— there is no obligation on the part of Members to give a reason for their vote. (…) As a Member who votes is entitled to do so without giving any reasons for his vote, he may act in accordance with his own view of the case".[495]

Under the UN Charter, the SC enjoys significant discretion to include or exclude the issue of mass atrocities from its agenda, and concerning the seized matter, the SC has the liberty to fix the most appropriate methods and procedures to tackle each specific case, including the authority to dismiss or halt any ongoing proceedings if it is deemed the most expedient course of action.[496] When considering these premises collectively, one might infer that the actions undertaken by the SC carry an inherent sense of finality, and consequently, the notion of expediency might be perceived as being synonymous with arbitrariness. The UN Charter, however, does not make any explicit mention of the SC's decisions being characterized as arbitrary. To properly evaluate the expediency of the SC, one must consider the boundaries set by the constituent instrument from which this organ derives its competence. It is crucial to differentiate between the concepts of expediency and competence, ensuring that their application is not conflated or misunderstood.[497] The ICJ in the case of Conditions of Admission ruled that "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment".[498] In a similar vein, it was underscored in the Namibia case that the definitive boundaries of the powers of the GA and the SC are delineated by the UN Charter through which

[494] Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), ICJ Reports, Advisory Opinion of 28 May 1948, Dissenting Opinion of Judges Basdevant, Winiarski, Sir Arnold Mcnair and Read, 85.
[495] Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), ICJ Reports, Advisory Opinion of 28 May 1948, Dissenting Opinion by M. Zoričič, 97.
[496] Ciobanu, *Preliminary Objections: Related to the Jurisdiction of the United Nations Political Organs*, 14-15.
[497] Albert Thomas, Director of The International Labour Office, Series C01, Competence of the International Labour Organization / Designation of the workers' delegate for The Netherlands at the third session of the Internationale Labour Conference / First Ordinary Session, Part II, Speeches Made and Documents Read before the Court. At The Public Sitting On July 6th , Annex 26, 1922, 225.
[498] Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), ICJ Reports, Advisory Opinion of 28 May 1948, 64; Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, Advisory Opinion, PCIJ Series B no 3, ICGJ 270 (PCIJ 1922), 12th August 1922, 55.

they are established, specifying their functions and powers.[499] These passages clearly indicate that the SC is obligated to adhere to the laws, and any deviation from the pertinent legal norms would render the decision *ultra vires*. Consequently, it is understandable for there to be disagreement between the SC and the offending state regarding the interpretation of the UN Charter.

5.4.2. Resolution of Jurisdictional Disputes

Historically, objections to jurisdiction have emerged in the jurisprudence of courts and tribunals, and over time they have gradually extended to accommodate political bodies like the UN, albeit with distinct legal nuances.[500] The following section will explore theories of last resort, as well as the SC's inherent power of interpretation.

5.4.2.1. Theory of Last Resort

The theory states that the ultimate basis of the SC's jurisdiction stems from the sovereignty of UN Member States, and hence the consensual nature of the UN Charter reserves certain rights for the Member States. In more details, As constituent instruments are international treaties, each party owns an inherent right to oversee their implementation, thereby ensuring that organizations refrain from making decisions that are incompatible with their objectives and purposes or that would harm the interests of Member States beyond what they have agreed upon as the foundation for membership.501 Essentially, members of an organization have the right, in the absence of a compulsory mechanism of judicial review, to question the legal validity of decisions made by the acting organs, and as a last resort, to refrain from complying with acts they perceive as ultra vires.502 The application of this theory does not seem to be illuminating, nor efficient. Delegating the authority of final interpretation to Member States would result in a lacuna and seriously hamper the efficiency of the UN, especially the SC. It would be easy for any Member State of the UN to impede or hinder the execution of the SC's duties by challenging the corresponding action on the grounds that it falls outside the SC's jurisdiction. This could

[499] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports, Vol. II, Oral Statements and Correspondence, Pleadings, Oral Arguments, Documents (I971), 485.
[500] Ciobanu, *Preliminary Objections: Related to the Jurisdiction of the United Nations Political Organs*, 61-63.
[501] Ibid, 69; Ebere Osieke, "The legal validity of ultra vires decisions of international organizations," *American Journal of International Law* 77, no. 2 (1983): 240
[502] Ciobanu, *Preliminary Objections: Related to the Jurisdiction of the United Nations Political Organs*, 174.

bring chaos to the UN system. Furthermore, other subjects of international law may be ambivalent about complying with the decisions of the SC due to the potential challenges to their legal validity in the future. Thus, the need for legal certainty necessitates a restrictive view regarding the Member States' right to provide authentic interpretations.503 As Pollux wrote, the 'easiest, the most primitive, and the most unsatisfactory solution is to say that each individual Member has the right to decide for itself how to interpret the Charter'.504 Lastly, in the exercise of a Member State's right to provide an authentic interpretation, it must be noted that such an act is unilateral and may have a significant legal effect on the state or states involved. There is no rule in international law that extends the legal validity of an interpretation issued by a party or group of parties to other parties. Nonetheless, a Member State may, under very rare circumstances, provide an authentic interpretation, but only if all members of the UN unanimously agree on the exact same interpretation.

5.4.2.2. The Inherent Power of the Security Council to Determine Its Competence

The second perspective examines the evolutionary nature of international organizations and interprets their functions and powers based on their efficient and effective functioning, rather than solely relying on the understanding derived from their constituent instruments.[505] Theories in this category assert that it is the SC that retains the competence to provide authentic interpretation, and this authority flows from the inherent right of international organizations to interpret their constituent instruments, thereby determining how their functions and powers should be exercised.[506] There is no explicit mention of this approach in the UN Charter; however, it could be supported by the preparatory work conducted during the San Francisco negotiations. According to the report of Committee IV/2 of the San Francisco Conference: "[i]n the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. It will be manifested in the functioning

[503] Ciobanu, *Preliminary Objections: Related to the Jurisdiction of the United Nations Political Organs*, 376; Cannizzaro and Palchetti, "Ultra Vires Acts of International Organizations," 383.
[504] Pollux, "The Interpretation of the Charter," *The British Year Book of International Law* 23(1946): 56.
[505] Tetsuo Sato, "Constituent Instruments of International Organizations and Their Interpretative Framework-Introduction to the Principal Doctrines and Bibliography," *Hitotsubashi journal of law and politics* 14 (1986):14.
[506] Osieke, "The Legal Validity of Ultra Vires Decisions of International Organizations," 242.

of such a body as the General Assembly, the SC, or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle."[507]

One could also cite the ICJ's ruling in the Certain Expenses case as further testament to corroborate the theory of the SC's inherent power to define its own jurisdiction. The ICJ stated:

> *Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction.*[508]

Nevertheless, all these arguments prove inadequate in attributing the power of ultimate authority to the interpretation offered by the SC. Any organ of the UN has the authority to interpret those sections of the UN Charter that are relevant to its specific function. However, it is important to note that such interpretations cannot be considered authentic or authoritative in nature, meaning they do not possess absolute binding force.[509] The report of the Committee solely pertains to the routine operations of the UN's organs, and it should not be conflated with the authority to provide authentic interpretation. Let us assume that there is a positive conflict between the SC and the GA concerning a specific matter. Taking into account that both organs have the ability to delimit their scope of competence, and also considering the absence of a hierarchical structure within the UN, such a situation may lead to a lacuna. Therefore, it seems that the presumption of absolute validity regarding the interpretation put forth by the SC is susceptible to immediate and robust contention. In the same report, the Committee explicitly rejected the assumption of competence in competence (*Kompetenz-Kompetenz*) for the organs of the UN. The Committee Report stated: 'It is to be understood, of course, that if an interpretation made by any organ of the Organization (…) is not generally acceptable it will be without binding force'.[510]

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[507] Documents of The United Nations Conference on International Organization San Francisco, 1945, Volume XIII, Commission IV, Judicial Organization, The Report by the Committee (Doc. 750, IV/2/B/1), 2 June 1945, 668.
[508] Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), ICJ Reports, Advisory Opinion of 20 July 1962, 168.
[509] Leo Gross, *Essays on International Law and Organization*, Vol. I (The Hague: Springer, 1984), 393.
[510] Documents of The United Nations Conference on International Organization San Francisco, 1945, Volume XIII, Commission IV, Judicial Organization, The Report by the Committee (Doc. 750, IV/2/B/1), 2 June 1945, 669.

Regarding the ICJ passage, the language used by the Court does not demonstrate enough strength to conclusively establish that the SC has the authority to provide an authentic interpretation. The advisory opinion suggests that each organ holds the authority to comment on its jurisdiction primarily, rather than definitively. It appears that the ICJ's statement aligns with the Committee Report and serves as an inevitable outcome of the UN's legal autonomy and the logical consequence of its legal personality's independence. Despite the opportunity to resolve all doubts, the ICJ did not deliver a definitive verdict. As Klabbers wrote: "That is not to say that the interpretation by such organ is necessarily authoritative: such might depend on the institutional balance created by the constitution. The Charter does not create any balance, or, depending on where you stand, creates the ultimate balance: there is no legal hierarchy between the various organs when it comes to interpreting the Charter."[511]

The theory of inherent power seems to be grounded in functional necessity, implying that an international organization has an inherent right to determine its own powers. When an organization is established, it inherently possesses powers that derive from organizationhood, allowing it to undertake any activities it deems necessary to fulfill the organization's objectives, and as long as those activities are not explicitly prohibited by the constituent instrument, they would be considered legally valid.[512] Moreover, proponents contend that the doctrine of inherent powers is associated with two notable benefits. Firstly, it contributes to the functionalist agenda by enabling an organization to accomplish its objectives without being hindered by legal provisions that are unclear or open to interpretation. Secondly, it grants courts and commentators the capacity to review the actions of organizations swiftly and accurately.[513]

Having said that, if the SC is believed to wield such an inherent power, then its actions cannot be subjected to challenges by Member States. Because if this power could be questioned by every individual, then it ceases to be inherent in any meaningful sense of the word.[514] Furthermore, regardless of the strength of the principle of necessity, it cannot supplant the UN Charter. In the context of collective security outlined in the UN Charter, relying solely on the

[511] Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2009), 101.
[512] Finn Seyersted, "Objective International Personality of Intergovernmental Organizations - Do Their Capacities Really Depend upon the Conventions Establishing Them," *Nordisk Tidsskrift for International Ret* 34 (1964): 28.
[513] Nigel D. White, "The UN charter and peacekeeping forces: constitutional issues," *International Peacekeeping* 3, Special Issue (1996): 48.
[514] Klabbers, *An Introduction to International Institutional Law*, 77.

principle of necessity does not constitute a purely legal argument that can be employed to justify the SC's power to establish definitive delimitations.

5.4.2.3. The Obligation to Cooperate in Good Faith

As a result of the analysis, neither the Member States nor the SC may provide an authentic interpretation of the UN Charter. The author believes that in cases of serious conflict between the SC and a defiant state, the UN Charter necessitates cooperation between both parties to attain a hybrid interpretation of its provisions. This solution is founded upon Articles 1(3) and 2(2)(5) of the UN Charter. Article 2 sets forth the corrective principles through which the objectives outlined in Article 1 must be attained. According to Article 2(2) of the UN Charter, both UN Organs and Member States are obligated to act in good faith to fulfill their duties, and based on paragraph 5 of the same Article, Members are required to provide the UN with assistance in any actions undertaken in accordance with the UN Charter. The synthesis of these two obligations shall culminate in the aim of fostering 'achieving international cooperation in solving international problems,' as one of the core purposes of the UN. In such a scenario, the offending state may raise objections to the SC's *ultra vires* acts, but it must substantiate and clarify the legal grounds upon which the made decision exceeded the powers delegated by the UN Charter. Similarly, although the SC is not obligated to explicitly cite the legal basis for its actions under normal circumstances, it is expected to present a compelling argument justifying the *intra vires* nature of the given act. If reconciliation proves unattainable, the offending state may seek the interpretation of the GA under Article 10. In this regard, the crucial factor lies in whether the interpretation proposed by the offending state garners majority support from the international community. If the GA deems the interpretation to be reasonable, it has the option to present the interpretation to the SC through a resolution under Article 10. While it is true that the SC is not obligated to adhere to this resolution, it cannot disregard it entirely. In the final stage, if both the SC and the GA maintain their respective interpretations, the dispute should be submitted before the ICJ for an advisory opinion in accordance with Article 96(1). Should the UN aim to maintain the adherence of its Members, it must resort to the ICJ as a final measure to safeguard the legitimacy of the system.[515] The author views this solution as appropriate since

[515] Thomas M. Franck, "The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?," *American Journal of International Law* 86, no. 3 (1992): 523.

it incorporates all advantages, aligns with international jurisprudence, and mitigates potential drawbacks.

5.5. The Origin of Human Rights in the Mirror of the United Nations Charter

The humanization of international law has led to disagreements, challenges, and conflicts between sovereign states and international organizations regarding the implementation of human rights. Jurisdictional objection remains the predominant legal defense used against allegations of human rights violations, and despite the proliferation of human rights instruments and international protection mechanisms, this conflict remains unresolved. A state accused of human rights violations frequently alleges that pertinent entities are overstepping their jurisdictional boundaries by intervening in its domestic affairs. On the opposite end of the spectrum are human rights activist institutions who contend that, especially by referring to international treaties, human rights have transcended the realm of domestic affairs. In the first place, this argument implies that human rights were originally under domestic jurisdiction, but they have now been placed in the ambit of international human rights law. Secondly, it leads to the conclusion that states bear responsibility commensurate with their willingness to subject their conduct under international human rights law. In other words, states determine the boundaries of their own responsibilities in cases of human rights infringements. Lastly, it indicates who bears the burden of proof. Given that human rights are initially governed by domestic law, it becomes incumbent upon the plaintiffs, regardless of their identity, to demonstrate that the contested matter falls in the realm of international law.

This section is an attempt to analyze whether the deliberations of states in positive international law establish a legal foundation supporting the submission that human rights primarily fall in the realm of domestic jurisdiction. The resolution of this question carries the potential to resolve the dispute between the SC and the accused state regarding the extent of the SC's interference in domestic affairs. To achieve this aim, the author opted for the UN Charter as the touchstone. The selection is based on the fact that the UN Charter not only stands as the first international treaty to adopt a systematic framework for human rights but also represents the most exhaustive document in this regard. More importantly, it explicitly defines the scope of the SC's jurisdiction. Thus, furnishing a solid basis for comprehending the legal and

historical context of human rights in international law. One may argue that in the contemporary time, human rights, at least the fundamental rights, have come under the jurisdiction of international law due to the proliferation of international instruments and widespread practice. Consequently, addressing the question might be a moot point. However, domestic jurisdiction has primarily been invoked when resolving disputes and situations related to state relations, treatment of minority groups, and administration of non-self-governing territories before the SC and the GA. By investigating this inquiry, one can attain a more nuanced comprehension of the legal dynamics governing the interaction between sovereignties and human rights. This exploration also sheds light on the appropriate interpretation of human rights in the holistic framework of the UN'Organs. It is important that any construal of the UN Charter should align with the foundational principles of human rights outlined in this document. Accordingly, the quality of the interpretation of the UN Charter regarding the status of human rights would change the burden of proof in the disputes.

5.1.1. Human Rights in Limbo: Navigating the Interplay Between Domestic and International Law

For decades, one of the most popular debates concerning the UN Charter has been whether the issue of human rights is of a domestic or international nature. More to the point, the question of whether human rights fundamentally fall in the reserved domain of Article 2(7) which explicitly prohibits any power arising under the UN Charter for the UN from intervening in matters that inherently belong to the domestic jurisdiction of any state,[516] or it falls in the purview of Article 24, which stipulates that the SC is entrusted with the primary responsibility for maintaining international peace and hence has the competence to seize matters related to human rights in the context of ensuring international peace and security. In the early years of the UN's work, there were divergent views on the relationship between human rights and domestic jurisdiction.[517] According to some states, specific provisions of the UN Charter explicitly detached human rights from domestic law and position them firmly in the realm of international law. Articles 1(3), 55, and 56 have been identified as a testament to their

[516] Georg Nolte, "Ch.I Purposes and Principles, Article 2 (7)," in *The Charter of the United Nations: A Commentary*, Volume I, ed. Bruno Simma and others, 3rd edition (London: Oxford University Press 2012), 285.
[517] Repertory of Practice of United Nations Organs, Art. 2(7), Repertory, Suppl. 3, vol. I (1959-1966), paras 330-331-332-333.

content.[518] In addition, it has been argued that acknowledging the assertion of domestic jurisdiction would erode the UN Charter's fundamental commitment to protect human rights and thereby rendering some of its most crucial provisions devoid of meaning.[519] This position was corroborated, in particular, by the GA resolutions 616 A (VII), 616 B (VII), and 721 (VIII), 1016 (XI), 1178 (XII), 1248 (XIII), and 917 (X). On the other side of the spectrum, certain states expressed that the UN Charter did not establish any obligations concerning human rights.[520] Therefore the question remains in the domestic jurisdiction of Member States. This group argued that the said Articles in the UN Charter are merely declarations of purposes and principles, rather than obligations, as the UN Charter did not define human rights and the subsequent obligations associated with them.[521] The South African delegate asserted that due to the lack of a defined or 'internationally recognized formulation' of such rights, Member States could not be considered to have undertaken any obligations. A British delegate remarked in 1946 that even if human rights were present, no standards were established in the UN Charter to assess human rights violations by states.[522] Similar to states, scholars have divergent opinions on the topic. Some commentators argue that human rights are no longer exclusively under the domestic jurisdiction of states following the adoption of the UN Charter. They contend that human rights, being one of the UN Charter's fundamental purposes, are subject to international law due to specific Articles containing legal obligations.[523] In this line of reasoning, Gutter argued that while there is some ambiguity in the UN Charter regarding human rights, it still establishes a legal foundation in positive international law, and thereby, "provided proponents of human rights and fundamental freedoms– individuals, NGOs, Governments etc. –, which, until then, had to find the legal basis for their claims in theories of natural law, with more solid ground on which to base their claims".524 In addition, it has been argued that the UN Charter

[518] Ibid, paras. 331-332.
[519] Ibid, para. 330.
[520] Ibid.
[521] Ibid.
[522] Ibid.
[523] C.B.H. Fincham, *Domestic Jurisdiction* (Leiden: Sijthoff, 1948), 176-177; Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens & Sons). Reprinted in: (Alston, Philip & Goodman, Ryan 2013 International Human Rights, 1950), 147–48, 151, 178.
[524] Jeroen Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community* (Antwerpen: Intersentia, 2006), 36.

per se acts as a marker of what falls beyond the boundaries of domestic jurisdiction.[525] According to Lauterpacht, actions taken by the GA, ECOSOC, or any other competent UN Organ, including Commission on Human Rights, should not be considered undue interference when they involve in "(1) discussion of a situation arising from any alleged non-observance by a State or a number of States of their obligation to respect human rights and freedoms".[526] Rosalyn Higgins, after making an extensive survey of UN action in this field, has concluded that it seems reasonable to assert that human rights issues are beyond domestic jurisdiction because the specific obligations imposed on all states by Articles 55 and 56, despite the presence of Article 2(7).[527] On the contrary, there are certain scholars who are at odds with the former's point of view. While acknowledging the incorporation of human rights in the UN Charter, they contend that the pertinent Articles lack binding force; instead, "they are merely a program of principles, not legal norms".[528] They contended that the UN Charter only invites members to 'promote' international cooperation in these fields. In this line of argument, Ermacora by distinguishing between the 'promotion' of human rights and the 'protection' of those rights, concludes that the promotion of human rights is no longer solely in domestic jurisdiction, whereas their protection remains within the reserved domain of states.[529] As briefly showed earlier, there exists a substantial body of literature examining whether human rights issues fall in domestic jurisdiction or not. The UN Charter is flexible enough to be interpreted in a manner that accommodates and supports both perspectives. Despite differing viewpoints, both perspectives acknowledge that human rights are initially considered as domestic matters. Legal research on this topic is limited by the lack of attention given to the integration of human rights into the UN Charter. Scholars have predominantly concentrated on post-Charter instruments, neglecting the UN Charter itself, which serves as an early and promising foundation for human rights principles. It seems that for some scholars, belonging to the domestic jurisdiction implies that a state may determine its policies and methods of treating its population as it deems

[525] Columbia Law Review Association, "The Domestic Jurisdiction Limitation in the United Nations Charter Source," *Columbia Law Review* 47 (1947): 268-279.
[526] Hersch Lauterpacht, "The International Protection of Human Rights" *Collected Courses of the Hague Academy of International Law* 70 (1947): 20.
[527] Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (London: Oxford University Press, 1963), 128.
[528] Abdulrahim P. Vijapur, "The Question of Domestic Jurisdiction and the Evolution of United Nations Law of Human Rights," *International Studies* 47, no. 2-4 (2010): 250.
[529] Felix Ermacora, "Human Rights and Domestic Jurisdiction (Article 2, §7, of the Charter)," *Collected Courses of the Hague Academy of International Law* 124 (1968-II): 430-431.

appropriate, akin to how "matters of immigration, naturalization, and tariffs are typically considered protected by the domestic clause",530 and consequently, "each state has the right to freely independent of other states and international organisations-exercise its own legislative, executive and judicial jurisdiction. Its exercise is consequence of state sovereignty and the rights of the nations to self-determinations"531. In such circumstances, states are shielded from criticism by invoking jurisdictional plea. Others are permitted to question the performance of states concerning human rights implementation or violation only to the extent that the states express their consents. But is such an impression truly grounded in legal facts? Did the concept of human rights emerge in the UN Charter without any historical context? There is no doubt that the UN Charter did not generate the concept of human rights and the Drafters were already familiar with this concept at the time of the UN Charter's adoption. Exploring this perception is a crucial question that is missed in many studies. The following sections base on the UN Charter aim to investigate whether, before the establishment of the UN, human rights were considered a domestic issue and to ascertain which perception the UN Charter adopts on this matter. If the answer is affirmative, then human rights would be analogous to certain matters, such as tariffs or customs, over which states have discretionary power in deciding how to treat their people.

5.5.2. Human Rights in the Preamble of the UN Charter

In seeking the answer, the Preamble of the UN Charter carries the solution. In this regard, the phrase 'reaffirm faith' serves as a golden key.[532] Tracing the origin of this faith will provide insights into how human rights were incorporated into the UN Charter. The Preamble state:

"We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small … "

530 "The Domestic Jurisdiction Limitation in the United Nations Charter Source," 270.
531 Galina G. Shinkaretskaya, "Content and Limits of 'Domestic Reserve" in *International Law and Municipal Law. Proceedings of the German-Soviet Colloquy on International Law at the Institut für Internationales Recht an der Universität Kiel 4 to 8 May 1987*, ed. Grigory I. Tunkin and Rüdiger Wolfrum (Berlin: Duncker & Humblot, 1988), 123.
532 Hedayatollah Falsafi, *Seyre Aghl dar Manzoomeh-ye Hoghooghe Beynolmelal* (Tehran: Nashr Now, 2020), 423.

