Chapter VII Powers and the Rule of Law:
The Jurisdictional Limits

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The Security Council is not a body that merely enforces agreed law. It is a law unto itself. If it considers any situation as a threat to peace, it may decide what measures shall be taken. No principles of law are laid down to guide it; it can decide in accordance with what it thinks is expedient. It could be a tool enabling certain powers to advance their selfish interests at the expense of another power.

J F Dulles, War or Peace (1950) 194-95

I. Introduction

The supremacy of the rule of law over the influence of discretionary power has claimed venerable authority as the central tenet of law.1 One of the fundamental challenges to this principle has been posed by the United Nations Security Council. The Security Council is a creature of the UN Charter,2 upon which sovereign states agree to confer some of their powers for the purpose of maintaining international peace and security.3 After 45 years of incubation,4 the Security Council has

1 A V Dicey, Introduction to the Study of the Law of the Constitution (10th ed, 1960) 202. Needless to say, the exact meaning of the concept has been contestable: see generally B Z Tamanaha, On the Rule of Law: History, Politics, Theory (2004); T R S Allan, Constitutional Justice: A Liberal Theory of the Rule of Law (2001); G de Q Walker, The Rule of Law: Foundation of Constitutional Democracy (1988) 1-42. In this article, the focus is confined to the formal conception of the rule of law which restrains the way in which discretionary powers are exercised rather than the content of the decision.


4 The author does not evaluate the Security Council’s activities during the Cold War period as ‘paralysed’ or ‘dysfunctional’. However restricted its activities might have
reinvigorated its authority by exercising sheer powers under Chapter VII of the UN Charter. In so doing, the Security Council has expanded its sphere of activities, ranging from peace-enforcement to law-enforcement, and even to quasi-judicial as well as quasi-legislative functions. While the Security Council has recently assumed a more active role in promoting the rule of law within states especially in post-conflict territories, the real possibility has emerged that the Security Council itself may well act above the rule of law, raising a fundamental question about the extent to which its actions, particularly under Chapter VII, can be restricted in accordance with the principles and rules of international law.

The concern that the Security Council may act *ultra vires* has produced a great deal of literature that has attempted to promote judicial control over its actions. However essential it may be, the issue of control is no more than an instrumental aspect of the fundamental question about the legality of the Security Council’s actions and by no means represents substantive requirements to delimit the Security Council’s powers under the Charter. For such control to be meaningful, less ambiguous criteria must be ascertained for limiting the scope within which the Security Council is empowered by the Charter to dispose of the rights and obligations of member states. The purposes and principles of the UN Charter set the substantive limits (‘outer limits’) to the Security Council’s general competence including its exercise of Chapter VII powers. Yet ambiguity remains with the more

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5 The expansion of Chapter VII grounds is examined at length below, in part II.
formalistic, jurisdictional limits (‘inner limits’) that relate not to the substance of the decision but rather to the manner in which the decision is reached. This ambiguity may well obscure the legal effects of resolutions, especially where the legality or the validity is challenged. Clarity is thus called for as to the jurisdictional scope within which Chapter VII powers may be validly exercised.

This article attempts to identify criteria by reference to which we may ascertain the jurisdictional scope of the Security Council acting under Chapter VII, relying on the formal conception of the rule of law. By this I am referring to the procedural limits to the powers of the Council; limits that relate not to the substance of the decision reached by the Council, but rather to the manner in which the decision was reached. It first outlines the historical background against which Chapter VII powers have emerged in place of the allegedly defunct article 42 of the Charter and subsequent expansion of the reach of these powers. Various aspects of Chapter VII powers are examined in parts III and IV, which address in particular the controversies concerning the expansion of Chapter VII powers and the problems of expansion in the absence of a discernible and systematic set of rules of law. To advance the supremacy of the rule of law over Chapter VII powers, part V explores possible grounds for ascertaining jurisdictional errors that the Security Council may commit in exercising Chapter VII powers. To that end, it draws on the jurisprudence developed in Australian migration law where the notion of jurisdictional error has recently been given a greater role against the backdrop of significant obstacles to judicial review of ‘privative clause decisions’. The understanding and application of this concept puts the jurisdictional, procedural limits of Chapter VII powers into perspective. Finally, part VI examines the legal consequences of Chapter VII actions arising from one of the identified grounds of jurisdictional error.


The formal conception of the rule of law addresses formal attributes of law-making and decision-making such as the manner in which a decision is made and the clarity of the ensuing norm, whereas the substantive conception of the rule of law seeks to pass judgment upon the actual content of the law itself. For details see, eg, P P Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] Public Law 467.