The silver bullet in the Preamble is 'reaffirm faith' in fundamental human rights. The passage explicitly states that the faith in fundamental human rights has previously been affirmed, and the adoption of the UN Charter serves as a reaffirmation of this conviction. Such phrasing naturally prompts the curiosity about the specific context and historical moment when this faith was initially proclaimed.

5.5.2.1. The Implication of 'Faith' in Fundamental Human Rights

Before proceeding to tackle the source of faith, it is necessary to elucidate the implication of 'faith in fundamental human rights' in the framework of the UN Charter. This elucidation is crucial as the UN Charter explicitly affirms that this particular implication was both currently recognized and had been previously intended. Essentially, faith is a conviction in the existence of something either already substantiated or presumed to be existent.[533] Human beings inherently do not invest their faith in phenomena that might manifest in the future; the concepts of non-existence and faith are fundamentally incompatible in human cognition.[534] Consequently, the Preamble's allusion to faith is a testament to the pre-existing nature of human rights prior to the inception of the UN Charter. The inclusion of the term 'reaffirm' following the phrase 'we the people' not only underlines the pre-existing belief in human rights but also signifies its temporary disruption during World War II.[535] Inserting 'faith' after the term 'the scourge of war' demonstrates that all men and women were subjected to the catastrophes of war, thereby implying that humanity is not a figment of the Drafter's imagination but a concrete concept that every man and woman, which affected by war 'twice in our lifetime', is inherently entitled to fundamental rights and freedoms.[536] In other words, to prevent the occurrence of another war on the scale of the Second World War, protecting human rights is an indisputable imperative.[537] The implication of 'faith in fundamental human right' is a critical question because it demonstrates the interaction between human rights and the UN system. In the Preamble, humanity, "as the normative idea of the moral unity of mankind"[538], is declared to function as the axis of the UN system, around which all activities and structures shall be shaped

[533] Ibid, 419.
[534] Ibid.
[535] Ibid.
[536] Ibid, 419-420.
[537] Ibid, 420.
[538] Tamás Hoffmann, "Crimes against the People–a Sui Generis Socialist International Crime?," *Journal of the History of International Law/Revue d'histoire du droit international* 21, no. 2 (2019): 300.

and orchestrated. Humanity is the *raison d'être* of the establishment of the legal order of the UN, and such an order shall serve the common good. 'Faith in fundamental human rights' not only necessitates locating humanity as a fundamental value but also enables the UN system to function on an agreed basis. In accordance with the UN Charter, such an implication already exists. Now, it is time to tackle whether 'faith in fundamental human rights' has been promulgated in positive international law before the UN Charter era or not.

5.5.2.2. Exploring the Origin of 'Faith in Fundamental Human Rights'

Conforming to the methodology of research in international law, the author attempts to delve into treaties and customary rules of international law to ascertain whether they offer any insights that can be considered as the source of the expressed faith.

5.5.2.2.1. International Treaties

Abolitionism and the Statute of the International Labor Organization are the two major relevant theoretical frameworks for addressing the provenance of faith.

International Labor Organization (ILO): On June 28th, 1919, the Allies and Associate Powers ratified the Treaty of Peace with Germany in Versailles. This treaty comprises fifteen sections, with Part XIII specifically focusing on labor. Part XIII is divided into two sections: the first, beginning with a Preamble, accommodates Articles 387-426, and the second, including Article 427, outlines several general principles. The ILO's Statute incorporates provisions aimed to enhance labor conditions, such as ensuring a sufficient standard of living, safeguarding workers from illness, disease, and work-related injuries, protecting the rights of children, young individuals, and women, establishing provisions for elderly and injured individuals, and protecting the interests of workers[539] within the territory of the Member States. The Preamble of the ILO initially envisioned the realization of lasting peace based on 'social justice' by pursuing the organization's stated goals. In the last part, it proclaimed 'justice, humanity, and permanent peace' as the sources of inspiration for the High Contracting Parties. It is evident from the ILO's Statute that it does not establish a framework for a legal order where humanity stands as the *raison d'être*. Because contrary to the UN Charter where 'we the people' is introduced as the latent power operating through respective governments, in the ILO's Statute,

[539] International Labour Organization (ILO), *Constitution of the International Labour Organisation (ILO)*, 1 April 1919, adopted by the Peace Conference in April 1919, the ILO Constitution became Part XIII of the Treaty of Versailles (28 June 1919).

states are recognized as both potential and actual parties. The fact that the formation of the ILO's Statute is inspired by humanity should not lead to the conclusion that humanity serves the same function as it does in the UN Charter. A crucial point to note is that the ILO's Statute is the outcome of the Treaty of Versailles, which codified the terms of peace between the victorious Allies and Germany, and it never aimed to work in the same capacity as the UN. It is true that the ILO incorporates numerous provisions concerning labor conditions, and undoubtedly, labor rights are among the most important human rights, however, in general, the relevant provisions are primarily related to the labor relations between workers and employers, and target just one aspect of human rights. This fact does not necessarily indicate that the ILO's Statute envisioned a system based on the axis of humanity. Therefore, one cannot conclude that fundamental human rights are the *modus operandi* of the ILO. Nevertheless, the ILO's Statute proves valuable for the present research. It indicates that the concept of humanity and human rights predated the establishment of the ILO in international law. The Preamble of ILO stated that

'[t]he High Contracting Parties, moved by sentiments of justice and humanity'.

Abolitionism: In the wake of the abolitionist movement, all efforts were made to eradicate slavery. Without delving into the history of abolitionism, the first signs of its emergence can be traced back to unilateral actions taken by states.[540] Subsequently, abolitionism gained recognition in positive international law through bilateral treaties, such as the prohibition of slave trade agreements between Britain and Spain (1833) or the British-Brazilian treaty that banned the slave trade (1826). Eventually, the first universal slavery convention to suppress the slave trade and slavery (Slavery Convention) adopted in 1926 under the initiation of the League of Nations to obligate signatories to abolish slavery, the slave trade, and forced labor within their respective territories. The Slavery Convention consisted of a Preamble and 12 Articles. According to the Preamble of the Slavery Convention, the purpose is to eradicate slavery in all its forms, and the subsequent articles outlined how parties should implement the Convention.[541] In contrast to the UN Charter and similar to the ILO's Statute, the Slavery Convention places

[540] For example, Denmark banned the import of slaves to its West Indies colonies (1792), Britain passed the Abolition of the Slave Trade Act (1807), Spain abolished slavery (1811), Sweden banned slave trading (1811), the Netherlands banned slave trading (1814), France banned slave trading (1817).

[541] League of Nations, Convention to Suppress the Slave Trade and Slavery, 25 September 1926, 60 LNTS 253, Registered No. 1414.

states both behind and front of the Convention, not the peoples. Hence, it does not provide any foundation for comprehending an international community's vision centered on the axis of humanity.

As the analysis above indicates, international treaties do not offer any inference that could be interpreted as the primary source of the faith expressed in the UN Charter. In both instruments, human rights do not appear to be considered as a fundamental basis for establishing an international social order.

2.1.1.2. International customary law

Moving on now to consider whether international customary law provides any evidence that could be interpreted as the provenance of faith in fundamental human rights. International customary law refers to obligations arising from established state practice and *opinio juris*, existing independently of treaty law.[542] Therefore, it is essential to identify the manifestation of faith in humanity as a foundational of social order in both practice and *opinio juris*. In terms of practice, prior to the era of the UN Charter not many states had constitutional laws, and among those that did, only a few contained provisions pertaining to humanity. For instance, the constitutional laws of the Netherlands and Sweden (1809-1878) did not include a single word about fundamental human rights. Among those few is the Constitution of the German Reich[543] (Weimar Constitution), which was adopted after the First World War and remained in effect until 1933. It carved out several principles that promised the establishment of a democratic society. Article 17 of the Weimar Constitution provided that "every state must have a republican constitution. The representatives of the people must be elected by universal, equal, direct, and secret suffrage of all German citizens, both men and women, in accordance with the principles of proportional representation".[544] Nevertheless, subsequent to the seizure of power by the National Socialist regime in Germany in January 1933, constitutional developments took a

[542] Thirlway, *The Sources of International Law*, 64.
[543] The Constitution of the German Empire of August 11, 1919 (Weimar Constitution). Availableat:<https://germanhistorydocs.ghi-dc.org/pdf/eng/ghi_wr_weimarconstitution_Eng.pdf > accessed 25 October 2023.
[544] Ibid.

markedly regressive turn with a rapid pace[545] and by order of 28 February1933[546] the legal force of the Weimar Constitution was promptly nullified. By the president's ordinance, the government suspended fundamental constitutional rights in response to an impending communist revolt[547] such as the right of personal liberty, freedom from arrest, freedom of expression, freedom of assembly, association and private property[548]. In this regard, Falsafi mentioned that in spite of the fact that having constitutional laws was not a ubiquitous phenomenon, and among those that did, few addressed fundamental human rights, let's assume that before the adoption of the UN Charter, some of constitutional laws incorporated concept of humanity.549 Then, the question that arises is whether the presence of humanitarian concepts in constitutional laws is adequate evidence to conclude the establishment of customary law, implying the creation of rules prioritizing humanity over legal systems. In response, it is important to note that only a limited number of constitutional laws have incorporated humanitarian concepts. Additionally, even among those governments that have included such concepts, there have been instances of fundamental human rights violations, as violated in the case of Germany. Lastly, the majority of states adopted an attitude of indifference and neutrality in cases of mass atrocities.550 Therefore, due to the fact that the enactment of fundamental human rights did not translate into common practice among the majority of states during that period (lack of practice), and concurrently, there was no significant international awareness or sensitivity to human rights abuses (lack of opinio juris), it seems difficult to assert that international customary law can be regarded as the provenance of affirming faith in fundamental human rights in the UN Charter Preamble.

5.5.2.3. The Provenance of Faith in National Legal Systems

The analysis based on the UN Charter revealed that while human rights have been established as the *modus operandi* of the UN, they do not derive their existence from the UN Charter, nor from international law. One may conclude that if human rights are not derived

[545] Karl Loewenstein, "Dictatorship and the german constitution: 1933-1937," *The University of Chicago Law Review* 4, no. 4 (1937): 537.
[546] Ordinance of the Reich President zum Schutz des deutschen Volkes of 4 February 1933 (RGB. I, 35), and Ordinance of the Reich President gegen Verrat am deutschen Volk und gegen hochverraterische Umtriebe of 28 February 1933 (RGB. I, 85).
[547] Loewenstein, "Dictatorship and the german constitution: 1933-1937," 540.
[548] These rights are reflected in Articles 114, 115, 117, 118, 123, 124, and 153 of the Weimar Constitution.
[549] Falsafi, *Seyre Aghl dar Manzoomeh-ye Hoghooghe Beynolmelal*, 426.
[550] Ibid.

from international law, they inevitably should fall under the reserved domain of Article 2(7). However, the author argues that without analyzing the coordinates of human rights in the framework of the national legal system, such a conclusion remains incomplete. A clearer understanding of human rights is necessary to determine whether they were matter of reigning like tariffs or if their purpose entails a distinct implication and function.

As examined in the first chapter of this thesis, the Age of Enlightenment brought about a significant shift in human mindset, influencing every aspect of human life. This process is known as humanism. The 1776 American Declaration of Independence and the 1789 French Declaration of the Rights of Man and Citizen, among other seminal documents, functioned as pivotal milestones shaping the conceptualization of human rights in national governance frameworks. The two Declarations constituted the primary wellsprings of inspiration underlying the establishment of democratic nations grounded in the principles of human rights on a global scale. This historical reality substantiates the conclusion that the drafters of the UN Charter likely had no alternative reference apart from these Declarations to comprehend the manner human rights have been integrated into national legal frameworks. Based on the analysis conducted in Chapter One, it is safe to conclude that human rights were not originated by states. Moreover, human rights have not been regarded as matters falling in the sovereign jurisdiction of governments, granting them the exclusive authority to interpret and apply human rights at their discretion. Accordingly, the realm of humanity is not subject to the absolute control of states. Humanity stands outside the legal system and imposes its requirements in the form of human rights on law, politics, and politicians.[551] The drafters of the UN Charter integrated human rights by taking a model from the said Declarations. The manifestation of certain principles and values from the Declarations in the Preamble, Articles 1, and 2 of the UN Charter is a testament to this assertion.

5.6. Rule of Law and Humanity in the UN Charter: Its Impact on Domestic Law

It is essential to remember that any legal system is not the ultimate end *per se*. In the contemporary era, legal systems are utilized as an instrumental means to facilitate the realization of transcendent values. These values may vary from nation to nation; however, they

[551] Ibid, 429.

are invariably united by the fact that they must never be construed in a manner that undermines the inherent dignity of human beings.[552] Every legal system is intertwined with the values of its society and provides the necessary means to weave these values into the fabric of reality. The key question here is who bears the responsibility of translating those values into the fabric of legal principles? Politics is the most plausible means for shaping values into social relationships. In the present context, there is a risk of the subjugation of law to politics instead of values. Given that in the contemporary international order, governments bear the task of interpreting and protecting these values, there is a high chance of discrepancy between the interpretations of these values by the governments and the wider societal consensus.[553] In other words, Governments may interpret values differently than society and impose their own interpretations as the definitive societal values. If this were to happen, values would become synonymous with politics.[554] As a proactive safeguard, the implementation of the rule of law has demonstrated significant efficacy. It is important to note that support for the rule of law is not limited to the West, but it extends to the leaders of government from a wide variety of societies, cultures, as well as economics and politics.[555] The author agrees with Tamanaha's opinion that "in view of this rampant divergence of understandings, the rule of law is analogous to the notion of the "good," in the sense that everyone is for it", but disagrees with him that "it have contrasting convictions about what it is and/ the rule of law is an exceedingly elusive notion".[556] The rule of law entails the establishment of regulatory frameworks that ensure the enforcement of fundamental rights and freedoms and facilitating the transformation of power into institutional competence in a society.[557] In other words, the rule of law refers to a system of mechanisms, processes, institutions, practices, and norms that protect the equality of all citizens before the law, ensuring non-arbitrary governance and thereby preventing the abuse of

[552] Hedayatollah Falsafi, 'interaction between humanity and peace in the United Nations Charter' (lecture, Allameh Tabataba'i University, Tehran, Iran, 4 March 2019).
[553] Ibid.
[554] Ibid.
[555] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 2.
[556] Ibid, 3; Olufemi Taiwo, "The Rule of Law: The New Leviathan?," *Canadian Journal of Law & Jurisprudence* 12, no. 1 (1999): 151-152; Judith N. Shklar, "Political Theory and the Rule of Law," in *The Rule of Law: Ideal or Ideology*, ed. Allan C. Hutcheson and Patrick Monahan (Toronto: Carswell, 1987), 1; Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?," *Law and Philosophy* 21, no. 2 (2002).
[557] Falsafi, "interaction between humanity and peace in the United Nations Charter".

power. The common good, rooted in social values, can be attained when interpreters and legislative bodies adhere to its requisites.[558] Accordingly, recognizing that the peoples are the original legislators, the concept of the rule of law does not implies the subordination of the peoples to authorities; instead, it signifies their compliance with legal norms and principles, ensuring the harmonious coexistence of societal values and legal mechanisms. In the Declaration of Democratic Values issued by the seven heads of the major industrialized democratic nations, it is stated that:

"We believe in a rule of law which respects and protects without fear or favor the rights and liberties of every citizen and provides the setting in which the human spirit can develop in freedom and diversity." [559]

Based on the above premise, it is crucial to highlight a significant implication related to the phrase 'to reaffirm faith in (...)' in the UN Charter's preamble. This term explicitly establishes humanity as the *modus operandi* of the UN system. By establishing the UN legal system, the framers of the UN hoped 'to save succeeding generations from the scourge of war'. Along this line, Falsafi raised the noticeable question of how the UN Charter plans to fulfill its purpose.

The UN Charter integrated rule of law as a foundational framework to realize its purposes in a systematic and structured manner. In pursuit of this, the focus of all the UN Charter's organs and mechanisms is humanity, as evidenced by the Preamble. Understanding the logic behind this improvisation is intriguing. Because such an arrangement subjects the circulation of all works and the implementation of international norms to an external force rather than at the discretion of states.[560] In any international organizations, the presence of objective criteria is essential as it sets the organization's activities and decisions in motion. Within the UN, the concept of humanity stands as an objective criterion.[561] The development of relationships between states based on the rule of law is a prerequisite for establishing universal peace. Hence, Article 2 of the UN Charter speaks of the rule of law by highlighting principles such as the equality of states, good faith, peaceful resolution of disputes, independence of states,

[558] Ibid.
[559] Declaration of Democratic Values, reprinted in Economic Summits, 1975-1986: Declarations (Rome: Istituto Affari Internazionali, 1987): 116-117; See also, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels (A/67/L.1) 19 September 2012; Declaration on genuine democracy adopted on 24 January 2013, The Conference of International Non-Governmental Organisations (INGOs) of the Council of Europe, CONF/PLE(2013)DEC1.
[560] Falsafi, "interaction between humanity and peace in the United Nations Charter".
[561] Ibid.

universality of the organization, and the exercise of domestic jurisdiction. In the absence of rule of law, the processes of amending and abrogating laws, the application of international rules to concrete situations, and the imposition of legal sanctions would be contingent upon the dynamics of power equilibrium and the political mechanisms of classic international law.[562] Therefore, the UN Charter conceives the rule of law as a method to preserve the values pertaining to humanity. Given that the inherent dignity of a human being does not originate from any legal norms, and humanistic values transcend the confines of the legal system, the law functions as a tool designed to preserve and protect those values. In this sense, the UN Charter has instituted an organization wherein states collaborate to attain the UN's goals, with humanity as the sole point of resemblance between states. In sum, states have acknowledged that humanity stands beyond the scope of the UN system and steer the trajectory of UN activities.

Regarding the national legal systems, let us assume that there is no implication supporting the argument that human rights are beyond domestic matters and exempted from domestic jurisdiction (as per Article 2(7)). Additionally, let us set aside the fact that nowadays many constitutional laws in democratic countries explicitly state that their governance structures are founded on fundamental rights and freedoms. This fact *per se* implies a distinction between the legal system and humanity, with the former being subordinate to the latter. Let us instead assume that human rights fall under the domestic jurisdiction of states in the national legal system. In such a scenario, there would be a contradiction between the national and international behavior of states. While at the international level, states perceive humanity as an objective matter external to the UN legal system, at the national level, humanity is viewed as a subjective matter falling in the discretionary authority of governments. In the event of such a collision, if there are allegations of grave human rights violations by a Member State against its citizens, as well as individuals of another nationality residing in its territory, the former should be regarded as a domestic matter left to the discretion of the concerned state, whereas, the latter should be adjudicated under international laws, which unquestionably provides greater protection. This scenario blatantly contradicts the essence of human rights. Moreover, in cases of conflict between international obligations and domestic laws, the ICJ has ruled that international obligations take precedence. Domestic laws cannot justify or exempt a state from fulfilling its international obligations. The ICJ held that:

[562] Ibid.

"[B]ecause of the failure of the American authorities to comply with their obligation under Article 36, paragraph 1 (b), the procedural default rule prevented counsel for the La Grands to effectively challenge their convictions and sentences other than on United States constitutional grounds. […]. Under these circumstances, the procedural default rule had the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violated paragraph 2 of Article 36". [563]

5.7. Conclusion

In the light of the principle of peaceful dispute resolution, the SC is empowered to recommend the methods or procedures for the peaceful settlement of disputes pursuant to Articles 33-38 of Chapter VI, as well as Articles 11 and 99 of the UN Charter. Depending on the nature of the referral, the powers exercised by the SC vary. If a referral is initiated by both parties who has already made attempts to resolve the dispute peacefully, but these efforts have proven ineffective, the SC has full power under Chapter VI, namely recommending the parties to resolve their dispute peacefully, conducting investigations into disputes or situations causing international tension, recommending appropriate procedures or methods of adjustment and lastly, recommending terms of settlement. When the referral is made without prior attempts by the disputes parties or if it is referred by either party, the SC will be unable to enter the substance of the question and may at most make recommendations for procedures or methods of adjustment.

Since the location of the dispute between an offending state and others involves violations of human rights, the offending state may raise jurisdictional objections, arguing that the situation falls in the scope of Article 2(7) of the UN Charter, which bars the SC from intervening in the domestic jurisdiction of any sovereign state. Accordingly, it is essential to clarify whether the matter of human rights falls in the realm of domestic jurisdiction. While the UN Charter enjoys a significant position in the protection of human rights, it has not been thoroughly discussed. This is primarily due to the compilation of various other international human rights instruments. The central idea expressed is that the UN Charter does not limit the actions of its Organs solely to emergency and critical situations. Additionally, these Organs are obligated to sustain long-term peace, aiming to shield humanity from 'the scourge of war' through the

[563] La Grand (Germany v. United States of America), ICJ Reports, Judgment of 27 June 2001, para. 91.

adoption of appropriate and effective measures as prescribed in the UN Charter. Achieving the goal of protecting human rights is unattainable without due respect for these rights. Nevertheless, states are reluctant to subject themselves to international mechanisms designed to safeguard human rights. They assert that human rights matters are within their domestic jurisdiction, and therefore, international intervention in their domestic affairs under the pretext of human rights is unauthorized, as per Article 2(7) of the UN Charter. While the origins of human rights can be traced back to national societies, it is fallacious to conclude that human rights are inherently a matter of sovereignty. To comprehend the relationship between human rights and sovereignty, it is essential to accurately identify the nature of human rights. Upon tracing the origins of human rights, the findings of this paper indicate that the issue of human rights has never been solely a matter of sovereign discretion, wherein rulers can exercise arbitrary power over them. The concept of human rights was originally conceived as an *infra* legal concept upon which legal and political frameworks should be built. Humanity, in its essential form, exists independently of the legal and political realm, and guides these structures based on its inherent needs and principles. States are subject to the requirements of human rights, not *vice versa*. One of the most significant legal consequences of such a conclusion is that states bear the burden of proof concerning human rights issues. Since human rights do not fall under domestic jurisdiction, Member States cannot raise jurisdictional objections based on Article 2(7) of the UN Charter to the SC's intervention.

Chapter VI: From Legislation to Adjudication: Scrutinizing the Quasi-Legislative and Quasi-Judicial Powers of the UN Security Council in the Face of Mass Atrocities

6.1. Introduction

The Security Council, through its practice, has often resorted to measures or made decisions that appear to have legislative or judicial characteristics. The adoption of resolutions 1370 and 1540 has been extensively characterized as a legislative act, and the compilation of a list of sanctioned individuals is regarded as a judicial act by commentators. Legislative act is defined as "[a]ctions which related which related to subjects of permanent or general character"[564], and judicial act as "[a]n act which undertakes to determine a question of right or obligations or of property as foundation on which it proceeds.[565] The aim of this chapter is not to scrutinize a legal analysis of individual resolutions but rather to conduct an analysis of whether the competence of the SC may justify the application of quasi-legislative and quasi-judicial measures against a state responsible for mass atrocities against its own population.

This chapter commences by investigating the feasibility of quasi-legislative power in the mirror of the UN Charter. This investigation involves a comprehensive analysis of arguments advanced by both proponents and detractors of such power. The second and concluding part of

[564] Joseph R. Nolan and others, *Black's law dictionary*, 6th edition (The US: West Publishing Company, 1991), 624.
[565] Ibid, 590.

this chapter tackles the inquiry into the quasi- judicial power of the SC in the framework of the UN Charter. It delves into the judicial competence of the SC concerning both legal and natural persons. Lastly, it addresses the legality of the establishment of *ad hoc* courts by the SC.

6.2. Analyzing the Quasi-Legislative Power of the UN Security Council under the UN Charter

The SC's decisions on terrorism and the prevention of weapons of mass destruction proliferation have prompted a heated scholarly debate regarding whether the SC may function as a legislative body in the pursuit of international peace and security.[566] Opinions are sharply divided. Some commentators argue that once the SC determines a matter as a threat to peace, a breach of peace, or an act of aggression, the UN Charter offers ample legal basis for the exercise of a wide range of powers, including legislative power. On the other side of the spectrum, there are scholars who believe that legislative power lacks a legal basis in the UN Charter, and therefore, its application is *ultra vires.*

6.2.1. The Security Council's Legislative Power: Examining Supporting Arguments

In a vigorous scholarly debate over whether the UN Charter permits the SC to enact legislation while discharging its primary duty of maintaining international peace and security, some scholars take an affirmative stance.[567] The permissive interpretation of the UN Charter begins with the analysis of Article 24. This Article provided:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

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[566] For a detailed analysis of the United Nations' actions against terrorism, look at: Péter Kovács, "The United Nations in the Fight against International Terrorism," in *Law in the War on International Terrorism*, ed. Ved P. Nanda, p.p. 41-53 (Ardsley: Transnational Publishers, 2005).

[567] Roele, "Sidelining Subsidiarity: United Nations Security Council Legislation and Its Infra-Law," 191; Johnstone, "Legislation and adjudication in the UN Security Council: Bringing down the deliberative deficit," 299; Kirgis, "The Security Council's first fifty years," 520; Harpher, "Does the United Nations Security Council have the competence to act as court and legislature,". 149

3. (…)

It has been argued that the letter and context of Article 24 authorize the SC to legislate in order to fulfill its primary responsibility to maintain or restore international peace and security. Delbruck, by highlighting the second paragraph of Article 24, argued that the first paragraph grants the SC general powers to fulfill its duties, including legislative power. He elaborates that while the wording of Article 24(2) implies that the SC has only the specific powers mentioned in this paragraph, it could be interpreted differently – that the second paragraph serves as a reference to specific powers, and thus, the SC should also possess general powers beyond those outlined in Article 24(2).[568] This interpretation is corroborated by the fact that the SC's powers extends beyond the specific powers listed in paragraph two of Article 24, as evidenced by other powers enumerated in different chapters, such as Articles 12(1), 26, and 94(2).[569] According to the latter Article, the SC may recommend or adopt measures to enforce the judgments of the ICJ. Moreover, bestowing specific powers to the SC implies that, logically, this body should also have general powers as stipulated in the first paragraph.[570] In the same vein, Anne argued that specifying powers in Article 24(2) does not preclude the SC from having the necessary general powers to fulfill its responsibilities.[571] This interpretation of Article 24 appears to be inspired by the advisory opinion of the ICJ. In the Namibia case, the Court stated:

" (…) Article 24 of the Charter vests in the Security Council the necessary authority to take action such as that taken in the present case. The reference in paragraph 2 of this Article to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1. Reference may be made in this respect to the Secretary-General's Statement, presented to the Security Council on 10 January 1947, to the effect that "the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VET, VI11 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. The

[568] Jost delbruck, "Article 24," in *The Charter of United Nations: A Commentary*, ed. Bruno Simma (Oxford: Oxford University Press, 1995), 401
[569] Ibid, 403.
[570] Ibid.
[571] Anne Peters, "Ch.V The Security Council, Functions and Powers, Article 24," in *The Charter of the United Nations: A Commentary*, Volume I, ed. Bruno Simma and others, 3rd edition (London: Oxford University Press, 2012), 777.

only limitations are the fundamental principles and purposes found in Chapter 1 of the Charter.""[572]

The author agrees with the notion that Article 24(1) entrusts the SC with general powers for the sake of peace. However, focusing solely on the first clause without considering the second paragraph of the same Article can lead to an imperfect understanding of Article 24. Firstly, the ICJ encapsulated its advisory opinion by broadly asserting that, according to Article 24(1), the SC holds general powers beyond what is specified in Article 24(2), with limited elucidating the nature and scope of these powers. It is unclear whether these powers are identical to the specific powers or if they vary in terms of severity or scope. Without attempting to ascribe any specific interpretation to the ICJ's intent, it can be confidently asserted that the ICJ did not echo unlimited power of the SC. If that were the case, the ICJ would not have needed to justify the SC's actions under the hidden (general) powers in Article 24(1), as the ICJ could have simply inferred unlimited powers for the SC from the letter of the same Article. The fact that the SC's powers are limited raises an inevitable question: If there are boundaries to the SC's powers, what are the criteria to identify those limits? By what legal grounds can one determine whether legislation by the SC is *intra vires* or *ultra vires*. If it is acceptable to view the SC as a legislator under the general powers of Article 24(1), by the same logic, one might argue that the SC could invalidate international conventions, such as the Vienna Convention on the Law of Treaties or the Convention on the Law of the Sea, and then enact new legislation based on its own discretion, imposing it on states. Although the advisory opinion construed Article 24(1) as a foundation for general powers, it does not provide any indication of the extent to which the SC may exercise these powers. Therefore, the advisory opinion, at most, demonstrates the existence of general powers but does not offer a solid legal basis to determine whether the SC may legislate. Secondly, Article 24(2) refers to specific powers. Mentioning these specific powers logically serves one of two purposes: it may either elaborate on the types of powers that the SC can derive from its general powers (acting as a guideline), or it may indicate special powers that typically do not fall under general powers but are granted to the SC because deemed necessary to enhance the efficiency of the SC. If one accepts the second paragraph of Article 24 as a

[572] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports, Advisory Opinion of 21 June 1971, para. 110.

guiding provision, it renders both the entirety of Chapter VII and the corresponding section in Article 24(2) redundant. This is because, under Article 24(1), the SC can make any decision to maintain international peace and security, and Article 25 obliges Member States to implement those decision. Moreover, the powers outlined in Article 24(2) should be such that a legal operator can deduce them from the general powers specified in Article 24(1), i.e., these powers should have a clear and justifiable connection to the fulfillment of the primary duty of maintaining international peace and security. A closer examination of the roles of these powers in Article 24(2) reveals that they establish legal parameters upon which the SC and other subjects of international law can use to ascertain the limits of the SC's jurisdiction. Examining only the first paragraph of Article 24 in isolation from the second paragraph might be seen as tantamount to endowing the SC unlimited powers, as the combination of Article 24(1) and Article 25 alone is adequate to assume absolute authority for the SC. Therefore, viewing the second paragraph of Article 24 merely as a guideline does not seem to be a satisfactory interpretation. The author's conclusion can be challenged with the argument that the specific powers outlined in Article 24(2) inherently lack restrictive functions. Additionally, What serves as a limiting criterion in the UN Charter is the reference to the purposes and principles of the UN in the opening sentence of the second paragraph of Article 24. In response to their reasoning, let's assume their argument is valid. In that case, it leads to the conclusion that under the general powers, the SC has the power to enter the merits of all disputes among states and judges them through binding resolutions, in line with the provisions of Article 1(1). This interpretation, even when approached liberally, appears highly unconventional and challenging to accept. Therefore, it appears logical to adopt the perspective that paragraph two of Article 24 enumerates powers requiring explicit stipulation for their legality, thereby demarcating the areas in which the SC may intervene.

Some other scholars place emphasis on Article 39 and contend that the basis of legislative power can be found in the mentioned Article. Article 39 stated:

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.

It has been argued that in the absence of any restrictive clause, the term 'measures' in Article 39 is broad enough to encompass to accommodate a wider spectrum of powers, including legislative power.[573] Tsagourias, by highlighting the ambiguity of the word 'measures', concluded that it could encompass various powers, including legislation.[574] In alignment with Tsagourias's viewpoint, Talmon contented that the SC's competence should be examined in the framework of the UN Charter, rather than simply characterizing the SC as a world police force, and thereby implying a policing function for this body. Accordingly, he argued that Article 39 grants the SC the freedom to select the means to be employed for the maintenance and restoration of international peace and security, and in this line, the term measures is so inclusive that it accommodates both general and specific powers, thereby equipping the SC with legislative power.[575] Talmon supported his interpretation with an analogous example, arguing that if the SC can order states to freeze the funds of individuals responsible for a specific act of terrorism, it should *a fortiori* have the power to order states to freeze the funds of all individuals committing such acts.[576] This deduction appears to be incorrect because it does not constitute an *argumentum a fortiori*. Such an analogy is applicable when the rationale in the first proposition is stronger than that in the second proposition. However, in the presented deduction, the reasons in both premises carry equal weight. Furthermore, the first proposition involves a judicial act, whereas the second premise involves a legislative act, making it appear as a false analogy.

The concept of a 'threat to peace' in Article 39 is another angle that has been adduced as a testament to support the existence of legislative power for the SC. This perspective is based on the argument that the UN Charter's ultimate aim is the attainment of enduring peace, and this aim can only be fulfilled if peace is safeguarded comprehensively. Accordingly, the UN Charter establishes a system of collective security that goes beyond merely reacting to peace breaches, and instead takes proactive measures to address any occurrences that could potentially

[573] Harpher, "Does the United Nations Security Council Have the Competence to Act as Court and Legislature," 150, 154.
[574] Nicholas Tsagourias, "Security council legislation, Article 2 (7) of the UN Charter, and the principle of subsidiarity," *Leiden Journal of International Law* 24, no. 3 (2011): 551.
[575] Peters, "Ch.V The Security Council, Functions and Powers, Article 24," 785; Talmon, "The Security Council as world legislature," 67,181.
[576] Ibid, 182.

jeopardize international peace and security, whether they are of a specific or general nature.[577] Due to the rapid changes in international circumstances, the concept of a threat to peace has not remained static; it has evolved, and as a result, it no longer resembles its former shape. Therefore, the methods for addressing these evolving threats must be updated to align with their new nature.[578] When a threat to peace assumes a general and abstract nature, the SC shall be equipped with legislative power to eradicate such a threat by imposing new obligations on states; otherwise, the SC may find it challenging to meet its fundamental duty.[579] In Talmon's words, specific threats should be encountered with concrete actions, and abstract threats should be met with general measures, and thus, it logically follows that the SC should be capable of addressing both specific and general threats on its agenda.[580]

Article 41 of the UN Charter provides another legal basis for justifying legislative power. Article 41 states:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Some commentators addressed the negative language used in Article 41 and contend that it offers the SC the latitude to employ a variety of measures that fall short of use of force and therefore such a broad discretion allows the SC to wield normative authority, potentially leading to the creation or modification of international law as deemed necessary for the preservation of international peace and security.[581] Another perspective seeks to establish normative power by scrutinizing the examples outlined in the Article. Kigis argues that imposing economic sanctions is undoubtedly one of the powers the SC may exercise, and economic sanctions have all the essential elements of a legislative act; sanctions imposed under Article 41 have taken a

[577] Peters, "Ch.V The Security Council, Functions and Powers, Article 24," 785; Károly Végh, "A legislative power of the UN Security Council?," *Acta Juridica Hungarica* 49, no. 3 (2008): 281
[578] Rosand, "The Security Council as Global Legislator: Ultra Vires or Ultra Innovative," 570; Kirgis, "The Security Council's first fifty years," 524.
[579] Rosand, "The Security Council as Global Legislator: Ultra Vires or Ultra Innovative," 559
[580] talmon, "The Security Council as World Legislature," 181.
[581] Tsagourias, "Security council legislation, Article 2 (7) of the UN Charter, and the principle of subsidiarity," 551; Rosand, "The security council as global legislator: ultra vires or ultra innovative," 556.

unilateral approach (they are adopted by the fifteen-member Security Council rather than by the agreement of all UN member states), these sanctions have also contributed to the establishment or alteration of legal norms (essentially creating binding rules), and lastly, they have exhibited a general scope, being directed toward all member states and occasionally even non-members.[582] He deduces from this premise that Article 41 justifies the imposition of a general obligation on Member States.

Another argument supporting the establishment or modification of new regulations within the UN Charter arises from an examination of the UN Charter's purposes. These scholars advocate for a teleological interpretation of the UN Charter, contending that the deliberation concerning the SC's powers should be examined in the light of the UN Charter's purposes, which evolve in response to the demands of international circumstances.[583] If the SC is entrusted with the responsibility of preserving international peace and security, it should have at its disposal further unspecified means to employ various measures necessary to fulfill its task, which may also involve acting as a legislature.[584] To achieve this goal, Article 41 offers a solid groundwork for all powers that are in line with that primary responsibility.[585] This reasoning is corroborated by adducing the advisory opinion of ICJ in the Repatriation case, in which the ICJ stated:

"Under international law, the Organization 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."[586]

The author contends that relying solely on the UN Charter's purposes as a source of power generation may be open to challenge. Because the purpose of the UN has the capacity to be used to justify any exercise of power by the SC. It is challenging to readily accept such an argument, and one can point to the ICJ's advisory opinion in the Certain Expense case, which diminishes the legal impact of the Repatriation case. Thirteen years later, the ICJ ruled that:

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[582] Kirgis, "The Security Council's first fifty years," 520.
[583] Tsagourias, "Security council legislation, Article 2 (7) of the UN Charter, and the principle of subsidiarity," 551;
[584] Rosand, "The security council as global legislator: ultra vires or ultra innovative," 556; Peters, "Ch.V The Security Council, Functions and Powers, Article 24," 782; Martinez, "The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits," 32
[585] Nico Krisch, " Article 41," in *The Charter of the United Nations: A Commentary*, Volume I, ed. Bruno Simma and others, 3rd edition (London: Oxford University Press, 2012), 1318.
[586] Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports, Advisory Opinion of 11 April 1949, 182.

The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited.[587]

Some commentators focus on the SC's position in the geometry of international law and construct their argument based on the premise that the international community faces numerous challenges jeopardizing international peace and security. These challenges demand swift and suitable responses, while the mechanisms of international law to address these issues are often sluggish, time-consuming, and occasionally difficult to accomplish. In these circumstances, the SC, empowered by the UN Charter to settle all conflicts or threatening situations, is the most fitting institution to address these issues and therefore it may effectively fill the existing gap in international law through its capacity for binding decision-making via legislative channels.[588] The normative power of the SC stands as the most accessible and efficacious solution to obviate these threats, as it aptly serves the international community by empowering the SC to formulate essential laws that are challenging to be made by using conventional methods of international law.[589] Chapter VII has the potential to bolster efforts aimed at conforming the behavior of states with legal norms that benefit everyone.[590] Preventing general threats in the international arena requires the appropriate participation of states and cannot be eliminated solely through specific coercive enforcement measures. Therefore, the SC's legislative power is a valuable means to encourage the right form of universal participation by providing a coherent framework for a 'coordinated response'.[591]

Having said that, it is evident that assigning such a role to the SC goes beyond the competence given to the SC, as nowhere in the UN Charter does it authorize the SC to act as a gap-filler in the international legal system.

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[587] Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), ICJ Reports, Advisory Opinion of 20 July 1962, 168.
[588] Rosand, "The Security Council as Global Legislator: Ultra Vires or Ultra Innovative," 544; Peter Hulsroj, "The legal function of the Security Council," *Chinese Jornal of International Law* 1, no.1 (2002): 62.
[589] Paul Szasz, "The security council starts legislating," *American Journal of International Law* 96, no. 4 (2002): 905, Tsagourias, "Security council legislation, Article 2 (7) of the UN Charter, and the principle of subsidiarity," 554.
[590] Harpher, "Does the United Nations Security Council have the competence to act as court and legislature," 131.
[591] Roele, "Sidelining Subsidiarity: United Nations Security Council Legislation and Its Infra-Law," 196.

This cluster of scholars, who believe in the UN Charter's authorization for the SC to legislate in the interest of peace, purifies their argument by rejecting jurisdictional objections that claim the SC is deprive of legislative power because such a power contradicts the consensual basis of rulemaking in international law. The proponents of legislative power respond by citing Article 25 as a source of member states' consent to the legislative acts of the SC.[592] Along these lines, Rosand pointed out that "when states joint to the Charter, they expressly consented to each and every exercise of the SC authority. more to the point, all states express their consent to the system the SC has a law-making role".[593] Some of these scholars also believe that if there is any doubt regarding the existence or absence of normative power of the SC, states have, through their subsequent practices, endorsed the SC's power to impose general obligations on states in cases where the SC has taken action.[594] Their primary reliance was based on the feedback from states regarding resolutions 1373 and 1540, along with the argument that these resolutions have been endorsed as a precedent, rather than being accepted merely as isolated acts.[595] They contend that even if the aforementioned resolutions were ultra vires, the overwhelming support from the majority of states evinces that Member States have signed the letter of authorization for the SC to legislate.[596] This perspective can be traced in the advisory opinion of the ICJ in the Namibia case. In that case, the ICJ upheld that:

This procedure [the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions] followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been

[592] Végh, "A legislative power of the UN Security Council?," 294; Martínez, "The legislative role of the Security Council in its fight against terrorism: legal, political and practical limits," 355.
[593] Rosand, "The security council as global legislator: ultra vires or ultra innovative," 674.
[594] Peters, "Ch.V The Security Council, Functions and Powers, Article 24," 784; Nico Krisch, "The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council," in *Terrorism as a Challenge for National and International Law: Security Versus Liberty*, ed. Christian Walter and others (Berlin: Springer, 2003), 886.
[595] Peters, "Ch.V The Security Council, Functions and Powers, Article 24," 784; Martínez, "The legislative role of the Security Council in its fight against terrorism: legal, political and practical limits," 351.
[596] Krisch, "The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council," 886; Axel Marschik, *The Security Council as World Legislator? Theory, Practice and Consequences of an Expansion of Powers*, IILJ Working Paper 2005/18, Institute for International Law and Justice (New York: New York University, 2005), 19; Martinez, "The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits," 335; Peters, "Ch.V The Security Council, Functions and Powers, Article 24," 786.

generally accepted by Members of the United Nations and evidences a general practice of that Organization.[597]

However, it should be noted that the passage expresses that the UN Charter has been modified by subsequent customary rule, and the procedure in question has been the general practice of the UN. The legality of the SC's normative power cannot be substantiated or proven by these two factors.

After establishing the legality of the normative power of the SC, supporters of legislative power raise the issue of its legitimacy by expressing concerns about non-compliance with the SC's normative decisions. They suggest that the SC should engage in consultations with the international community prior to making decisions that entail general obligations.[598] In both its general conduct and when it assumes a legislative role, the SC should exercise its powers in a manner that avoids being perceived as illegitimate by the international community.[599] Some commentators, such as Szasz, while not subscribing to the belief that the SC is obligated to consult with states, still argue that any legislative resolution of the SC should be reflective of the general will of the international community.[600] On the other hand, some others argue that considering the public opinion of the international community is a prerequisite for the adoption of normative resolutions under Article 2(1), and legislation basically falls in the general function of the GA in Chapter IV.[601] Marinez held that, under normal circumstances, the SC may legislate and modify the rights and obligations of states under the following conditions: a) respecting norms of general international law, b) being directed towards peace and security and the provisions of the Charter, c) if the SC intends to create a rule without time limitation and addressing a specific case, it should be based on inter-state consent, and d) respecting the principle of proportionality. [602] However, if deviation from the said requirements is deemed inevitable for the protection of international peace and security, the SC may legislate, except

[597] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports, Advisory Opinion of 21 June 1971, para. 22.
[598] Peters, "Ch.V The Security Council, Functions and Powers, Article 24," 787.
[599] Harpher, "Does the United Nations Security Council have the competence to act as court and legislature," 132,148.
[600] Szasz, "The security council starts legislating," 905.
[601] Peters, "Ch.V The Security Council, Functions and Powers, Article 24," 787.
[602] By addressing these conditions, he sought to absorb all criticisms and present a comprehensive solution. Martínez, "The legislative role of the Security Council in its fight against terrorism: legal, political and practical limits," 345-346

jus cogens norms.[603] Similarly, Harpler contended that the SC may legislate but is only constrained by the observance of the principles and purposes of the UN Charter, international law, and justice.[604]

Another important issue worthy of consideration in the proponent's argumentation is the assertion that the structure of the SC has no impact on the belief in its legislative power. The SC is a political body composed of fifteen states, which includes five permanent members with veto rights. The SC is a delicate balance between the individual interests of the permanent members and the collective interests of all members. Despite its political and non-democratic character, the proponents argue that the SC's structure should not hinder it from exercising legislative power. This is because, when compared to authorizing military action, which is the most serious decision the SC can make and requires less democratic legitimacy, it is not convincing that imposing general obligations would necessitate a higher threshold.[605]

The last topic in this section that deserves attention is the reference to the principle of proportionality [606] by protagonists of legislative power. They argue that transnational abstract threats cannot be removed solely through specific coercive enforcement actions; rather, only general responses are proportionate means to counter general threats.[607]

Despite the intriguing and tempting arguments built by proponents of legislative power, the primary shortcoming lies in the potential for an excessive expansion of the SC's power. They fail to offer further clarity regarding the limits of this expansion. Such an interpretation of Articles 25, 39, and 41 could transform the SC into a super-state entity with boundless powers, capable of virtually any action. At this point, it is worth mentioning the ICJ advisory opinion in the Admission case, where the Court held:

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[603] Ibid, 346

[604] Harpher, "Does the United Nations Security Council have the competence to act as court and legislature," 149.

[605] Talmon, "The Security Council as World Legislature," 179

[606] Erika de Wet believes that the principle of proportionality is not applicable to the SC. She wrote that applying the principle of proportionality to the Security Council would necessitate exhausting all non-binding or non-military enforcement measures before allowing the use of force. However, this approach is considered incompatible with the flexibility required by the Security Council for swift and efficient actions. De Wet, *The Chapter VII Powers of the United Nations Security Council*, 30.

[607] Roele, "Sidelining Subsidiarity: United Nations Security Council Legislation and Its Infra-Law,"193; Tsagourias, "Security council legislation, Article 2 (7) of the UN Charter, and the principle of subsidiarity," 551

"The political character of an organ does not release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgement"[608]

6.2.2. The Security Council's Legislative Power: Examining Opposing Arguments

There is a spectrum of arguments that, at odds with previous interpretations of the UN Charter, strongly reject the SC's ability to establish general and abstract rules for the future without limitations in time and geography.[609] They view this capacity as contradictory to the UN Charter. Opponents of legislative powers argue that, as the UN Charter entrusts the SC with the mission of maintaining international peace and security, this body is granted peace enforcement powers, neither law enforcement nor law-making powers.[610]

Regarding Article 24(1), it has been an argued that the broad language in paragraph one is not sufficiently persuasive to infer legislative power for the SC. Furthermore, paragraph one of Article 24 should be considered in conjunction with paragraph two of the same Article. The attribution of the power to institute general obligations is a specific power, and therefore requires explicit provisions while nowhere in the UN Charter permits the SC to address matters that lack concrete features. [611]

This group of scholars presents different interpretations of Article 39 of the UN Charter. They argue that a systematic examination of Article 39 within the context of Chapter VII and the norms in the immediate vicinity of Article 39 suggests that the SC has the power to address

[608] Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), ICJ Reports, Advisory Opinion of 28 May 1948, 64.
[609] Mónica Lourdes de la Serna Galván, "Interpretation of article 39 of the UN Charter (threat to the peace) by the security council: is the security council a legislator for the entire international community?," *Anuario mexicano de derecho internacional* 11 (2011):182; Velásquez-Ruiz, "In the Name of International Peace and Security: Reflections on the United Nations Security Council's Legislative Action," 36; Martínez, "The legislative role of the Security Council in its fight against terrorism: legal, political and practical limits," 339; Munir Akram and S Haider Shah, "The Legislative Powers of the United Nations Security Council." in *Towards World Constitutionalism*, ed. R.S. J. Macdonald and D. M. Johnston (Leiden: Brill, 2005), 452; Joyner, Daniel H. "Non-proliferation law and the United Nations system: resolution 1540 and the limits of the power of the Security Council," *Leiden Journal of International Law* 20, no. 2 (2007): 514; Kenneth Manusama, *The United Nations Security Council in the post-cold war era: applying the principle of legality* (Leiden: Brill, 2006), 42-44.
[610] Gaetano Arangio-Ruiz, "On the Security Council's Law Making," *Rivista di diritto internazionale* 83 (2015): 640- 641.
[611] Georges Abi-Saab, "The security council legibus solutus? On the legislative forays of the Council," in *International Law and the Quest for its Implementation. Le droit international et la quête de sa mise en oeuvre*, ed. Marcelo Kohen and Laurence Boisson de Chazournes (Leiden: Brill, 2010), 29.

only concrete cases, rather than abstract ones.[612] Article 39, coupled with 41 and 42, indicate that the SC is permitted to address specific behaviors of states rather than the manifestation of that particular type of behavior.[613] The provisions of Chapter VII clearly indicate that it was intended to establish an organ with the powers to enforce peace, not to enforce laws or engage in legislation.[614] In this line, Krisch wrote that the UN Charter did not designate any organ as a legislator within the framework of the UN, and the reading that the SC enjoys legislative power goes beyond the role envisioned for this body.[615] He further argued that the rationale behind the creation of the SC is to establish an organ capable of taking the most effective measures to maintain peace, rather than enforcing or creating laws.[616] Therefore, the SC has a policing function and cannot address generic threats through a general role, instead, it can only adopt preliminary measures to remove the threat in a specific case.[617] To support his argument, Krisch cited Article 26 as testament to the SC's lack of legislative power and argued that even though the issue of armaments is undoubtedly one of the chief threats in the international community, Article 26 only bestowed the SC recommendatory power.[618] Krisch, in agreement with Abi-Saab, argued that it is unacceptable to assume specific powers for the SC without justification, and these powers must be derived from Chapter VII, and in this context, Article 41 is the most plausible legal basis for legislative power but it only accommodates powers that align with the SC's primary policing function, namely making preliminary decisions to cope with situations in order to eliminate threats.[619] Imposing abstract obligations to address a situation is more commensurate with definite settlement of disputes, which falls in the domain of Chapter VI, where the SC lacks binding powers.[620]

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[612] Arangio-Ruiz, "On the Security Council's Law Making," 628-630; Bjorn Elberling, "The Ultra Vires Character of Legislative Action by the Security Council," *International Organizations Law Review* 2, no. 2 (2005): 342.
[613] Matthew Happold, "Security Council resolution 1373 and the constitution of the United Nations," *Leiden Journal of International Law* 16, no. 3 (2003): 559; Roberto Lavalle, "A novel, if awkward, exercise in international law-making: Security Council Resolution 1540 (2004)," *Netherlands International Law Review* 51, no. 3 (2004): 421.
[614] Arangio-Ruiz, "On the Security Council's Law Making," 628.
[615] Nico Krisch, " Introduction to Chapter VII: The General Framework." in *The Charter of the United Nations: A Commentary*, Volume II, ed. Bruno Simma and others, 3rd edition (London: Oxford University Press, 2012), 1253.
[616] Ibid, 1248.
[617] Ibid.
[618] Ibid.
[619] Ibid, 1256.
[620] Ibid.

Zemanek criticized the ICJ's *dictum* in the Namibia case and those who support the interpretation that the SC's powers are not restricted to paragraph 2 of Article 24, and paragraph 1 of the same Article provides a sufficient legal foundation for the SC to issue binding decisions on Member States. He stated that the term 'specific measures' in Article 24(2) implies the existence of general powers, but it does not lead to the conclusion that the SC is entitled to implement enforcement measures beyond the realm of specific provisions that expressly authorize such actions.[621] Accordingly, the SC enjoys general powers under Article 24(1), but the adoption of any binding decision must be carried out in accordance with specific provisions of the UN Charter that authorize such powers.[622] In a similar vein, Judge Fitzmaurice, in his dissenting opinion in the Namibia case, wrote, "If, under the relevant chapter or article of the Charter, the decision is not binding, Article 25 cannot make it so. If the effect of that Article were automatically to render all decisions of the Security Council binding, then the words 'in accordance with the present Charter' would be entirely redundant."[623] Zemanek also argues that the term 'measures' used in Articles 39, 41, and 42, despite the discretionary power of the SC, does not imply that the SC can create rules of general international law through its decisions; but the conventional meaning of the word in the context of these Articles suggests a specific action intended to achieve a concrete outcome, constituting a temporary, case-specific response to one of the situations mentioned in Article 39, and thus it does not entail the abstract establishment of future rules for general behavior over an unspecified duration.[624] The advisory opinion of the ICJ in the Admission case has been cited as evidence that the mere generality of an Article in the UN Charter is insufficient to establish a specific power for the SC in the absence of any clear indication of such power. The ICJ stated that:

(...)Article 24, owing to the very general nature of its terms, cannot, in the absence of any provision, affect the special rules for admission which emerge from Article 4.[625]

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[621] Karl Zemanek, "Is the Security Council the Sole Judge of Its Own Legality?," in *Liber Amicorum judge Mohammed Bediaoui*, edited by Emile Yapko and Tahar Boumedra, (The Hague: kluwer law international, 1999), 640-641.
[622] Ibid, 641.
[623] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports, Advisory Opinion of 21 June 1971, Dissenting opinion of Judge Gerald Fitzmaurice, para. 113.
[624] Zemanek, "Is the Security Council the Sole Judge of Its Own Legality?," 636.
[625] Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), ICJ Reports, Advisory Opinion of 28 May 1948, 64.

Abi-Saab raised doubts about the argument that legislative power should not necessarily be tied to a specific the UN Charter Article but can be justified by the general powers defined in Chapter VII because Articles 24(2) and 39 clearly state that the decisions of the SC shall be made in accordance with Articles 41 and 42.[626] Abbi Saab further underscores the significance of the pronoun 'any', which appears just before 'threat to peace' in Article 39, and argues that this phrasing distinctly signifies reference to a specific question or situation.[627]

Fremuth and Gabriel expressed that the concept of a 'threat to peace' has often been cited as the legal foundation for the SC's legislative power, but such an interpretation is not congruent with the entire wording and context of Article 39 because Article 39 in addition to a threat to peace, speaks of a breach of peace and act of aggression which are undeniably associated with specific situations.[628] They also added that it is difficult to accept that an abstract situation could be qualified as a breach of peace or an act of aggression.[629] Building upon these premises, they conclude that since breaches of peace and acts of aggression, which are more severe and critical compared to the mere threat to peace, do not include abstract dangers, it is not persuasive to argue that this could be the case for a threat to peace, therefore, legislative power does not fit with the specificity hidden in the concept of a threat to peace.[630]

The author contends that the argument proposing that a 'breach of peace' and an 'act of aggression' pertain to specific instances, and consequently, a 'threat to peace' must align with them and apply only to particular cases, is not compelling enough to rule out legislative power. Each of these - a threat to peace, a breach of peace, or an act of aggression - has its own distinct implication and independence, and they should not be evaluated in relation to each other.

In critiquing the reasoning that legislative power is far-reaching and less gravy than the use of force and, therefore, should be permissible under the chapeau of Article 41, the opponents counterargue that, firstly, the use of force is not an implied power but rather an explicit provision of the UN Charter, and secondly, if one were to accept this logic, then every

[626] Abi-Saab, "The security council legibus solutus? On the legislative forays of the Council," 33.
[627] Ibid, 29.
[628] Michael Fremuth and Jörn Griebel, "On the Security Council as a Legislator: A Blessing or a Curse for the International Community," *Nordic Journal of International Law* 76, no. 4 (2007): 350.
[629] Ibid.
[630] Ibid.

conceivable power could be assumed to be within the SC's ambit because any power would lose its weight when compared to the use of force.[631]

Lovalle placed his focus on Article 41 as the primary source from which the SC's extraordinary powers emanate and argued that both the language and context of Article 41, as well as the historical background of the UN Charter, indicate that it was designed to be applied to a specific situation rather than a generic state.[632] Regarding the specificity of the SC's actions, the advisory opinion of the ICJ in the Certain Expenses case has been frequently cited, wherein the Court stated:

The operation did not involve "preventive or enforcement measures" against any State under Chapter VI1 and therefore did not constitute "action" as that term is used in Article 11.[633]

Some scholars examined the examples provided in Article 41 as a benchmark for assessing the validity of any new power and argued that all the examples in this Article corroborate the interpretation that the SC should adhere to specificity in terms of time, rule, and target, and since legislative power extends beyond the specificity criterion, it does not parallel with these examples, therefore, does not fall in the domain of Article 41.[634] Eberling wrote that although Article 41 does not provide an exhaustive list of measures, this should not be interpreted as a *carte blanche* for employing any non-forceful actions.[635] Similarly, Abi-Saab pointed out that it is evident from the language of the Article, its examples, and the general context that the aim of these measures is to safeguard peace in specific crises or situations.[636] Antagonists also raised doubts about the acceptance of legislative power for the SC through subsequent practice or acquiescence.[637] While they generally concede the possibility of amendment in the future[638] they reject the hypothesis that the SC practice has led to changes in the UN Charter law up to

[631] Ibid, 351.
[632] Lavalle, "A novel, if awkward, exercise in international law-making: Security Council Resolution 1540 (2004)," 412.
[633] Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), p 177
[634] Lavalle, "A novel, if awkward, exercise in international law-making: Security Council Resolution 1540 (2004)," 421; Zemanek, "Is the Security Council the Sole Judge of Its Own Legality?," 636; Abi-Saab, "The security council legibus solutus? On the legislative forays of the Council," 30.
[635] Elberling, "The Ultra Vires Character of Legislative Action by the Security Council," 343
[636] Abi-Saab, "The security council legibus solutus? On the legislative forays of the Council," 30.
[637] Nico Krisch, "Article 41," in *The Charter of the United Nations: A Commentary*, Volume II, edited by Bruno Simma and others, 3rd edition (London: Oxford University Press, 2012). 1323; Elberling, "The Ultra Vires Character of Legislative Action by the Security Council," 346.
[638] Zemanek, "Is the Security Council the Sole Judge of Its Own Legality?," 643-644.

date.[639] In response to the claim that the widespread international cooperation with Resolution 1370 evinces an amendment to the UN Charter in favor of legislative power, Marschik argued that even if we consider states' willingness to implement Resolution 1370, it does not necessarily imply an endorsement of a subsequent alteration to the UN Charter. It is important to distinguish between singular approval as an exception and a state's consent to both specific actions and the general power under which those specific actions are taken. In the case of Resolutions 1373 and 1540, the most that can be concluded is an approval of a singular derogation.[640] In the same spirit, Arangio wrote that the absence of sufficient resistance or even later acceptance or acquiescence to the SC's *ultra vires* conduct does not necessarily imply that states legally accepted the interpretation in question or established a new customary rule to empower this organ.[641]

Referring to the internal law of the UN Charter is another legal basis that has been cited to reject the submission of the SC acting as a legislature. It is argued that, while there is no legislative organ in the technical sense in the UN system, the GA is the most suitable candidate to be considered a legislative body.[642] The adoption of normative resolutions by the SC, such as 1370 and 1540, is an encroachment into the jurisdiction of the GA.[643] Under Article 13(1)(a) of the UN Charter, the codification or progressive development of international law is the specific function assigned to the GA, and any involvement by the SC in this realm would disrupt the balance between these two organs.[644] What falls in the remit of the SC is solely the handling, management, and control of concrete crises, and it is prohibited from acquiring new powers that infringe upon the competence of other UN organs.[645] According to the UN Charter, the only realm in which the SC may act as a legislator is in the context of disarmament under Article 26, which allows the SC to promote a world without large-scale destructive weapons but in a

[639] Krisch, "Article 41," 1323-1324.
[640] Marschik, *The Security Council as World Legislator? Theory, Practice and Consequences of an Expansion of Powers,* 19-20.
[641] Arangio-Ruiz, "On the Security Council's Law Making," 691
[642] Elberling, "The Ultra Vires Character of Legislative Action by the Security Council," 343, De la Serna Galván, "Interpretation of article 39 of the UN Charter (threat to the peace) by the security council: is the security council a legislator for the entire international community?," 182; Akram and Haider Shah, "The Legislative Powers of the United Nations Security Council," 455.
[643] Lavalle, "A novel, if awkward, exercise in international law-making: Security Council Resolution 1540 (2004)," 418; Akram and Haider Shah, "The Legislative Powers of the United Nations Security Council,"452
[644] Martinez, "The legislative role of the Security Council in its fight against terrorism: legal, political and practical limits," 339.
[645] Akram and Haider Shah, "The Legislative Powers of the United Nations Security Council," 452.

non-binding format, therefore any legislative actions under Chapter VII in other areas constitute a false analogy between Article 26 and Chapter VII.[646]

Furthermore, the interpretation that grants the SC normative power to establish new obligations would subvert the foundational structure of international law, as it contradicts the principle of state consent, a well-established norm in international law for the creation of any primary rule.[647] Anne Peters, who stances with the supporters of legislative power, pointed out that relying on Article 25(1) to address sovereigntist concerns is not a compelling justification. She contends that merely referencing this Article, upon which states have essentially agreed to limit their sovereignty to the point where they could be subject to decisions by the SC requiring them to adhere to unforeseen obligations in the future, does not provide a strong enough case. [648] Following the positivist tradition, the UN Charter was designed to safeguard traditional principles of state sovereignty and equal sovereignty in shaping international law in accordance with the prevailing belief that the consent of states is the basis for the legitimacy of all international legal sources.[649]

The Critics also argue that the SC's structure, which favors swift executive responses to specific situations or actions[650] blocks any justification for equipping this organ, which is non-democratic, has limited membership, and operates with a political nature, with the power to create general obligations on unlimited targets for indefinite time.[651] Neither the UN Charter nor subsequent practice concretizes the assumption of supremacy for the SC coupled with representing the community of states, and if such a status were to exist, it would serve as the source of all implied and non-implied powers.[652] Bowett adopted an extremely narrow interpretation of the UN Charter, contending that even the GA which comprises nearly all states

[646] Daniel H. Joyner, "Non-proliferation law and the United Nations system: resolution 1540 and the limits of the power of the Security Council," *Leiden Journal of International Law* 20, no. 2 (2007): 513.
[647] Elberling, "The Ultra Vires Character of Legislative Action by the Security Council," 351; Martinez, "The legislative role of the Security Council in its fight against terrorism: legal, political and practical limits," 340.
[648] Peters, "Ch.V The Security Council, Functions and Powers, Article 24," 785
[649] Joyner, "Non-proliferation law and the United Nations system: resolution 1540 and the limits of the power of the Security Council," 514.
[650] Happold, "Security Council Resolution 1373 and the Constitution of the United Nations," 607; Powell, "A Fullerian analysis of Security Council legislation," *International Organizations Law Review* 8, no. 1 (2011): 224.
[651] De Wet, *The Chapter VII Powers of the United Nations Security Council*, 137; Akram and Haider Shah, "The Legislative Powers of the United Nations Security Council," 455.
[652] Arangio-Ruiz, "On the Security Council's Law Making," 687.

does not have the power to legislate, let alone the SC.[653] The UN Charter does not define the role of the SC as having the power to impose new obligations; instead, the SC's role should be centered on the required conduct of a Member State based on its existing obligations under the UN Charter.[654]

Finally, the Opponents of legislative power argue that such power is incompatible with the principle of proportionality because this principle is inherently restrictive regarding the competence.[655] As a result, they suggest that the SC should be compelled to abide by proportionality rules in its decision-making under the obligation of acting in good faith as outlined in Article 2(2).[656]

6.2.3. From Debate to Decision: Clarifying the Security Council's Legislative Power

The scholars on both sides have scrutinized the legislative power of the SC from various angles to eliminate the dust of vagueness from the mirror of the UN Charter. As it is evident, opinions are desperately divided, and the ambiguity in the text of the UN Charter makes a diverse interpretation of the UN Charter understandable. The caveats in the arguments of both sides raise doubts about confidently declaring either interpretation as the most accurate, coherent, and rational reading of the UN Charter. In the following, the author of this thesis presents his point of view.

It is worth starting with De Wet's assertion, where she restricts the SC's jurisdiction to negative peace. De Wet, based on two reasons, opposes the extension of the SC's jurisdiction to cover positive peace, particularly in the domain of human rights.[657] Initially, she rejects the conviction that the SC has the competence to intervene in the realm of positive peace. She states that taking action on positive peace lies outside the framework, composition, and mandate of the SC because the SC is not designed to hamper long-term tensions; rather, its purpose is to respond to international disputes, including human rights violations, only when they escalate

[653] D.W. Bowett, "Judicial and political functions of the Security Council and the International Court of Justice," in *The Changing Constitution of the United Nations*, ed. Georges Abi-Saab and Hazel Fox (London: British Institute of International and Comparative Law, 1997), 79–80.
[654] Ibid.
[655] Fremuth and Griebel, "On the Security Council as a legislator: a blessing or a curse for the international community?," 352; Kolb, *An introduction to the law of the United Nations*, 56.
[656] Ibid; Fremuth and Griebel, "On the Security Council as a legislator: a blessing or a curse for the international community?," 352.
[657] De Wet, *The Chapter VII Powers of the United Nations Security Council*, 138-139.

into short- or medium-term international armed conflicts.[658] Human rights fall within the cluster of structural issues, rather than security issues, and as such, they fall in the ambit of GA and Economic and Social Council (ECOSOC).[659] Her second point asserts that even if one were to accept that the SC has such competence, it would lead to unmanageable complexities. She maintains that incorporating positive peace in the definition of peace would make the concept non-justiciable, as any internal issue could be interpreted as a threat to peace, potentially resulting in unchecked powers for the SC.[660]

Regarding the first argument, Article 1 of the UN Charter evinces the opposite. According to this Article, one of the purposes of the UN, *inter alia*, is 'to strengthen universal peace'. Based on Article 31 of the Vienna Convention, the text of a treaty should be interpreted in accordance with the ordinary meaning of the words. Dictionaries similarly define the word 'strengthen' as 'to make or become stronger'.[661] Naturally and logically, something can become stronger if there is already a minimum level of strongness in place. The absence of strength and the process of becoming stronger are inconsistence. Consequently, the mentioned Article follows the logic that a certain degree of peace exists, but the UN should not confine itself to that minimum level; instead, it should make every effort to enhance the strengthening of peace. Based on this definition, one can confidently state that the most basic level of peace involves the absence of armed conflict, as proposed by negative peace proponents. Article 1's mandate to strengthen peace necessitates a focus on the structural underpinnings of peace, and in pursuing this aim, the SC is not exonerated. Therefore, even if one adopts a negative definition of peace, the argument that the SC is limited to the security aspect of peace and is not permitted to engage in the structural dimension of peace appears to be incorrect. Regarding the second argument, it was extensively discussed in chapters one and two of this thesis that human rights are an integral component of the UN Charter peace. Moreover, the incorporation of human rights into the concept of peace does not render it non-justiciable and indefinable. While ambiguity may exist in other areas of international law, the field of human rights is characterized by a wealth of literature and numerous international human rights instruments

[658] Ibid, 139.
[659] Ibid.
[660] Ibid, 144.
[661] *The Oxford Encyclopedic English Dictionary*, ed. Joyce M. Hawkins and Robert Allen (Oxford: Clarendon Press, 1991), 1433; *Collins Dictionary and Treasure* (Glasco: HarperCollins Publishers, 2000), 1179.

that provide comprehensive guidance on every aspect of human rights. The determination of whether the threshold is exceeded relies on the collective conscience of the international community. The UN Charter's Preamble characterizes such breaches as 'untold sorrow to mankind'. Finally, the same critique articulated by De Wet can be raised against the negative definition of peace. Still, the link between the flow of refugees or immigrants and armed conflict is not clear.

Having established that the concept of peace enshrined in the UN Charter entails both the absence of war and the implementation of human rights, and recognizing the SC's jurisdiction over the latter [662], the author proceeds to present his perspective on the legality of the SC's legislative power.

In the first step, it should be clarified whether the term a 'threat to peace' includes only a specific threat or if it can also accommodate a general threat. The generality of the term implies that it entails both specific and general threats. In the absence of any indication, the factor of specificity is not an inherent element of a threat; instead, the concept is open to being applied to both specific and general threats. Therefore, the SC should have the competence to address general threats as well. Article 11(2) corroborates such an interpretation. The Article stipulated that '[t]he General Assembly may discuss any questions relating to the maintenance of international peace and security', and if necessary, the GA can make recommendations to the SC. Moreover, if the GA determines that the matter requires action, it shall be referred to the SC. The term 'any question' is broad enough to convince that it includes general threats as well. Therefore, the GA may refer a general threat to the SC if it deems taking action is necessary. At this point, it is worth recalling the ICJ advisory opinion in the Certain case, where it held that:

"*The Court considers that the kind of action referred to in Article II, paragraph 2, is coercive or enforcement action. This paragraph, which applies not merely to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35, in its first sentence empowers the General Assembly, by means of*

[662] Szasz, "The security council starts legislating," 904; Conforti, *The Law and Practice of the United Nations*, 171; Andrea Birdsall, "Creating a More Just Order: The Ad Hoc International War Crimes Tribunal for the Former Yugoslavia," *Cooperation and Conflict* 42, no. 4 (2007): 413.

recommendations to States or to the Secuity Council, or to both, to organize peacekeeping operations, at the request, or with the consent, of the States concerned".[663]

It should be noted that while the competence of the SC confines its ability to make decisions about the past, it does not imply that the SC must always wait for a threat to be materialized before responding. The SC, based on past events, may perceive those events as a threat to peace and take all necessary measures to thwart the recurrence of such a threat in the future. One may question whether the establishment of the SC's competence to address a general threat justifies granting legislative power to the SC? Article 39, as the most relevant article to this question, stipulates that once the SC has determined the existence of a threat to peace, it shall make recommendation or proceed in accordance with Articles 41 and 42. The Article does not provide any implication of the possibility of legislation. Inevitably, one should continue following the line in Articles 41 and 42, as instructed by Article 39. Article 42, specifically and explicitly, deals with the use of force and therefore does not provide a suitable basis for analyzing normative powers. Article 42 stipulates that:

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. ..."

Regardless of the powers that the SC may possess under Article 41, it should be noted that the said Article also outlines the purpose of applying Article 41, which is to enforce the SC's decisions. Article 41 has been labeled as a method, often referred to as the 'bargaining model', in which sanctions function not solely as punishment but as incentive tools which are most potent when employed within a diplomatic strategy that combines both rewards and penalties, with the aim of achieving a negotiated resolution.[664] However, Article 41 does not specify which decision of the SC it refers to. Neither Article 39 nor Article 24 speaks of the decisions of Article 41. Nevertheless, it appears that the drafters assumed that when the SC determines a threat to peace, a breach of peace, or an act of aggression, it naturally adopts a decision on how to maintain or restore endangered peace. For example, in the case of an armed conflict between

[663] Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), ICJ Reports, Advisory Opinion of 20 July 1962, 164.

[664] Eugenia López-Jacoiste, "The UN Collective Security System and its Relationship with Economic Sanctions and Human Rights," *Max Planck Yearbook of United Nations Law* 14 (2010): 298; David Cortright and others, *Sanctions and the search for security: Challenges to UN action* (London: Lynne Rienner Publishers, 2002), 28.

two states, once the SC has identified the situation as a threat to peace, a breach of peace, or an act of aggression, it may issue an order for the parties to engage in retreatment or a ceasefire. Hence, it is essential to distinguish between the identification of a threat to peace, a breach of peace, or an act of aggression and the subsequent decision by the SC on how to maintain or restore peace. The powers of Article 41 are employed to give effects to latter decision.[665] Therefore, the UN Charter speaks of three heterogenous types of decisions: decisions regarding the existence of a threat to peace, decisions related to how peace shall be maintained or restored as outlined in Article 39, and decisions aimed at giving effect to the previous decisions (actions) in accordance with Articles 40, 41, and 42. What distinguishes the second and third decisions is their nature. The decision under Article 39 falls into the category of primary rules, which means it creates obligations, whereas the decisions (actions) under Articles 40, 41, and 42 belong to the realm of secondary rules, which pertain to the consequences of breaching primary rules. All three of these Articles ensure the enforcement of decisions made under Article 39. At this point, the critical question is whether the discussion of the legislative power of the SC should be approached in the context of primary rules, secondary rules, or both? No credence should be accorded to arguments that attribute legislative power in the sense of primary rules to Articles 40, 41, and 42. Because as previously established, these articles can only be a basis for creating secondary rules. Based on the discussed premises, it appears that the SC enjoys a quasi-legislative power in the realm of secondary rules to reinforce its decision in compliance with Article 41, which explicitly permits the SC to adopt any measures short of the use of force. Within the realm of primary rules, the UN Charter does not provide any support for the normative power of the SC. Consequently, the SC may only create primary rules pertaining to a particular case, rather than addressing an abstract or general situation. The submission that the SC has competence to deal with an abstract threat is not accompanied with corollary of normative power in primary rules. At this point, one may highlight a paradox and a caveat in the author's argumentation. In a sense that on one hand, the author asserts that the SC has the power to address general threats, but on the other hand, it appears that this organ lacks the capability to exercise this competence. Because the authors' argument contradicts a common

[665] Arangio-Ruiz, "On the Security Council's 'law-making'," 563; John W. Halderman, *The United Nations and the rule of law: Charter development through the handling of international disputes and situations* (New York: Oceana**,** 1966**),** 66-77.

principle in international organizational law, where competence typically comes with corresponding powers. Moreover, the critics may highlight that most scholars have interpreted Resolution 1370 as an instance of quasi-legislative power exercised by the SC, a point that the author seems to overlook. The author's response is that he never claimed that the SC is divest of any power in implementing its competence regarding general threats. Additionally, the author will present an analysis of Resolution 1370 as a quasi-legislative act alongside an analysis of the SC's general powers.

Firstly, international law, akin to any legal system, is inherently dynamic and evolving. To effectively address novel issues, it adapts and devises solutions by making use of the available tools at its disposal. Without this dynamic characteristic, international law cannot ensure its continued relevance on the international level. Accordingly, it would not be accurate to expect international law to consistently demonstrate its performance through identical methods and frameworks. Secondly, in Article 1 of the UN Charter, the purposes of the UN are enumerated, and all its Organs and Member States are obligated to ramp up all their efforts to realize those purposes. In paragraph two of Article 1, it speaks of the necessity of taking appropriate measures without imposing any restrictions on those who may initiate such measures. In other words, any organ or member has the potential to be an initiator and proposer. Paragraph three of the same article seeks to promote international cooperation in addressing international problems. It is worth noting that this paragraph does not restrict the methods for achieving cooperation, thus allowing the utilization of various methods to fulfill this goal. Paragraph four of Article 1 introduces the UN as a platform for harmonizing the actions of nations without specifying methods for this harmonization or limiting it to particular methods. In the light of this reasoning, it would be reasonable to conclude that the modes of coordination are not curbed by treaties, customary law, or general principles. Lastly, the SC, in addition to its specific powers, enjoys general powers under Article 24. Analyzing these general powers requires a thorough and independent examination. However, based on the earlier discussion, it appears safe to conclude that these general powers, concerning their legal enforceability, are softer compared to the specific powers, and do not cover the same scope as those falling under the specific powers category in terms of their nature. Accordingly, the SC can issue resolutions that, aside from recommending or mandating actions, may contain proposals for promoting peace in the international community. It is important to emphasize that this particular type of

resolution (propositional resolutions) carries legal significance as well. Once propositional resolutions are deliberated, the GA is legally obligated to either concede or refuse the proposal; the GA cannot simply disregard them. Based on the given premises, the author's conclusion is that propositional resolutions by the SC represent one of the new methods for establishing obligations in international law. Once accepted, they transform into immediate commitments. Resolution 1370 exhibits this characteristic and falls into the group of propositional resolutions issued by the SC, which carry binding authority exclusively in relation to the specific situation in question.

The cornerstone of the SC's institutional legitimacy relies on the backing its decisions garner among the international community, hence It should avoid actions that in the eyes of the international community lack legitimacy.[666] ICJ's endorsement of the existence of general powers should not be interpreted as a *carte blanche*, allowing the SC to attribute any power under the chapeau of general powers. The establishment of competence on a particular issue does not automatically imply the legality of any powers. Any power lacking explicit reference in the UN Charter must undergo a case-by-case scrutiny.

Therefore, in the event of mass atrocities, the SC has, under Article 24, the power to issue a propositional resolution to the GA regulating the matter without specific temporal or geographical constraints (primary rules). If the GA endorses the resolution through the mechanism anticipated in the UN Charter, it becomes the basis for the SC's actions regarding the offending state. Moreover, to enforce its decisions pertaining to the quality of maintaining or restoring peace in cases of mass atrocities, the SC may create any general rule without limitations on time and geography under Article 41.

6.2. Analyzing the Quasi-Judicial Power of the UN Security Council under the UN Charter

The SC, through its practice, has made decisions that some scholars have stereotyped as the exercise of judicial powers.[667] The establishment of special tribunals for the former Yugoslavia and Rwanda, as well as the listing of sanctioned individuals, *inter alia*, has sparked a widespread debate on whether the SC's competence justifies the adoption of these powers.

[666] Harpher, "Does the United Nations Security Council have the competence to act as court and legislature," 105.

[667] Elberling, "The Ultra Vires Character of Legislative Action by the Security Council," 338.

While the examination of the mentioned cases falls outside the scope of the current research, this section aims to analyze the judicial powers of the SC in the light of its competence. Initially, it should be noted that as the maintenance of peace pertains to a situation, the SC can essentially exercise its jurisdiction over situations. Given that a situation accommodates various factors, including states and individuals, the SC may address issues concerning both states and individuals. In the present context, judicial power means when the SC acts as a court with compulsory jurisdiction and renders decisions on the legality of actions taken by a legal person or a natural person.

6.2.1. Does the Security Council Enjoy Judicial Power over Sovereign States?

Regarding legal persons, which in this context naturally refers to states, the UN Charter is explicit in stating that the SC is a political body with political occupations[668] and, as such, does not have a judicial function. Preserving peace is inherently a political occupation and therefore involves considerations beyond legal facts and requires taking into account realpolitik, which is alien with a judicial function.[669] Chapter XIV of the UN Charter is dedicated to the ICJ, introducing it as the UN's principal judicial organ with optional jurisdiction (Article 92). Furthermore, in accordance with Article 36(3), when it comes to the peaceful settlement of disputes, the SC should consider that legal disputes should be resolved through the ICJ. Despite the wide range of powers vested in the SC, the UN Charter did not foresee this organ making legal decisions regarding the conducts of states.[670] However, it should not be concluded that the UN Charter entirely bans the SC from exercising judicial functions. According to Articles 37(2) and 38, when parties refer a dispute to the SC, it may recommend terms of settlement, and in doing so, it may enter the merits of the case and issue recommendations that resemble judicial decisions.[671]

[668] Gábor Kajtár, "Self-Defence against Non-State Actors-Methodological Challenges," *Annales U. Sci. Budapestinensis Rolando Eotvos Nominatae* 54 (2013): 319-320.
[669] Shirley V. Scott, "Climate change and peak oil as threats to international peace and security: is it time for the security council to legislate?," *Melbourne Journal of International Law* 9, no. 2 (2008): 502; Harpher, "Does the United Nations Security Council have the competence to act as court and legislature,"135;
[670] Ibid, 140; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports, Judgment of 27 June 1986, Dissenting opinion of Judge Schwebel, para. 60.
[671] Conforti, *The Law and Practice of the United Nations*, 167

6.2.2. Does the Security Council Enjoy Judicial Power over Natural Persons?

The SC had enlisted numerous individuals as terrorists and subsequently imposed sanctions on them. Therefore, one could argue that if individuals can be sanctioned for committing act of terrorism[672] in the interest of international peace and security, why should not the SC also be able to sanction the perpetrators of mass atrocities in the name of peace? This question raises the issue of how the SC engages with individuals. Recognizing individuals as perpetrators is not a recent development within the realm of international law; it was previously done in the context of piracy as 'those acts of robbery and depredation upon the high seas which, if committed on land, would have amounted to a felony'.[673] Today, individual accountability has expanded into realms involving both human rights violations and peace. Along these lines, the SC compiles a list of sanctioned individuals and updates it in commensurate with the circumstances of the relevant case when it is deemed an appropriate measure for maintaining peace. This action by the SC should be analyzed in coupled with international human rights law. Like many other unanswered questions, this issue oscillates between two common legal arguments: that the SC may exercise its jurisdiction over the criminal responsibility of individuals because the UN Charter does not ban it, or that the SC may not have the power to do so because there is no explicit provision for such power in the UN Charter.[674] However, similar to sovereign states, individuals also enjoy protection under international law. Discretionary powers of the SC should not undermine the imperative of respecting human rights. Nowadays, certain human rights norms are considered *jus cogens* and *erga omnes* obligations. Prioritizing the respect and promotion of human rights stands as a key objective for the UN, and under Article 1(3) the SC should ramp up its efforts to achieve aim. Imposing sanctions on individuals without affording them a fair trial blatantly violates the right to a fair trial.[675] The right to a fair trial is counted as a cornerstone in human rights law,[676] as it plays a

[672] Gábor Kajtár, "On Necessity as a Legal Basis in Counter-Terrorism Operations," *Annales U. Sci. Budapestinensis Rolando Eotvos Nominatae* 60 (2021): 212.
[673] Nolan and others, *Black's law dictionary*, 795.
[674] Karl Zemanek, "The Legal Foundations of the International System," General Course on Public International Law, in Recueil des Cours 266 (1997): 204-209.
[675] The term 'fair' is used in Article 10 of the Universal Declaration of Human Rights, Article 67 x 1 of the Rome Statute of the ICC, Article 130 of the Geneva Convention relative to the Treatment of Prisoners of War, Article 47 of the European Union Charter of Fundamental Rights, and Article 19(e) of the Cairo Declaration on Human Rights in Islam, Article 6 of the European Convention on Human Rights, Article 14 of ICCPR.
[676] Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford: Oxford University Press, 2021), 5.

pivotal role in upholding the rule of law and ensuring human rights protection.[677] The Inter-American Commission on Human Rights in Guy Malary vs. Haiti pointed out that "the right to a fair trial is one of the fundamental pillars of a democratic society. This right is a basic guarantee of respect for the other rights recognized in the Convention, because it limits abuse of power by the State".[678] Branding individuals as perpetrators without a fair trial and denying them basic rights appears to violate general international law.

Nevertheless, the other side of the coin is the issue of expediency and efficiency of the SC. In this line, the Unites States expressed concerns that international human rights may cause unwise restriction on the combat against terrorism.[679] Compelling the SC to navigate through all human rights protection mechanisms could result in unwarranted delays in discharging the SC's responsibilities and might hinder the efficient maintenance of peace. At this point, the question arises in a conflict between the need to neutralize the threatening facts and the right to a fair trial: which direction should take precedence? To arrive at an appropriate response, one must analyze the objectives of both propositions. As mentioned earlier, the SC has jurisdiction over a situation, and whatever included in that given situation. Along this line, the circumstances may require the SC to encounter with individuals, even if it amounts to the deprivation of their fundamental rights. Deciding whether to address these facts or not is entirely within the discretion of the SC. On the other hand, the purpose of the right to a fair trial is to ensure that the voices of disputing parties are heard.[680] This concept is defined as "respect for the opponent and for the rules of the game, honesty, self-restraint, a readiness to fight for victory, but not for victory at all costs".[681] The approach of branding individuals as criminals and imposing sanctions on them renders individuals powerless to seek remedy for their basic rights.[682] The right to a fair trial is grounded in the recognition of potential errors in decisions

[677] *UN Human Rights Committee (HRC), General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32.*
[678] Guy Malary v. Haiti, Case 11.335, Report No. 78/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 682 (2002).
[679] Brief for the United States of America, As Amicus Curiae, Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), available at <http://www.hrw.org/press/2003/05/doj050803.pdf>. (accessed 21 December 2023).

[680] Nolan and others, *Black's law dictionary*, 412.
[681] Stefan Trechsel and Sarah Summers, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2006), 82.
[682] Jose E. Alvarez, "The UN's War on Terrorism," *International Journal of Legal Information* 31, no. 2 (2003): 248; CH Powell, "The Legal Authority of the United Nations Security Council," in *Security and Human Rights*, ed. Benjamin J. Goold and Liora Lazarus (Portland: Hart Publishing, 2007), 162; George J. Andreopoulos, "The

made against individuals and offers them an opportunity to demonstrate the impropriety of accusations. As a result, the appropriate context for applying the right to a fair trial is when the SC determines that encountering with individuals is necessary to maintain peace. The UN Charter does not bestow absolute authority to the SC's decisions. In addition, this body is not immune to making mistakes. Without a fair trial, the SC cannot deprive individuals of their fundamental rights by imposing sanctions.

The SC's past experience evinces that sanctioning individuals, especially in the short term, may not serve as an efficient means to swiftly preserve peace. Therefore, the argument of absolute necessity does not work in this context. If the situation is dire, the SC has alternative options available at its disposal.

6.2.3. The Legality of Security Council's Establishment of *Ad Hoc* Courts

The Security Council, in accordance with Chapter VII of the UN Charter, created two *ad hoc* criminal tribunals, namely the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, [683], with the aim of restoring peace and stability to the region. These tribunals were established to prosecute and adjudicate serious violations of international humanitarian law committed in the former Yugoslavia and Rwanda. The creation of these tribunals, like certain other initiatives by the SC, raises questions about the legality of *ad hoc* courts under the UN Charter. The utilization of this power by the SC is intriguing due to its intertwined nature. On one hand, the form of this power draws inspiration from the power to establish subsidiary organs under Articles 7(2) and 29, while on the other hand, the merit of this power is derived from Article 41 of the UN Charter. The UN Charter, in Article 7(2), provided that the principal organs of the UN may establish subsidiary organs to advance their objectives and efficiently carry out their tasks. Article 29 also grants the SC the power to create subsidiary organs as it deems necessary to perform its responsibilities. The Repertory of United Nations Practice stereotyped subsidiary organs within the UN's system based on their roles into five groups: (1) Study committees (including commissions of investigation) to facilitate the consideration of subjects by the GA; (2) Political commissions and other organs having active political responsibilities; (3) Organs of

challenges and perils of normative overstretch," in *The UN Security Council and the politics of international authority*, ed. Bruce Cronin and Ian Hurd (London: Routledge, 2008), 135

[683] (S/RES/808) 22 February 1993; (S/RES/827) 25 May 1993; (S/RES/955) 8 November 1994.

administrative assistance, to assist the GA in financial, budgetary and administrative matters; (4) Operational agencies; and (5) Judicial bodies.[684] In the Award case, the ICJ upheld that the principal organs of the UN enjoy the prerogative to delegate their powers to subsidiary bodies, including tribunals, and to exercise their powers through these subsidiary organs.[685] Saroshi defines the delegation of powers as follows: "A delegation of powers can be defined as taking place whenever an organ of an international organization which possesses an express or implied power under its constituent instrument conveys the exercise of this power to some other entity. In many cases this will involve a delegation of competence which enables the delegate to carry out acts which would otherwise be unlawful."[686] The inception and ending of a subsidiary organ shall be subject to legal evaluation in accordance with the UN Charter and the norms of international organization law, while the propriety of a subsidiary organ's actions must be determined based on the founding document conferred upon it by the principal organ.[687] One of the prerequisites recognized for an appropriate establishment of a subsidiary body is that "the powers being delegated can only be those which the organ itself either expressly or impliedly possesses under its constituent treaty".[688] Undoubtedly, the SC wields the power to create subsidiary organs, but if the task of the subsidiary organ involves judicial functions, it presupposes that the SC must have the same capability to entrust judicial functions to the subsidiary organ. At this point, the central question arises: does the SC possess such power? This matter, similar to numerous others, has not been shielded from controversy. Some commentators believe that the SC is not essentially equipped with the power of exercising judicial functions, let alone delegating such functions to a subsidiary body.[689] Because by a

[684] Repertory of United Nations Practice, Supplement No 3 (1959–1966), volume 1, 665.
[685] Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, ICJ Reports, Advisory Opinion of 13 July 1954, 57.
[686] Danesh Sarooshi, *The United Nations and the development of collective security: The delegation by the UN Security Council of its Chapter VII Powers* (Oxford: Oxford University Press, 1999), 4-5.
[687] Ibid, 86.
[688] Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within diversity*, Fourth Revised Edition (Leiden: Martinus Nijhoff, 2003), 168; Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems: with supplement*, 142; D.W. Bowett, *United Nations Forces: A Legal Study* (New York: Frederick A. Praeger, 1964), 178. Sarooshi numerates the feature of a subsidiary organ as follows: The features of subsidiary organs: 1) it is established by the principal organ 2) it be under the control and authority of principal organ 3) the subsidiary organ does not violate the delimitation of charter power between principal organs 4) subsidiary organ necessarly possesses a certain degree of independence from its principal organ otherwise it would be a part of the principal organ. *The United Nations and the development of collective security*, 89.
[689] Marschik, *The Security Council as World Legislator? Theory, Practice and Consequences of an Expansion of Powers*, 11-12; James Crawford, "The Work of the International Law Commission," in *The Rome Statute of the*

close examination of the UN Charter, it becomes evident that there is no legal basis for ascribing to the SC the competence to make determinations regarding the criminal responsibility of individuals.[690] Also, it has been submitted that establishing tribunals like the ICTY and ICTR impinges on the criminal jurisdiction prerogatives of the affected states.[691]

On the contrasting end of the spectrum, there are scholars who firmly endorse the judicial power of the SC, and hence, observe no legal impediment to delegating the function of prosecuting and penalizing those responsible for mass atrocities to a subsidiary organ.[692] Should this interpretation of the UN Charter prove accurate, it raises the question as to why during the inception of the ICTY numerous states expressed concerns that its establishment might jeopardize the principle of state sovereignty, and underscored that the ICTY could neither serve nor be regarded as a precedent that might precipitate similar actions in other situations and conflicts.[693] Besides the typical justifications offered to support the legality of the SC's actions, Sandholtz speaks of two types of authority: 'first-order authority' and 'second-order authority'. The first one pertains to actions by the SC that undeniably fall in its realm of authority, while the second one denotes the SC's power to execute first-order authority.[694] Accordingly, the establishment of *ad hoc* tribunals constitutes innovative methods for exercising the power that the SC already enjoyed.[695]

In the middle of this swinging pendulum, another proposition contends that the SC wields judicial power but lacks a judicial function.[696] This submission stems from the technical distinction between the concepts of power and function. Power pertains to the discretion of making decisions, while function relates to the mere execution of that power.[697]

International Criminal Court: A Commentary, ed. Antonio Cassese and others, volume I (Oxford: Oxford University Press, 2002), 23.

[690] Zemanek, "The Legal Foundations of the International System," 204-209.

[691] Arangio-Ruiz, "On the Security Council's Law Making," 724.

[692] William A. Schabas, *The UN international criminal tribunals: the former Yugoslavia, Rwanda and Sierra Leone*. (Cambridge: Cambridge University Press, 2006), 8, 53; James C. O'Brien, "The international tribunal for violations of international humanitarian law in the former Yugoslavia," *American Journal of International Law* 87, no. 4 (1993): 643.

[693] Birdsall, "Creating a More Just Order: The Ad Hoc International War Crimes Tribunal for the Former Yugoslavia," 403.

[694] Andreopoulos, "The challenges and perils of normative overstretch," p 131.

[695] Ibid.

[696] Sarooshi, *The united nation and the development of collective security*, 8.

[697] Ibid, 10.

Lastly, one may advance the argument that in the case concerning the Awards, the ICJ has affirmed the power of the GA to create a subsidiary organ with a judicial nature, and thus, by analogy, the SC has a similar power to establish a judicial subsidiary organ. As a result, both the ICTY and ICTR fulfilled all the prerequisites for a legitimate establishment.

Let's start with the last submission. In the case at hand, the ICJ initially mentioned that there is no specific provision in the UN Charter that can be used to justify the creation of a judicial body.[698] Then, the ICJ attempted to determine whether any Articles of the UN Charter pertaining to the relations between staff members and the Organization are persuasive enough to induce the UN's power to establish a tribunal. The ICJ connected Articles 7(2) and 22 to Article 101(1) and deduced that the GA may wield the power to create a tribunal for the purpose of ensuring fairness in disputes involving the Organization and its staff members.[699] As the ICJ's passage evinces, the Court initially established the implied power of forming a tribunal, then recognized the binding effect of the administrative tribunal's award. Accepting a similar analogy in favor of the SC in this context seems difficult. When the GA, possessing extensive jurisdiction that allows it to maneuver in every aspect of international peace and security, except for involvement in the executive realm, is divest of explicit power, *in fortiori*, the SC with a narrower jurisdiction would likewise lack explicit power to establish *ad hoc* tribunals.

The argument suggesting that the SC's establishment of tribunals is inherently of an executive nature under Article 41, permitting the SC to take actions short of using force, and therefore implying that this body enjoys explicit power in the question at hand, does not appear to be accurate. Because if the establishment of *ad hoc* tribunals is considered to fall in the prerogative of the SC in the context of taking action under Article 11(2), it would imply that the GA is deprived of such power because the said Article explicitly halts the GA from resorting to measures of an action-oriented nature. While, in its advisory opinion, the ICJ affirmed that the GA has the competence to engage in such actions. Additionally, the implied power of the SC to adjudicate individuals responsible for mass atrocities, prior to the establishment of the ICTY and ICTR, has not received validation from any international court or through practice. The author's contention is that the UN Charter does not offer any evidence of either explicit or

[698] Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, ICJ Reports, Advisory Opinion of 13 July 1954, 56.
[699] Ibid, 58.

implicit power favoring the SC in establishing *ad hoc* tribunals for the prosecution and punishment of individuals accused of mass atrocities. The author believes that the establishment of ICTY and ICTR was consistent with the UN Charter, but with a different reasoning. Those *ad hoc* tribunals were established properly due to the endorsement received from the GA. While it is true that the SC lacks both explicit and implied judicial power concerning the criminal responsibility of individuals under the UN Charter, there is nothing preventing the SC from devising new establishment in international law in pursuit of strengthening peace. The decision to accept or reject it would then be at the discretion of the GA. In this context, the SC extended an offer to the GA for achieving peace restoration through *ad hoc* tribunals by means of its resolutions. The GA embraced this offer when it endorsed apportioning the expenditures of ICTY and ICTR from the UN budget. As the ICJ noted in its Advisory Opinion on the Awards, the assessment and approval of the budget fall in the prerogative of the GA in accordance with Article 17.[700] The GA had the option to decline funding for both tribunals, but it refrained from vetoing the SC's resolutions. The consecutive approval of funding for *ad hoc* criminal tribunals by the GA should not be construed as the SC enjoying such a power. The GA simply endorsed the SC's improvisation regarding two *ad hoc* tribunals for tow specific situations, and it does not indicate a willingness on the part of the GA to grant the SC new power. In the event of confronting a state responsible for mass atrocities, the SC lacks the initial judicial power to adjudicate the criminal liability of government officials. However, if the SC considers *ad hoc* tribunals to be an appropriate means of preserving international peace and security, it can issue propositional resolutions to the GA, following a similar path was wended in the cases of Former Yugoslavian and Rwanda.

6.3. Conclusion

To address emerging threats to international peace and security, the SC adopted decisions as if it were granted powers similar to those of legislative and judicial powers. Because of the significance of these powers and their substantial impact on the rights and duties of Member States, they need to be meticulously assessed in the framework of the UN Charter.

Concerning legislative power, one should distinguish between three stages of decision-making under Chapter VII by the SC. In the first step, when the SC is convinced that

[700] Ibid, 59.

international peace and security need to be maintained or restored, it identifies the given challenge as a threat, a breach, or an act of aggression. Then, the SC determines the manner in which the threat or breach should be removed (primary rules). In the last stage, to enforce its aforementioned decision, the SC employs strategic measures (secondary protocols) to ensure the execution of the prescribed solution. In the realm of determining the method by which a threat is to be eradicated, the SC lacks quasi-legislative power and is restricted to a concrete situation. On the contrary, to ensure the execution of prior resolutions, the SC is not bound by such constraints and possesses the capacity to wield quasi-legislative powers. Regarding quasi-judicial power, the UN Charter explicitly prohibits the SC from exercising such power over Member States. When it comes to individuals, no matter how essential it might be to engage with them, the right to a fair trial thwarts the SC from resorting to quasi-judicial measures against individuals. Imposing undue constraints on the SC is as detrimental to its functioning as endowing it with boundless powers. If the SC were to offer an unchecked mandate, empowering powerful states to disguise their unilateral pursuits in the guise of multilateral actions, the UN would serve little purpose to the international community and such a scenario would erode its authority significantly.[701]

[701] Erik Voeten, "Delegation and the nature of Security Council authority," in *The UN Security Council and the politics of international authority*, ed. Bruce Cronin and Ian Hurd (London: Routledge, 2008), 50.

Chapter VII: Does the Security Council Enjoy the Power to Overthrow the Incumbent Regime Because of Mass Atrocities Against Its Own People?

7.1. Introduction

The friction between the Member States of the UN and the augmentative power of the SC has been an undeniable fact since the San Francisco negotiations and continues to exist to present day. The SC, through its practice, has demonstrated a generous interpretation of the UN Charter in fulfilling the crucial task of maintaining international peace and security. However, at times, such an ever-expanding interpretation has not been satisfactorily received by the Member States. It caused tension over the SC's exercised powers, questioning whether they were *ultra vires* or *intra vires*. The issue of regime change by the SC in response to mass atrocities committed by the incumbent regime has become the focal point of recent confrontations between the SC and sovereign states. In several situations, this organ had determined that the preservation of international peace and security necessitates a change in the incumbent regime, and hence has authorized Member States to adopt appropriate measures to bring to halt atrocities committed by the offending state. In other words, the SC's practice reflects a liberal interpretation of the UN Charter and implies that if preserving international peace necessitates regime change, the SC would not be ashamed of resorting to such measure. In this regard, the situation concerning Libya marks a significant turning point in the practice of the SC. Following the Arab Spring, a substantial portion of the Libyan population demanded the enjoyment of fundamental rights and freedom in opposition to the regime of Moammar

Qaddafi. The Libyan government responded to the protests with severe violence, suppressing all expectations. The brutality employed by Qazzafi prompted the SC to seize the situation and acting under Chapter VII of the UN Charter. Initially, the SC favored non-forceful measures, and imposed various sanctions on Libya, ranging from asset freezes to a weapons embargo. Shortly thereafter, the SC became convinced that the time had come to employ the use of force and authorized the international community to take all necessary measures to restore international peace and security by Resolution 1973. The Resolution was interpreted by NATO quite literally, considering all available options, including the overthrowing of the incumbent regime. What makes the Libyan situation unprecedented in the history of the SC's practice is that all previous humanitarian interventions were carried out with the consent of the receiving state, whereas in this case, it was not. The act of overthrowing the Qaddafi regime as the only aptly solution to halt the humanitarian tragedy committed by the regime not only revealed disagreements among the SC's Members but also sparked scholarly debates among commentators regarding whether Resolution 1973 could be seen as an endorsement for the removal of the Qaddafi regime. The experience in Libya compelled the author of this thesis to analyze the issue of regime change through the decision of the SC. While the analysis of the Libyan situation and Resolution 1973 falls outside the scope of this study, pertinent matters will be highlighted and discussed as necessary. At this point, it should be mentioned that a government's behavior may become the target of the SC under divergence banners. The chief focus of this study is solely on the overthrow of the incumbent regime due to mass atrocities. Therefore, other issues such as democracy are not the objectives of this study. Accordingly, the aim of this chapter is solely to address the question of whether, in accordance with its primary responsibility to maintain international peace and security under the UN Charter, the SC can intervene to remove an incumbent regime engaged in mass atrocities against its own population.

7.2. The Concept of Regime Change

Commentators generally agree on the same concept of regime change, and the common denominator in any definition refers to the forceful removal of an established regime by a power other than the people. For Butler, regime change is "the use of military force by a state or states to overthrow the *de facto* or *de jure* government of another state or to enforce the secession of

foreign territory".[702] Bellamy defines it as "the changing of a government by unconstitutional means. this may involve complete change – as when the government of a whole country is changed (e.g., Libya 2011) – or partial change – as when a government remains in office but loses authority over a particular region, which may or may not subsequently achieve formal independence (e.g., Indonesia/East Timor, 1999–2000)."[703] In Hurd's perspective, it is "the toppling of a ruler because he has become repellent or dangerous either to his own people or to their neighbours or to both".[704] In the word of Fox "regime change may be defined as external actors changing governments or systems of government by the use or threatened use of military force."[705]

7.3. Examining the UNSC Competence: The Boundaries of the Principle of Non-Intervention and Regime Change in the UN Charter

The principle of non-intervention stands as the most pertinent and paramount concern when examining the matter of regime change in the framework of international law. Consequently, the forthcoming section will delve into the discourse surrounding regime change, scrutinizing it through the lens of the non-intervention principle.

The presence and increasing influence of different regional, international, and supranational groups have made the application of the principle of non-intervention more complex, as a part of a broader pattern where globalization and growing interconnection have weakened the capacity of states to act independently without international community participation.[706] The principle of non-intervention, which signifies one of the fundamental prerogatives of states in the international legal system, [707] rests upon a sturdy foundation in both international treaties and customary law [708]. The ICJ, after reiterating the principle of non-intervention as a safeguard

[702] Jay Butler, "Responsibility for Regime Change," *Columbia Law Review* 114, no. 3 (April 2014): 504.
[703] Bellamy, "The responsibility to protect and the problem of regime change," 167.
[704] Douglas Hurd, "Foreword," in *Regime Change It's Been Done Before*, ed. Roger Gough (London: policy exchange, 2003), 11.
[705] Gregory H Fox, "Regime Change," in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012), para. 1.
[706] Sean Butler, "Separating protection from politics: The UN Security Council, the 2011 Ivorian political crisis and the legality of regime change," *Journal of Conflict and Security Law* 20, no. 2 (2015): 252.
[707] Niki Aloupi, "The Right to Non-intervention and Non-interference," *Cambridge International Law Journal* 4, no. 3 (2015): 566.
[708] Jianming Shen, "The Non-Intervention Principle and Humanitarian Interventions under International Law," *International Legal Theory* 7 (2001): 5.

for the 'political integrity' of states in the Nicaragua case,[709] proceeded to define and expound upon the scope of this principle as follows:

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parce1 of customary international law.

The principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.[710]

Because of the significance of this norm, the inclusion of this principle among the tenets of the UN Charter was not overlooked by the drafters. As the principle dictates that each state enjoys exclusive jurisdiction over its own affairs and is the sole entity authorized to make determinations on these matters, the extent to which an international organization can expand its sphere of influence in relation to these issues has consistently been a point of contention between member states and international organizations. This controversy becomes more palpable within the UN system, when the SC animates unprecedented powers in carrying out its duties. If the SC were to argue that its actions or use of powers could be justified based on its primary competence in interpreting its scope of responsibilities, it is important to stress that interpreting the UN Charter in a way that grants the SC the clear power to overthrow an incumbent regime cannot be taken for granted without a thorough examination of the UN Charter and a solid basis for its application. Hence, it is vital to investigate the extent to which the UN Charter bestows Member States immunity from intervention by the SC. Article 2 of the UN Charter underscores the principles governing the relationship between the organization and its Member States, aiming to ramp up all efforts in achieving the UN's purposes. It could be argued that paragraph 4 of Article 2 entails the principle of non-intervention and serves as a protective shield against the SC's use of force against an established regime for humanitarian purposes. Under the said paragraph:

[709] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Reports Judgment of 27 June 1986, para. 202.
[710] Ibid, paras, 202, 205.

"*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*."

However, this paragraph does not appear to explicitly define the quality of the relationship between the SC and Member States. During the San Francisco conference, discussions regarding this paragraph primarily centered on the relationships among states, rather than between states and the organization.[711] It is true that the inauguration of Article 2 applies to both the organization and Member States, but it would be erroneous to assume that every principle in Article 2 applies uniformly to both sides. The initial term of the paragraph clearly evinces that it sets forth the relationship exclusively among states. Furthermore, it imposes a prohibition on the threat or use of force, which obviously has no bearing on the powers of the SC because Article 42 explicitly entrusted the SC the power to use force if it deems it necessary to maintain or restore international peace. Finally, it goes without saying that the SC's decisions under both Chapter VI and VII are inherently coupled with the implicit threat of using military force if it is necessary. Therefore, this paragraph does not seem to carry the principle of non-intervention regarding the SC.

The author believes that paragraph 7 of the same Article includes the principle of non-intervention among Member States and the SC, delineating the boundaries of the SC's jurisdiction concerning matters deemed as domestic affairs. This principle acts as a restraint and prevents the SC from intervening in areas where its intervention is legally impermissible.

The paragraph 7 of Article 2 provides:

"*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 or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll*."

The first part of the paragraph speaks of matters that are essentially domestic affairs from the states' perspective, and in the subsequent part, it addresses the powers of the SC under

[711] Official Records of The General Assembly Twenty-Third Session Annexes, 24 September- 21 December 1968, Agenda Item 87: Consideration of Principles of International Law Concerning Friendly Relations And Co-Operation Among States In Accordance With The Charter Of The United Nations: Report Of The Special Committee On Principles Of International Law Concerning Friendly Relations And Co-Operation Among States, Twenty-Third Session New York, 1968, (New York: United Nations, 1971), 1-10.

Chapter VII, emphasizing that the application of these powers cannot be impeded by the domestic affairs mentioned in the first part of the paragraph. The entire paragraph presents contrasting perspectives and does not clearly elucidate the meaning of domestic matters in the context of the UN Charter. This lack of clarity makes it challenging to determine whether regime change should be regarded as an untouchable part of domestic affairs or whether it falls in the competence of the SC. To grasp the concept of domestic affairs, Article 31 of the Vienna Convention on Treaties provides guidance by stating general rules of interpretation. It specifies that, in addition to considering the context of a treaty, 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account. Since the UN Charter alone is not sufficient to eliminate ambiguity regarding what constitutes matters under domestic jurisdiction, one should necessarily delve into international law to determine whether the presence of the incumbent regime should be considered an untouchable part of domestic affairs or within the scope of the SC's authority. Therefore, in order to thoroughly understand the implications stemming from the initial and subsequent segments of paragraph 7 of Article 2 in this context, a separate analysis of each part is warranted.

7.3.1. The Implications Arising from the Opening Segment of Paragraph 7 in Article 2

As previously indicated, the UN Charter fails to offer adequate illumination to definitively ascertain whether regime change resides in the realm of untouchable domestic affairs or falls under the ambit of the SCs potential intervention when this organ acts under Chapter VII. Accordingly, the question of regime change by the SC will be analyzed in the context of international law in accordance with Article 31 of the Vienna Convention on the Law of Treaties.

7.3.1.1. The Institution of Government in International Law

To find an answer to the above question, it is necessary to comprehend the concept of government[712] as a preliminary step.

[712] The word 'government' is undoubtedly one of the ubiquitous terms in international law. Black law dictionary defines government as "[t]he whole class or body of officeholders or functionaries considered in the aggregate, upon whom devolves the executive, judicial, legislative, and administrative business of state". *Black's law dictionary*, 479); Article 1 of the Montevideo Convention on the Rights and Duties of States (1933) in Article 1 enumerates the constituent elements of a state as a permanent population; a defined territory; a government; and the capacity to enter into relations with other states.

The essence of the Westphalian treaties was the birth of the concept of sovereignty. In this context, sovereignty incardinated in the form of government and exercised by political leaders, devoid of involving any civil society.[713] After this period, for many years, the government was operated within a territory by a powerful individual who elicited his legitimacy from divine or historical authority[714] and was free from interference by others.[715] The European monarchs, in pursuit of their mutual interests, established a system of public law for Europe and as well as an international legal framework based on a concept immune to legal debate, granting authority over a wide array of subjects, subsequently recognized as 'matters exclusively falling within domestic jurisdiction'.[716]

Any government operates in two realms of action: actions within its own territory, and interactions with other international subjects. In the former domain, the government wields superior power, exercising absolute control over the population within the defined territory and the resources therein.[717] This dimension of government's functions equips the government with the right to act at its own discretion in every aspect of affairs within its territory. Individuals or institutions in power possess the approved mandate to make decisions regarding governing power at any level.[718] In respect of interacting with other international subjects, the government serves as an embodiment and symbol of a unified identity, acting autonomously and independently, free from external influence.[719] In the international forum, the institution of government strives to convince international actors to hold a strong belief in the government's ability to effectively govern and control its population and territory.[720] From this perspective, the primary function of a government is to safeguard its autonomy and secure its borders against any foreign threats or attacks. The scope of the government's implementation of power in the

[713] Samuel M. Makinda, "Sovereignty and international security: Challenges for the United Nations," *Global Governance* 2, no. 2 (1996): 150.
[714] Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law* 84, no. 4 (1990): 867.
[715] Michael Poznansky, *In the shadow of international law: Secrecy and regime change in the postwar world* (New York, Oxford University Press, 2020), 19.
[716] Reisman, "Sovereignty and Human Rights in Contemporary International Law," 867.
[717] Ramesh Thakur, *The Government and Politics of India* (London: Macmillan, 1995), 347; Hedley Bull, *The anarchical society: a study of order in world politics* (London: Macmillan, 1977), 8; Bruce Russett and Harvey Starr, *World Politics: The Menu for Choice* (New York: Freeman, 1989), 58.
[718] Winston P. Nagan and Craig Hammer, "The Changing Character of Sovereignty in International Law and International Relations," *Columbia Journal of Transnational Law* 43, no. 1 (2004):153.
[719] Makinda, "Sovereignty and international security: Challenges for the United Nations," 150.
[720] Nagan and Hammer, "The Changing Character of Sovereignty in International Law and International Relations," 153.

international arena is governed by international legal norms. At this stage, a government bears no assumption of international obligation without its consent.[721] Accordingly, everything that transpires within a government's territory falls under its exclusive jurisdiction, including the quality of treatment of its own population.[722] This power of a government is referred to as sovereignty in legal and political literature.

After the Enlightenment era, a paradigm shift happened to the source of authority of governments. Prior to the Renaissance, the prevailing notion predicated the legitimacy of government authority on any factors other than the will of the people. This perspective inevitably positioned the people as objects of the government and ostensibly justified the attribution of absolute power to the government, allowing it to act as it pleased towards its own citizens. After the Enlightenment period, owing to advancements in philosophical thoughts and social evolution, the foundation of authority became detached from other claims and was founded on the will of individuals which is known as popular sovereignty.[723] From this standpoint, sovereignty originates from the people and represents a power that is meant to be wielded by, for, and on behalf of the state's citizens.[724] As a result, the concept of sovereignty, which was traditionally seen as a top-down issue, transforms into a bottom-up question that fundamentally eliciting its legitimacy from the people.[725] In this scenario, sovereignty and the will of the individuals are intertwined, and safeguarding sovereignty essentially means protecting the will of the people as the sheer dynamic constitutive element of sovereignty's authority.[726] The outcome of this novel approach to the source of authority leads to a paradigm shift towards the government's power being primarily directed at serving the interests of the people. Accordingly, if a government employs stratagems that jeopardize the fundamental rights and freedoms of its people, it impinges the sovereignty of both the state and its people [727]

[721] S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, Judgment of 7 September 1927, 18.
[722] Dire Tladi, "Security Council, the use of force and regime change: Libya and Cote d'Ivoire," *South African Yearbook of International Law* 37, no. 1 (2012): 30.
[723] Makinda, "Sovereignty and international security: Challenges for the United Nations,"151; Bellamy, "The responsibility to protect and the problem of regime change," 179.
[724] *Our Global Neighbourhood*, The Report of the Commission on Global Governance, Commission on Global Governance (New York: Oxford University Press, 1995), 69.
[725] Nagan, Winston P., and Craig Hammer. "The changing character of sovereignty in international law and international relations." *Colum. J. Transnat'l L.* 43 (2004): 141, p 165
[726] Nagan and Hammer, "The changing character of sovereignty in international law and international relations," 165.
[727] Gulati Jasmeet and Ivan Khosa, "Humanitarian Intervention: To Protect State Sovereignty," *Denver Journal of International Law and Policy* 41, no. 3 (2013): 398.

and in such cases, rulers cannot invoke national sovereignty as a shield to protect themselves from the writ of international law[728]. If a government desires to remain recognized as legitimate by the international community, it must adhere to specific established international standards regarding its treatment of its population; otherwise, it exposes itself to exposure of being subject to change.[729] The institution of government gives rise to certain legal effects, among which nonintervention is the issue most closely related to the present discussion.

7.3.1.2. The Principle of Non-Intervention and Humanitarian Intervention: Perspectives from Value-Based International Law and State-Oriented International Law

The conflict between modern, value-based international law, and traditional, state-oriented international law becomes evident in the potential application of the non-intervention principle in relation to the responsibility to protect (humanitarian intervention).[730] This conflict arises when determining how international law should see interventions in a country's internal affairs to prevent mass atrocities and protect populations at risk. As discussed above, there exist two contrasting interpretations of government sovereignty, and the choice of which approach to adopt would lead to different answers to the question of whether it is possible to overthrow the incumbent government. In the following, the perspectives of both views will be examined.

A people-oriented understanding of government's authority amounts to a new form of internal threat to sovereignty, in addition to the classic external threats that states may pose to each other's sovereignty. The internal threat occurs when the ruling government expropriates its power, leading to gross violations of human rights, which in turn deprives the people of their ability to steer sovereignty in order to realize fundamental rights and freedoms. Given that these circumstances represent a threat to sovereignty caused by the functioning government, the principle of non-intervention loses its weight because 'the sovereignty can no longer vest in its

[728] Reisman, "Sovereignty and human rights in contemporary international law," 874; Hugh Breakey, "The Responsibility to Protect: Game Change and Regime Change," in *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, ed. Angus Francis and others (Tokyo: United Nations University Press, 2012), 12; Charles R. Beitz, "Bounded Morality: Justice and the State in World Politics," *International Organization* 33, no. 3 (1979): 405-424.

[729] W. Michael Reisman, "Why regime change is (almost always) a bad idea," *The American Journal of International Law* 98, no. 3 (2004): 517; Deng, Francis M. and others, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington: Brookings Institution, 1996), xviii.

[730] Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects.," *European Journal of international law* 10, no. 1 (1999): 5.

violator', and consequently, the incumbent regime will not be able to invoke the non-intervention norm as a defense when international actors intervene on humanitarian grounds to protect the sovereignty of that state by preventing the rulers from violating it.[731] Teson argues that " [g]overnments and others in power who seriously violate those rights undermine the one reason that justifies their political power, and thus should not be protected by international law".[732] In the same vein, in the eights edition of Oppenheim has been asserted that "when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible".[733] In summary, for this group of commentators, the principle of non-intervention is seen as applicable solely to external threats, with no implication of its applicability to threats engendering from the internal sovereign authority against the sovereign power. Protagonists of intervention advance the argument that Article 2(4) of the UN Charter not only does not hinder humanitarian intervention but can also be seen as supportive of it. They assert that the proscription mentioned in Article 2(4) only restricts the use of force that goes against the purposes of the UN, while confronting an offending regime aligns with those purposes, particularly as outlined in Article 1(3).[734] Additionally, preventing mass atrocities amounts to the realization of 'reaffirm[ing] faith in fundamental human rights' and 'sav[ing] succeeding generations from the scourge of war,' as declared in the Preamble to the UN.[735] Furthermore, the proscription mentioned in the said Article applies exclusively when the use of force targets the territorial integrity or political independence of a state, whereas the humanitarian intervention pursues another aim, i.e., protection of people.[736] Asserting the establishment of humanitarian intervention as a new

[731] Gulati and Khosa, "Humanitarian intervention: To protect state sovereignty," 398; Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), 101.
[732] Fernando R. Teson, "The liberal case for humanitarian intervention." in Humanitarian Intervention Ethical, Legal, And Political Dilemmas, ed. J. L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003), 93.
[733] Lassa F.L. Oppenheim, *International Law*, Volume I, 8th edition, ed. Hersch Lauterpacht (London: Longmans Green & Co, 1955), 312-13.

[734] Sarah Joseph and Joanna Kyriakakis, "The United Nations and human rights," in *Research Handbook on International Human Rights Law*, ed. Sarah Joseph and Adam McBeth (Cheltenham: Edward Elgar, 2010), 1-2.
[735] Gulati and Khosa, "Humanitarian intervention: To protect state sovereignty," 400.
[736] Janne Haaland Matlary, *Values and Weapons: From Humanitarian Intervention to Regime Change?* (New York: Palgrave Macmillan, 2006), 41.

customary rule is another legal argument put forth by protagonists to justify humanitarian intervention.[737] Other commentators with the same view but diverse points of departure establish their arguments on moral principles.[738] They argue that after the Cold War, moral internationalism has become a new source of legitimization for the use of force.[739] This stance is perfectly portraited by Anthony D'Amato's question that "if a state is butchering groups of its defenseless citizens, should we defer to the state's dignity?"[740] In response to the statistical and dogmatic perception of government sovereignty, they hold that the connotation of concepts does not remain eternally attached to them; instead, it is a matter of historical contingency.[741] Predicated on such an evolutionary perspective, the concept of state sovereignty in modern international law essentially signifies the 'constitutional independence' of a state, and emphasizes that the extent of a government's authority is subject to the prevailing principles of international law and morality that have been developed by the international community.[742] To support their submission, this group cites various international instruments, including Article 21(3) of the Universal Declaration of Human Rights, the 1991 Charter of Paris,[743] the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.

On the other end of the spectrum stands the perspective that vehemently rejects any hypothesis permitting humanitarian interventions. This cluster of scholars places their emphasis on the formality and existing rules of international law, which strongly deter any attempts to encroach upon governments' sovereignties.[744] One commentator argued that recognizing a

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[737] Ibid, 44.

[738] Anthony D'Amato, "There Is No Norm of Intervention or Non-Intervention in International Law," *International Legal Theory* 7, no. 1 (2001): 35; Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 3th ed.(New York: Transnational Publishers, 2005).

[739] Jean Bethke Elshtain, "The Third Annual Grotius Lecture: Just War and Humanitarian Intervention," American *University International Law Review* 17, no. 1 (2001): 5.

[740] D'Amato, "There is no norm of intervention or non-intervention in international law," 22.

[741] Kelsen, *Peace through Law*, 38-41; Christian Reus-Smit, "Human rights and the social construction of sovereignty," *Review of international studies* 27, no. 4 (2001): 526; Matlary, *Values and Weapons: From Humanitarian Intervention to Regime Change?*, 25.

[742] Christian Reus-Smit, "Human rights and the social construction of sovereignty," *Review of international studies*, 526; C.A.W. Manning, "The Legal Framework in a World of Change," in *The Aberystwyth Papers: International Politics 1919–1969*, ed. Brian Porter (London: Oxford University Press, 1972), 318-319.

[743] Charter of Paris for New Europe, Adopted on 21 November 1990 by the heads of State and government of the Conference on Security and Cooperation in Europe, Paris, 19-21 November 1990. Available at: <https://www.osce.org/mc/39516>. (accessed January 2, 2024).

[744] Emer de Vattel, *The Law of Nations*, ed. Bella Kapossy and Richard Whatmore, trans. Thomas Nugen (Indianapolis: Liberty Fund, 2008), ii, 4, 54.

government as responsible for its pattern of treating its people not only dilutes the established rights of peoples to govern themselves free from external interference but is essentially a contradiction. A government is assumed to enjoy sovereignty because it is not accountable to external entities, and if this is the case, the government is essentially devoid of any sovereign authority from the beginning.[745] In the words of Gilpin, "The state is sovereign in that it must answer to no higher authority in the international sphere. It alone defines and protects the rights of individuals and groups".[746] While commentators in this group acknowledge the emergence of popular sovereignty as a new value and recognize its distinct influence on the structure of international law, they argue that deducing the use of force to protect people is a *non sequitur*. This is because the value of popular sovereignty, according to their perspective, does not automatically imply legal authorization for other states to overthrow an illegitimate regime.[747] For scholars on this side, humanitarian intervention cannot be considered an international customary rule due to the absence of *opinio juris* because the practice of states regarding the interpretation of humanitarian intervention is desperately split and hence does not provide conclusive evidence of the legal consensus of all or most states accepting intervention as an established legal norm.[748] Regarding the UN Charter, they render an opposing interpretation. They argue that humanitarian intervention contradicts the principle of sovereignty, which is a well-established norm of international law[749] and this principle is embodied in Article 2(4), which explicitly prescribes proscription on any use of force against the sovereignty and integrity of a state.[750] Some critics have taken a radical stance and claimed that what is outlined in the aforementioned Article constitutes *jus cogens*[751] and thereby imposing an absolute proscription on humanitarian intervention.[752] Additionally, the *jus cogens* nature of Article 2(4) thwarts the

[745] David Chandler, "The Responsibility to Protect? Imposing the 'Liberal Peace'," in *Peace Operations and Global Order*, ed. Alex J. Bellamy, Paul Williams (London: Routledge, 2005), 65; Robert Jackson, *Quasi-states: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990), 728;
[746] Robert Gilpin, *War and Change in World Politics* (Cambridge: Cambridge University Press, 1981), 17.
[747] Michael Byers and Simon Chesterman. " "You, the People": pro-democratic intervention in international law," in *Democratic Governance and International Law*, ed. Gregory H. Fox and Brad R. Roth (Cambridge: Cambridge University Press, 2000), 269; Fox, "Regime Change," 17.
[748] Ibid, 18; Matlary, *Values and Weapons: From Humanitarian Intervention to Regime Change?*, 43, 266-267.
[749] Joseph and Kyriakakis, "The United Nations and human rights," 1-2.
[750] Gulati and Khosa, "Humanitarian intervention: To protect state sovereignty," 400.
[751] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Reports Judgment of 27 June 1986, Separate opinion of President Nagendra Singh, 153.
[752] Sir Adam Roberts, "The United Nations and Humanitarian Intervention," in *Humanitarian Intervention and International Relations*, ed. Jennifer M. Welsh (Oxford: Oxford University Press, 2004), 76; Byers and Chesterman, " "You, the People": pro-democratic intervention in international law," 270.

formation of any customary international law permitting humanitarian intervention.[753] They also refer to the deliberations among states during the adoption of the UN Charter and assert that the contracting parties did not seriously consider humanitarian intervention as one of the legitimate grounds for the use of force within the UN's system, but they primarily focused on the use of force against external aggression rather than against tyrannies. [754]

To corroborate their argument, they reference certain international instruments. For example, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,[755] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[756], the UNGA' resolution on Enhancing the effectiveness of the principle of periodic and genuine elections[757].

Now, let's proceed to review both perspectives. Regarding the submission of the protagonist of humanitarian intervention, the author believes that they often overlook the fact that the first part of Article 2(7) in the UN Charter is one of the rare articles that requires scholars to delve into the true connotations of domestic affairs in international law to fully grasp its meaning. The caveat in their argumentation is that they fail to scrutinize whether the issue of the incumbent government itself has been truly separated from matters that fall within the domestic jurisdiction according to positive international law or not. Conflict of norms is inherent in every legal system, and international law is no exception, however, the protagonist fails to provide any reasoning for the legal basis on which the general prohibition of the use of force loses its weight in the face of mass atrocities. It is partially accurate that governments, in various international agreements, committed to respecting and ensuring the protection of fundamental human rights and freedoms for their people, nevertheless, they adamantly remained intransigent to the notion that (the continuous of their life should be subject to) their exercise of sovereign rights should be contingent upon fulfilling this obligation.[758]

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[753] Gulati and Khosa, "Humanitarian intervention: To protect state sovereignty," 400.
[754] Roberts, "The United Nations and Humanitarian Intervention," 72.
[755] UN General Assembly, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, 21 December 1965, A/RES/2131(XX).
[756] UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV).
[757] (A/RES/45/150) 18 December 1990.
[758]Luke Glanville, "Sovereignty," in *The Oxford Handbook of The Responsibility to Protect*, ed. Alex J. Bellamy and Tim Dunne (Oxford: Oxford University Press, 2016), 158.

In the context of the anti-intervention argument, supporters often halt their analysis by stating that international law lacks any rule of intervention, without presenting a comprehensive argument. Undoubtedly, human rights are an integral component of modern international law. The concept of governmental authority has consistently been concomitant with the protection of fundamental rights for inhabitants. Even early scholars who adhered to the idea of absolute sovereignty believed that a government's sole responsibility was to safeguard and rescue its people from any threats endangering their lives.[759] Finally, the antagonist does not provide an explanation for what should be done in cases where the incumbent regime remains obstinate in its acts of massacre against the population, and thereby rendering human rights norms ineffectual.

By relying on a permissive interpretation of international law, a significant number of humanitarian interventions have taken place, disregarding the principle of non-intervention. The conflict between both sides on interventions escalated to their peak through unilateral intervention outside of the UN's mechanisms. Such a dramatic wrangle between both sides has left them with no option but to engage in international dialogue to address the legality of humanitarian intervention. The next section is dedicated to this question.

7.3.1.2.1. Framing Humanitarian Intervention (Responsibility to Protect): International Actions

Makinda defined intervention as "an attempt to get involved, deploys military forces in a conflict without the approval of all the parties to the conflict".[760] For Holzgrefe humanitarian intervention is " the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the government of the state within whose territory force is applied".[761]

Following a similar conceptual discourse at the international level, Canada took the initiative and sponsored the Independent International Commission on Intervention and State

[759] Hobbes, *Leviathan*, xxx,1; Jean Bodin, *Six Books of the Commonwealth*, trans. M. J. Tooley (Oxford: Basil Blackwell, 1955), ii, 4-5.
[760] Makinda, "Sovereignty and international security: Challenges for the United Nations," 149.
[761] J. L. holzgrefe, "The humanitarian intervention debate," in Humanitarian Intervention Ethical, Legal, And Political Dilemmas, ed. J. L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003), 18.

Sovereignty (ICISS) in September 2000.[762] The goal was to seek a solution regarding the legality of humanitarian intervention under the banner of the Responsibility to Protect.[763] The report of the commission recognized solely the SC as a competent body to authorize legitimate intervention for humanitarian reasons and emphasized that the primary focus should be on enhancing the efficiency and effectiveness of the SC, rather than seeking new alternatives to it as a source of authority.[764] However, if the SC fails to act promptly and effectively, the ICISS anticipated the possibility of using force outside of the SC's framework to protect people.[765]

In November 2003, Secretary-General Kofi Annan established the High-Level Panel on Threats, Challenges, and Change. This panel was assigned the responsibility of conducting a comprehensive examination of worldwide threats, presenting an analysis of upcoming peace and security challenges, and proposing essential adjustments to enable effective collective responses, including a review of the UN's organs 'to protect the innocent without shielding the criminals.[766] The Panel recognized the emergence of the responsibility to protect as a new norm that can be invoked in cases where a government is either unable or unwilling to halt perpetrating genocide, mass killings, ethnic cleansing, or serious violations of international humanitarian law under the auspices of the SC.[767] Contrary to the ICISS's report, the Panel, firstly; limited any intervention to the ambit of the SC, Secondly; did not address situations in which the SC is incapable of taking action, and lastly it referred to the responsibility to protect as an emerging norm rather than an established one.[768] As per the Panel's report, when considering the potential use of force, the SC should assess five legitimacy criteria: (a) the threat should be of significant gravity; (b) the military actions must be aimed at preventing the threat; (c) all feasible non-military alternatives must be exhausted; (d) the scope, duration, and

[762] *The Responsibility to Protect*. Report of the International Commission on Intervention and State Sovereignty December 2001 (Ottawa: the International Development Research Centre, 2001).
[763] This thesis does not deal with the issue of responsibility to protect, but for this aspect see in detail: Sulyok, Gábor. "Understanding the Responsibility to Protect: Textual Anomalies and Interpretative Challenges in the 2005 World Summit Outcome." *Hungarian YB Int'l L. & Eur. L.* (2014): 207-221.
[764] Ibid, para. 6.14.
[765] Ibid, paras. 6.37- 6.40
[766] Ramesh Thakur, "A shared responsibility for a more secure world," *Global Governance* 11, no. 3 (2005): 281.
[767] UN General Assembly, Note (transmitting report of the High-level Panel on Threats, Challenges and Change, entitled "A more secure world : our shared responsibility") 2 December 2004, A/59/565, para. 203.
[768] Mindia Vashakmadze, "Responsibility to Protect," in *The Charter of the United Nations: A Commentary*, Volume I, ed. Bruno Simma and others, 3rd edition (London: Oxford University Press, 2012), 1209.

intensity of the proposed military action should be the minimum required to address the threat; (e) there should be a reasonable prospect of the military action achieving its objectives.[769]

Following the GA's directive for the Secretary-General to deliver a report on the progress in implementing the Millennium Declaration adopted in 2000, the Secretary-General published his report, "In Larger Freedom", in March 2005.[770] The report constructed with a softer and more cautious language compared to the Panel's report. The Panel's report refrains from unequivocally acknowledging the responsibility to protect as an emerging norm,[771] and alludes to 'sensitivities involved in this issue' without elaborating on the nature of these sensitivities[772]. Furthermore, the report weakens the tough tie between the responsibility to protect and the use of force by restricting military options to the situation its application is vital, and instead, places greater emphasis on peaceful means and prevention.[773] Last but not least, The Secretary-General strongly urged states to support the adoption of the five criteria established by the High-level Panel for the SC's authorization of military actions.[774]

The last concrete action taken by the GA was the World Summit in 2005, which resulted in the Outcome Document regarding the responsibility to protect.[775] The mainstream views the Outcome Document as the preeminent statement regarding the responsibility to protect.[776] The Outcome Document confines the scope of responsibility to protect to only four specific offenses: genocide, war crimes, ethnic cleansing, and crimes against humanity.[777] The Outcome Document neither speaks of the possibility of using force against an offending state nor establishes any guidelines for the SC when making decisions about taking action.[778]

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[769] The Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility, para. 207.
[770] (A/RES/55/2) 8 September 2000: (A/RES/55/ 62) 14 December 2000.
[771] Vashakmadze, "Responsibility to Protect," 1209.
[772] UN General Assembly, In larger freedom: towards development, security and human rights for all: report of the Secretary-General, 21 March 2005, A/59/2005, 135.
[773] Vashakmadze, "Responsibility to Protect," 1209.
[774] UN General Assembly, In larger freedom: towards development, security and human rights for all: report of the Secretary-General, 135.
[775] UN General Assembly, 2005 World Summit Outcome: resolution / adopted by the General Assembly, 24 October 2005, A/RES/60/1.
[776] Vashakmadze, "Responsibility to Protect," 1210.
[777] UN General Assembly, 2005 World Summit Outcome, para. 137
[778] *The Responsibility to Protect*. Report of the International Commission on Intervention and State Sovereignty, para. 4.41; UN General Assembly, report of the High-level Panel on Threats, Challenges and Change, entitled "A more secure world: our shared responsibility, para. 207.

In light of the adopted documents and their associated deliberative processes, it may safely be asserted that the concept of the responsibility to protect hinges on the idea that sovereignty should not be interpreted as giving a state *carte blanche* to mistreat its own people without facing accountability; instead, it emphasizes that sovereignty entails a duty for governments to safeguard the well-being of their citizens.[779] The feedback from both the international community and scholars also permits one to securely conclude that, firstly, there is a profound division of opinions regarding the acceptance of the responsibility to protect as a legal norm,[780] and secondly, if the responsibility to protect were to be implemented, the sole competent body to address this matter would be the UNSC.

Despite the rich literature and discussions surrounding the responsibility to protect, it has not introduced any novel value or rule to the international legal system. What the evolution of the responsibility to protect underscores is a mere reaffirmation of a government's duty not to infringe upon the fundamental rights and freedoms of its own citizens, and in the event of such a situation, the only appropriate avenue for addressing it is through the SC. In the authors' perspective, the endeavors made by both proponents and opponents of the responsibility to protect appear to be an attempt to acquire what has already been acquired. The promotion of states' responsibility to implement the fundamental rights and freedoms of their populations is firmly grounded in positive international law and does not necessitate advocacy for its legality. The UN Charter alone suffices to attribute such a responsibility to states. Moreover, treating the SC as the entity responsible for addressing mass atrocities is not a novel concept, as Article 11 of the UN Charter allows Member States to bring any matter to the attention of the SC. The antagonist argued for the general prohibition of the use of force and the exclusive competence of the SC to implement the responsibility to protect, while both of which are among the achievements of the UN Charter. The sole outcome of this conflict was the triumph of the

[779] Vashakmadze, "Responsibility to Protect," 1206; Conference Report, Human Rights Protection for Internally Displaced Persons: An International Conference, Convened by Refugee Policy Group, 24-25 June 1991. Available at: <https://robertcohenhumanrights.files.wordpress.com/2019/01/idps-1991-rpg-conference-report.pdf>.(accessed January 3, 2024),7-8.

[780] Melissa Labonte, "R2P's Status as a Norm," in *The Oxford Handbook of The Responsibility to Protect*, ed. Alex J. Bellamy and Tim Dunne (Oxford: Oxford University Press, 2016), 134. For proponent views, look at: UN General Assembly, Implementing the responsibility to protect: report of the Secretary-General, 12 January 2009, A/63/677, para. 3. For opposition view, look at: Vashakmadze, "Responsibility to Protect," 1213; Edward C. Luck, "The Responsibility to Protect: Growing Pains or Early Promise?," *Ethics and International Affairs* 24, no. 4 (2010): 349-365.

antagonist over the protagonists, preventing them from establishing a new exception to the use of force outside of the UN's system.

Addressing the central question of whether regime change falls in the ambit of domestic affairs, the discussion in this section reveals that the current approach of international law regarding the responsibility to protect does not touch the issue of toppling the offending regime. It only goes as far as acknowledging that the SC can potentially employ military options, along with offering some guidelines for when to act, without implying any consideration of regime change. The analysis in this section also suggests that, because the prospect of regime change has not been incorporated into positive international law, one might find merit in the argument that the issue of regime change is untouchable part of the category of essentially domestic matters outlined in the initial section of paragraph 7 of Article 2.

7.3.2. The implications arising from the last segment of paragraph 7 in Article 2

Relying solely on the above-mentioned conclusion is partial in its analysis, as the second part of the said Article addresses the SC's competence to intervene in such essentially domestic matters. Consequently, it is imperative to explore the extent of the SC's competence to determine whether it entails the power of changing the incumbent regime in cases of mass atrocities. As mentioned earlier, the Libya case has ignited hot discussion on this matter, and therefore, most literature naturally revolves around that case. However, the primary focus of this study is not the Libya case itself. The following section is dedicated to scrutiny the arguments provided by proponents and opponents of the SC's power to depose the incumbent regime.

7.3.2.1. Inclusion of Regime Change in the Security Council's Competence

The essence of the argument for regime change, advocated by its proponents, is rooted in the belief that human rights are an inalienable part of modern international law with concomitant result of the primacy of individual well-being over state interests and asserting that the quality of governance in any state, regardless of its internal structure or organization, shall not trespass the established standards of behavior, otherwise the sovereignty of the offending state may be subject to change.[781] It has been contended that regardless of one's perspective on

[781] Reisman, "The Manley O. Hudson Lecture - Why Regime Change is (Almost Always) a Bad Idea." 517.

sovereignty, there is little dispute regarding the idea that the SC is empowered, by the authority vested in it by sovereign states, to utilize any measure it deems necessary, including regime change, in the pursuit of international peace and security. This vision rejects any arguments for the categorical prohibition of regime change in advance for the purpose of human protection, as well as the idea that states have the unilateral right to change the perpetrator regimes.[782] Thus, the SC may move towards authorizing regime change or actions that result in the removal of a regime.[783]

Another line of argument put forth by this group is that the SC can introduce the protection of civilians or people to Member States as the primary objective to be achieved. In this context, the situation may lead to the scenario where the realization of this decision becomes unattainable unless the incumbent regime is removed.[784] Since there is barely a compelling reason to believe that an adamant government perpetrator can be induced to alter its behavior through any means other than suppressing,[785] ousting the perpetrator is not only a necessity but also the only effective solution for ending harm to the people.

Further argument is constructed by distinguishing between the desired objective intended by the SC and the methods employed to achieve that objective. For instance, in the case of Libya, it could be argued that Resolution 1973 does not bear the legitimacy of regime change, but there is no rationale for excluding regime change as a means to accomplish the SC's established objective.[786] Hence, the pursuit of regime change may be considered an illegitimate goal, whereas it could be viewed as a legitimate method or means to achieve other goals.

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[782] Bellamy, "The responsibility to protect and the problem of regime change," 180.
[783] Ibid, 181; Nahlawi, "The legality of NATO's pursuit of regime change in Libya," 305.
[784] Tladi, "Security Council, the use of force and regime change: Libya and Cote d'Ivoire," 44; Bellamy, "The responsibility to protect and the problem of regime change," 167; Sean Butler, "Separating protection from politics: The UN Security Council, the 2011 Ivorian political crisis and the legality of regime change," *Journal of Conflict and Security Law* 20, no. 2 (2015): 275; Luke Glanville, "Armed Humanitarian Intervention and the Problem of Abuse after Libya." in *The Ethics of Armed Humanitarian Intervention*, edited by Don E. Scheid (Cambridge: Cambridge University Press, 2014), 162; Geir Ulfstein and Hege Føsund Christiansen, "The legality of the NATO bombing in Libya," *International and Comparative Law Quarterly* 62, no. 1 (2013): 168; Mehrdad Payandeh, "The United Nations, Military Intervention, and Regime Change in Libya," *Virginia Journal of International Law* 52, no. 2 (2012):389; Christian Henderson, "International Measures for the Protection of Civilians in Libya and Cote D'ivoire." *International and Comparative Law Quarterly* 60, no. 3 (2011): 777; Edward C. Luck, "Will Syria Follow Libya?," 1 September 2011. Available at:<https://www.cfr.org/interview/will-syria-follow-libya>. (accessed January 10, 2024).
[785] Bellamy, "The responsibility to protect and the problem of regime change," 170.
[786] Payandeh, "The United Nations, Military Intervention, and Regime Change in Libya," 387.

Other commentators believe that while the idea of overthrowing a functioning regime may be a contentious concept in international law, however when a regime perpetrates mass atrocities against innocent people, thwarting the continuation of these atrocities requires encountering with the offending regime, and within this framework, the removal of such a regime could be as a 'legitimate consequence' of protecting civilians.[787] Therefore, for them, removing the offending government is not the primary objective but rather a knock-on effect of protecting people.

The final argument in favor of regime change can be based on the G8 summit' stance in May 2011, stating that Qadhafi and the Libyan government had not fulfilled their duty to protect the Libyan people and hence, had forfeited all its legitimacy. The summit stressed that the Libyan government had no place in a liberated, democratic Libya, and hence, they must go.[788] Therefore, due to the absence of legitimacy resulting from the commission of mass atrocities,[789] the offending government cannot lay claim to the prerogatives of statehood enshrined in both international law and the UN Charter.

7.3.2.2. Exclusion of Regime Change in the Security Council's Competence

In contrast to the previous viewpoint, commentators against regime change argue that it is premature to conclusively judge that positive international law accommodated rule of regime change, even when conducted through the collective security mechanisms envisioned by the UN. It has been argued that the utilization of military forces to either depose an established regime or impose a specific political solution lacks endorsement and backing from the UN.[790]

Some scholars support the proscription of regime change by drawing a distinction between the concept of responsibility and regime change. Accordingly, the consensus, at most, centers around the implementation of the responsibility to protect, which might entail the use of force when the Security Council deems it an appropriate measure solely to prevent genocide, war crimes, ethnic cleansing, and crimes against humanity, without endorsing regime change.[791]

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[787] Ibid, 389; Hurd, "Foreword," 12.
[788] G8 Declaration: Renewed Commitment for Freedom and Democracy, Deauville, May 26-27, 2011. Available at:<https://www.state.gov/declaration-of-the-summit-for-democracy-2023/>. (accessed January 10, 2024).
[789] Conference Report, Human Rights Protection for Internally Displaced Persons: An International Conference, 19.
[790] Pippan Christian, "The 2011 Libyan uprising, foreign military intervention, and international law," *Juridikum: Zeitschrift für Kritik–Recht–Gesellschaft* 2 (2011): 163.
[791] Bellamy, "The responsibility to protect and the problem of regime change," 173.

While protection is a valid target and action, it should not be conflated with or made synonymous with the act of overthrowing a incumbent regime.[792] They corroborate their argument by referencing paragraph 139 of the World Summit Outcome Document, which states that:

"we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peacefully means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[793]

Furthermore, some scholars challenge an overly permissive interpretation of Article 2(7) that allows the SC to intervene in domestic affairs at its own discretion when operating under Chapter VII. They argue that the purpose of this article is to empower the SC to address the international dimensions of domestic issues that have significant repercussions on international peace and security, with the aim of restoring international peace and security, rather than focusing on domestic peace and security.[794]

7.3.3. The Legality of Regime Change by the Security Council

The author of this thesis has certain issues regarding the arguments built by both proponents and opponents of regime change. Concerning the proponents, a general reference to the general powers bestowed to the SC by the UN Charter does not constitute a solid and convincing legal foundation for implementing the power to conduct regime change. The text of the UN Charter is not improvised in such an ambiguous manner as to justify the ascription of any power to the SC. Rather, it is designed to enable the SC, within the evolving dynamics of international relations, to effectively work towards the goal of international peace and security while adhering to the legal constraints established by the UN Charter and international law. The open-ended nature of the UN Charter should not be equated with gifting unrestricted powers to the SC. Any extraordinary power, unless explicitly mentioned in the UN Charter, necessitates a robust legal justification rooted in the mechanisms provided in the UN' system. Additional

[792] Alex J. Bellamy and Paul D. Williams, "The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect," *International Affairs* 87, no. 4 (2011): 846.
[793] UN General Assembly, 2005 World Summit Outcome, paras. 138-139.
[794] Pippan, "The 2011 Libyan uprising, foreign military intervention, and international law," 162.

presented reasoning revolves around the concept of necessity. Firstly, according to international organization law, necessity does not serve as a legal foundation for creating new powers for an organization. Secondly, if one accepts necessity as a justification for regime change without presenting a compelling framework, they must also be prepared to accept the consequences of such reasoning. For instance, if the SC were to conclude that the most effective means to preserve or restore international peace and security is to divide or dissolve a state, would they embrace such a decision as *intra vires*? Endowing the SC with unrestricted power would place perilous and potentially exploitative levels of authority in the hands of an entity that is inherently susceptible to political influences.[795] The other argument that views regime change as an illegitimate goal but a legitimate means cannot be deemed acceptable due to its susceptibility to the logical fallacy of *petitio principii*. It is not clear on what basis regime change, as a means to attain an objective, is considered permissible. If that were the case, one would have to embrace the principle that anything banned as an objective becomes permissible as a means. Regarding the viewpoint that regards regime change as an inevitable outcome of confronting the offending state, one could counter-argue that military operations could be planned in a manner that does not result in regime change. However, in an exceptional scenario, if the offending state staunchly resists military measures by the SC aimed at deterring mass atrocities, the inevitable outcome of such a military confrontation would be the toppling of the incumbent regime. In respect to the last submission, it is true that committing a massacre could signal the illegitimacy of a government. However, logical deductions do not necessarily lead to the conclusion that it confers new power to the SC and makes the offending government susceptible to regime change. In summary, the rationale of proponents mainly relies on political considerations, non-legal facts, and reasoning that is not aligned with the principles outlined in the UN Charter.

In relation to the opponents of regime change, the challenging issue in their argumentation is that they do not provide any Charter- oriented solution through the SC for a situation in which a government remains intransigence in halting mass atrocities. Additionally, their legal argumentation is confined to pointing out the absence of explicit permission for resorting to regime change by the SC in the UN Charter, without providing further detailed reasoning.

[795] Nahlawi, "The legality of NATO's pursuit of regime change in Libya," 296.

The author contends that Article 2(7) offers a clue by which one can determine whether regime change falls in the ambit of the SC's powers or not. Beyond any doubt, the latter part of paragraph 7 of Article 2 exempts the SC from the obligation of non-intervention when acting under Chapter VII. At this point, it should be noted whether the Article equips the SC with a general exemption from all domestic matters or exempts the SC from specific types of domestic matters. When one closely examines the first part of the paragraph, the article refers exclusively to specific domestic affairs. The Article after establishing the proscription of UN intervention, clarifies the nature of these domestic matters by stating that they are characterized by the potential for being subject to settlement mechanisms outlined in the UN Charter. In other words, the domestic affairs addressed by the article are those that could enter the settlement process only if the state concerned wishes to initiate such action. Accordingly, Article 2(7) is applicable solely to domestic matters that Member States consent to bring to the settlement mechanism. Naturally, it does not entail the issue of whether the incumbent government remains in power or not. The non-applicability of the non-intervention principle to the SC is limited to those matters that the state concerned voluntarily submits to the UN settlement mechanism. Governments generally refrain from exposing the continuity of their existence to a settlement mechanism. The article narrows the jurisdiction of Member States in favor of the SC to promote peace, without addressing the inception or termination of the functioning regime. Thus, when confronted with a perpetrator regime, the SC may orchestrate any action that falls short of effecting a regime change. Given that the power of the SC to change a regime is widely recognized as an exceptional measure, it unquestionably demands a solid legal basis in the UN Charter and cannot be taken for granted. The overthrow of an incumbent regime due to the commission of mass atrocities occurred only once in the history of the SC. In the case of Libya, the SC, through Resolution 1973, authorized the international community to employ all necessary measures to protect civilians and civilian areas. This authorization was interpreted by Western countries as a green light to overthrow the Qaddafi regime. However, shortly after the collapse of the Libyan government, controversy intensified. Many states, including both permanent and non-permanent members of the SC, voiced opprobrium against NATO's regime change actions, arguing that regime change was never the intended purpose of Resolution 1973. The robust opposition proves two crucial points. Firstly, regime change is not a part of the SC's jurisdiction. If it were, opposing the resolution would be illogical, as the resolution clearly

permits the use of all necessary measures. If the SC did enjoy such power, there would be no rationale for excluding regime change as one of those necessary measures. Secondly, it thwards the formation of any assumption that, in the aftermath of the Libyan situation, a new precedent has been created that grants the SC the power to trigger regime change in cases involving mass atrocities committed by the incumbent regime.

7.4. Conclusion

Regretfully, the persistent and widespread violation of fundamental human rights and freedoms by incumbent regimes against their populations continues to be evident in various regions across the universe. The international community has endeavored to address these issues through a multitude of peaceful initiatives aimed at eradicating, or at the very least mitigating, the grave human rights violation. One of the potential strategies for addressing human rights violations on an international scale is the consideration of coercive measures, including the overthrow of the offending regime by the SC. Indeed, the saying that the UN Charter bestowed unparalleled powers upon the SC is true. However, it is equally true to recognize that the UN Charter situates this organ within specific competencies and mandates this body to operate in conformity with the established legal framework. Assuming any power for the SC should be approached primarily with a comprehensive understanding of the UN Charter's context, as well as the overarching framework of international law. The initial segment of paragraph 7 in Article 2 acts as a constraint, and impedes the SC from assuming the power to change the incumbent regime. The determination of the incumbent regime's existence and operational role remains the prerogative of its people. It is a matter of people choice and collective authority in shaping the political landscape. Aligned with this line, the SC is vested with the competence, acting on behalf of the international community, to stand in solidarity with suppressed people and safeguard them against infringements upon their fundamental rights and freedoms. Toppling the incumbent perpetrator regime blatantly violates the right to independence of the peoples to determine their own political status and pursue their socio-economic, cultural, and political development independently. The UN Charter empowers the SC to intervene in instances of mass atrocities to stop them and facilitates affairs for the oppressed people to deliberate upon and choose their desired political regime. The UN Charter

bans the SC from supplanting the people, forcibly removing the incumbent regime, or usurping the decision-making process on their behalf.

Chapter VIII: Conclusion

Historical lessons have unequivocally indicated to the international community that the establishment of an environment fostering universal peace is the indispensable prerequisite for nation-states to effectively pursue their individual interests. Toward this end, the UN was established in 1945, and the SC was entrusted with the responsibility of maintaining and restoring international peace and security. Undoubtedly, the SC stands as the preeminent organ, not only within the United Nations but also in the broader context of international organizations. In articulating this perspective, the author does not seek to diminish the significance of other organs or organizations; rather, this acknowledgment stems from the unparalleled powers vested in the SC, setting it apart in the international arena. The SC represents the culmination of centuries of endeavors aimed at finding a collective resolution to realize the longstanding aspiration of peace for all. Given the multifaceted historical background of the SC, it is feasible to analyze this institution from diverse perspectives, ranging from political dimensions to sociological considerations. Due to the importance of the SC, any scholarly investigation into it invariably generates novel insights that cannot be easily dismissed. These findings might occasionally diverge from conclusions drawn in other studies. Confrontations in the study of the SC often arise between legal studies employing legal analytical or dogmatic method and political studies. While the former focuses on understanding the essence of law at the time of its application as it is, the latter base its observations on the power dynamics among states. The SC is *par excellence* for unambiguous observation of this conflict. On one side, a group of five major powers wields veto rights, while on the other side the rest of the international community with competing interests among themselves. The regrettable reality is that states, instead of making constructive contributions, often pursue egoistical goals on the international stage. They may even form coalitions to advance their individual interests. In this context, it is evident that states strive to influence the decisions of the SC in their favor, and the degree of success in this endeavor largely depends on the states' individual power capacities. The drafters of the UN Charter were well aware of these circumstances. Accordingly, the drafters of the UN Charter anticipated the necessity of establishing a legal framework to govern the performance of the SC. Accordingly, the UN Charter delineates the competence of the SC. The UN Charter, in some parts, explicitly assigns certain powers aligned with designated competencies to the SC. In other parts, it provides the SC with discretionary authority to determine which specific

powers are necessary to execute its relevant competencies for the maintenance or restoration of peace. In accordance with the UN Charter, the SC's jurisdiction is delimited to addressing threats to peace, breaches of peace, and acts of aggression. The UN Charter expressly defines these parameters, and any interpretation exceeding these confines conspicuously deviate from the UN Charter.

One of the unfortunate situations that the SC may confront is when a Member State commits mass atrocities against its own population. This thesis is dedicated to providing legal answers to four pivotal and challenging questions concerning the extent of the SC's competence and the powers it can exert over offending states.

Question one: The UN Charter frequently refers to the concept of peace. However, the specific implication of peace in the UN Charter remains a topic of discussion. Accordingly, the question arises what does the peace in the UN Charter implies? The author vehemently opposes the perspective that grants the SC the discretion to define the concept of peace. The founding of this thesis suggests that the definition of peace is established by the UN Charter, and its definition is not subject to the decisions of the SC. According to this thesis, the peace of the UN Charter is incardinated in a specific form with a specific connotation. The form of peace is the relationship among Member States. The connotation of peace which sets a standard for the quality of these interactions, rests upon the absence of armed conflict and the observance of fundamental human rights. The thesis underscores the UN Charter's nuanced understanding of peace, emphasizing the pivotal role it plays in shaping the quality of international relations through the prevention of conflicts and the promotion of fundamental human rights and freedoms. According to the UN Charter, the peoples are the original creators of the UN which exercise their will through their governments. The UN Charter establishes humanity as the exclusive common denominator across all nation-states and as the pivotal force capable of uniting and mobilizing all Member States under universally shared norms. Humanity is the axis, *modus operandi*, and ultimate end of the UN. In sum, according to the UN Charter, peace implies the maintenance of relationships among nation-states devoid of coercive measures, coupled with the imperative of ensuring human rights. Such a conceptualization of peace in the UN Charter was not an improvision by the drafters but rather it was a manifestation of the prevailing consensus in the international community during that period. Therefore, the scope of the SC's competence is defined, and its discretion entails determining whether relationships

among nations have been disrupted. In other words, the SC has the authority to make decisions concerning specific situations or disputes that disturb or potentially jeopardize peace, rather than formulating a distinct definition of peace and acting based on that construct. Consequently, the competence of the SC is limited to the concept of peace as defined in the UN Charter.

Question two: When the SC, utilizing its discretionary power to determine whether peace is disrupted, concludes that peace is violated and action is necessary, does it face any limitations in the course of its actions? Notwithstanding the pivotal role assigned to the SC, taking into account Articles 24, 25, and Chapter VII of the UN Charter, alongside the supremacy conferred by Article 103 to the SC's decisions, the founding of this thesis suggests that that the SC is not granted *carte blanche*, and there are limitations and boundaries that constrain the scope of its actions. These constraints in positive international law are known as GIL. GIL constitutes the foundation of modern international law, providing the basis upon which the field maintains its cohesion and evolves. It is an *infra*-legal matter. GIL consists of two clusters: axiomatic principles and axiological principles. Axiomatic principles are the presumptions that enable the establishment and continued existence of international law as a legal system. Axiological principles are grounded in the fundamental assumption of humanity, serving as the foundational premise guiding the pursuit of the common good. The principles of GIL manifest through legal concepts of *jus cogens* and *erga omnes*. Peremptory norms protect the foundation of international law in the realm of international treaties, while *erga omnes* pursues the same aim but in other areas of international law. It is in the light of GIL's principles that the functionality of international law and the allocation of competencies among the subjects of international law are viable. Accordingly, owing to the nature of GIL, all subjects of international law are obligated to adhere to its rules without exception or derogation. The SC, in line with the legal personality of the UN, is bound by GIL, and neither Article 1 nor Article 103 of the UN Charter exempts the SC from the norms of GIL in the international legal system. Therefore, the SC must consistently comply with GIL in performing its duties when seizing questions related to mass atrocities committed by a Member State, and deviation from these principles is strictly prohibited under any circumstances.

Question three: The UN Charter defines both the competence and powers of the SC in particular domains, while in other instances, it defines the competence without providing an exhaustive list of powers. Instead, the UN Charter bestows the SC the discretion to choose the

necessary powers required to fulfill its responsibility. Derived from its discretionary authority, the SC has the capacity to employ powers not explicitly stated in the UN Charter. This circumstance prompts the question that whether the SC is granted *carte blanche*, allowing it to deploy any powers in its attempts to maintain international peace and security? The founding of this research suggests that assuming the legality of any exercised power by the SC does not align with its designated jurisdiction, and this body cannot claim powers that do not fall in its competence. Through Articles 1, 24, 25, Chapter VI, and VII, the Member States did not delegate the exercise of a part of their sovereignties to the SC. The SC cannot assume powers that fall in the scope of domestic jurisdiction, specifically legislative power, judicial power, or overthrowing the incumbent regime. Sovereignty retains its inviolability in international law. International organizations, including the UN, do not inherit segments of sovereignties; instead, they are platforms wherein states exercise their sovereignty. The application of any new powers by the SC that impinge on the sovereignties of Member States without their consent is *ultra vires* and devoid of any legal effects. Therefore, the adoption of legislative measures, rendering judicial decisions, or overthrowing an incumbent government without consent in cases involving mass atrocities committed by a Member State does not align with the competence of the SC.

Question four: In the event of a disagreement between the SC and an offending state concerning the interpretation of the UN Charter, which side's interpretation should prevail? The founding of this study suggests that although the SC has the jurisdiction in the initial phase to define the boundaries of its course of actions, neither this organ nor any Member State is granted the power to provide an authoritative interpretation of the UN Charter. When a serious disagreement arises between the SC and a Member State, the authoritative interpretation should be pursued through sincere dialogue in good faith. In the event that the dialogue reaches an impasse, the question should be referred to the ICJ for a definitive resolution.

Future of the Security Council: A segment of the current discourse on the Security Council (SC) revolves around the proposed modification of the United Nations (UN), particularly the SC itself-a matter that has recurrently surfaced over time. Although the articulation of this proposition is not novel and has resonated for an extended duration, the pragmatic viability of its implementation remains a salient question. Drawing upon the annals of international law, historical transformations have consistently manifested in the aftermath of momentous

incidents, frequently characterized by their regrettable nature. In adherence to this pattern, anticipating a change appears somewhat unrealistic unless such a significant incident transpires. During the era of classical international law, in response to egoistic behaviors exhibited by a state or group of states to the detriment of the international community, changing measures were undertaken to prevent the recurrence of such incidents in the future. To date, it seems states have not witnessed an incident of sufficient magnitude that would compellingly prompt them to earnestly advocate for a substantive change of the SC. Following the establishment of modern international law, the role of peoples emerged as a novel dynamic capable of instigating changes in the international behaviors of states. Interestingly, it is the public opinion of the people that has the capability to substantially escalate the cost associated with the exercise of veto power by its wielders, and occasionally, render such application impossible. The war between Israel and Palestine sounded the alarm once again. The passivity of the SC in preventing the significant casualties endured by Palestinians, particularly children and women, places this body at the forefront of critique by the peoples. If the peoples reach the conclusion that the SC is incapable of protecting fundamental rights and freedoms, they can compel their respective governments to earnestly pursue a reform agenda. Based on past and present circumstances, the author believes that any prospective changes in the SC would likely occur predominantly under the influence and insistence of the peoples.

Suggestions: A considerable amount of time has elapsed since the adoption of the UN Charter. Throughout this period, the international community has undergone substantial shifts and witnessed the emergence of novel challenges. To address impending threats, the SC sought to strengthen its capabilities by progressively expanding its powers. It is true that the deliberate use of ambiguous wording is an ubiquitous technic in the drafting of international treaties which allows flexibility to address novel developments, however, on occasion, it may bear counterproductive outcomes. This problem is particularly conspicuous in the case of the SC. Given the absence of a competent institution tasked with observing SC actions and the SC's discretionary power in determining appropriate measures for maintaining international peace, the ambiguity in the text of the UN Charter can provide ample grounds for veto-wielding members to interpret the UN Charter based on their individual interests or alliances. This situation arises due to the dual role of the SC as both the executor and judge in determining appropriate measures. Consequently, there exists a possibility for the SC to act not in

accordance with the behests of the UN Charter, which is centered on the common good, but rather to substitute its own will as the authentic behests of the UN Charter. The toolbox of the SC that creates the potential for abuse of power comprises Articles 24, 25, 39, and 41. These Articles urgently require revision to either specify the powers granted to the SC explicitly or establish criteria for evaluating the legality of decisions made by the SC. Such revisions are deemed necessary to enhance transparency, accountability, and legality in the framework of the SC's actions. The author suggests the following modifications to the mentioned Articles to enhance its precision and functionality:

Article 24

1. (…).

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations, and general international law. The specific powers granted to the Security Council to give effect to its decisions are laid down in other Chapters.

3. The Security Council may adopt any measures deemed necessary to exercise its duties but may not exceed the specific powers mentioned in the previous paragraph.

4. The Security Council shall submit (…).

Article 25

The Members of the United Nations agree to accept and carry out the resolutions of the Security Council.

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make decisions on the solution under Chapter VI or the current chapter to maintain or restore international peace and security.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.

Regarding Veto power, it was established as part of the UN Charter to ensure that the major powers would have a word in the decision-making process. The combination of this issue and the discretionary power of the Security Council has led critics to argue that veto power can often result in gridlock and prevent action on critical issues or can be utilized by the P5 for

personal gain. A variety of scenarios have been proposed in response to this deficit, ranging from the omission of the veto to a change in the membership structure. Any reform of the SC[796], however, must be feasible in accordance with the nature of a political council, as well as the realities of the international society. The international community may not achieve a better model than the current SC's form because any fundamental changes in the SC would require fundamental changes in other sections of the international legal order and the circumstances of international social life. Accordingly, the author suggests that veto power can still be retained but only in the interests of the common good. Veto power, despite negative approaches, has the potential to serve the international community. In the current form of the SC, the application of veto is entirely at the discretion of the states holder, and they often seek to prevent decisions that are incongruent with their policies or those of their allies. However, under the proposed model, the holder is only entitled to use veto power in the interests of common good. Such a modification would be in line with the SC's philosophy as the guardian of international peace and security rather than a protector of the individual interests of limited states. Additionally, it fits with the political nature of the SC, which rejects any notion of the SC acting like a judicial institution. Further, it has sufficient force to persuade the P5 to consent to a future reformation. Finally, if the SC adopts an unjust decision in the name of peace, each veto holder has the ability to veto and protect the common good.

Further research questions for future study: Despite the wealth of literature dedicated to the SC, certain unresolved questions persist that necessitate the attention of researchers interesting in the SC affairs. While some individual decisions of the SC have been subject to legal scrutiny, there is a notable gap in comprehensive legal analysis of the SC's practice. This gap hinders the understanding of the extent to which the SC has adhered to international law. Another question that deserves attention is the responsibility of the UN due to *ultra vires* actions of the SC. Existing research in this area has predominantly focused on the UN's responsibility in cases involving injuries occurring during peace-building, peace-making missions, and, to some extent, the authorization of the use of force. However, there remains a significant gap in understanding the accountability mechanisms for actions falling short of the use of force by the SC, including sanctions, interference in domestic affairs, violations of international law, and

[796] This thesis does not deal with the issue of reform necessaty, but for this aspect see in detail: Sulyok, "Thoughts on the Necessity of Security Council Reform," 143-167.

the remedial measures available to compensate for these wrongful acts. This ambiguity necessitates further scholarly exploration to comprehensively elucidate the UN's responsibility in such contexts.

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