II. Origin and Development of Chapter VII Powers

What do Chapter VII powers mean? Chapter VII of the UN Charter is titled ‘action with respect to threats to the peace, breach of the peace, and acts of aggression’ and contains 13 provisions: article 39 (determination of the existence of a threat to the peace, a breach of the peace, or an act of aggression); article 40 (provisional measures); article 41 (enforcement measures not involving the use of armed force); article 42 (enforcement measures involving the use of armed force); articles 43-50 (mechanisms and obligations in implementing enforcement measures); and article 51 (the right of self-defence). It is evident that Chapter VII concerns situations where the peace is threatened, breached, or an act of aggression is committed.\(^ {13}\)

References to Chapter VII are nearly as old as the United Nations itself. In the very early meetings of the Security Council, Chapter VII was referred to as a means to adopt an enforcement measure against the Franco regime in Spain, because of its pro-fascist activities, which contentiously fell within the domestic jurisdiction of Spain.\(^ {14}\) The reference to Chapter VII in the discussion of the Spanish issue was made specifically in relation to the severance of diplomatic relations. More ambiguous use was ventured when the Security Council buttressed the call for a cease-fire in the Palestinian conflict with an explicit threat of further actions under Chapter VII if the parties involved failed to comply.\(^ {15}\) Yet it was far from clear exactly what measures were envisaged by this reference to Chapter VII. As the Belgian representative pointed out,\(^ {16}\) there were obvious difficulties with carrying out military enforcement action under article 42 in the absence of special agreements within the meaning of article 43 of the Charter.\(^ {17}\)

Chapter VII was explicitly relied upon in Security Council resolutions when it instituted mandatory economic sanctions against Southern Rhodesia in 1968,\(^ {18}\) and when it imposed a mandatory arms embargo against South Africa in 1977.\(^ {19}\) There was no obvious reason why Chapter VII was invoked in general terms to impose sanctions, as non-military enforcement measures can be taken specifically under article 41. One explanation is that the Chapter VII measures were intended as legal sanctions (reaction against a violation of obligations established by the Charter),

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\(^ {13}\) There has been debate as to whether the finding under art 39 should precede the adoption of provisional measures under art 40. Also, the right of self-defence under art 51 can be exercised without the Council’s finding under art 39.

\(^ {14}\) See, eg, UN SCOR, 1\(^ \text{st} \) year, 1\(^ \text{st} \) series, No 2, 180-82 (UK), 317-18 (Australia). Enforcement measures under Chapter VII constitute an exception to the principle of non-intervention as enshrined in art 2(7) of the Charter.

\(^ {15}\) SC Res 50 (1948), SC Res 54 (1948).


\(^ {19}\) SC Res 418 (1977).
rather than as an enforcement measure to restore international peace and security.\(^{20}\)

It is hardly possible to draw a uniform definition of what constitutes a sanction under international law,\(^{21}\) much less to ascertain the relationship between enforcement measures and sanctions.\(^{22}\) While enforcement measures are not designed to possess the character of a sanction,\(^{23}\) there has been an emerging view that Chapter VII measures have the character of a sanction when they are adopted to enforce certain fundamental norms that have been reflected in the Charter and its practice.\(^{24}\)

The 1990-1991 Gulf Crisis heralded a new era of the Council’s operation under Chapter VII. A watershed was marked when the Security Council upgraded enforcement measures against Iraq under Chapter VII, so as to authorise member states to use armed force. Chapter VII was used for that purpose together with the term ‘by all necessary means’,\(^{25}\) as a result of a compromise between the United States and the Soviet Union.\(^{26}\) The use of Chapter VII powers in authorising and justifying the use of armed force was widely accepted by states,\(^{27}\) but provoked extensive academic debate as to what was the exact legal basis under the Charter.\(^{28}\)


\(^{27}\) A few countries criticised the authorisation in this manner: see UN SCOR (2963\(^{rd}\) mtg), UN Doc S/PV.2963 (1990), 31 (Yemen), 74 (Malaysia).

\(^{28}\) There are four main propositions:


It is arguable that the omission of any particular provision could have been deliberate, with a view to avoiding unnecessary legal complication and political confrontation. It might also have aimed to leave the possibility for the wording to be held consistent with the idea that the Council approved collective self-defence measures under article 51 within Chapter VII. There is therefore no doubt that the invocation of Chapter VII was meant to give effect to ‘what is the core of the United Nations system of collective security’.

It is thus possible to understand Chapter VII powers in two different ways: first, as legal sanctions against violations of fundamental norms established by the Charter and its practice (law enforcement); and second, as enforcement measures against an entity posing a threat to the peace, which are comparable to, albeit not necessarily identical to, those under articles 41 and 42 of the Charter (peace enforcement). The distinction between law enforcement and peace enforcement is a fine one, as the Security Council often performs law enforcement functions in conjunction with peace enforcement, authorising military action to ensure compliance with the terms of the mandate. Yet both interpretations may share the view that Chapter VII measures are confined to those listed in articles 41 and 42 and taken against the will of a target state. This view finds support in the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in Tadic.

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29 See, eg, Greenwood, above n 28, 169; Schachter, above n 28, 462.
31 UN SCOR (2963rd mtg), UN Doc S/PV.2963 (1990), 84-5 (Finland).
Council under Chapter VII was not unfettered but limited to the measures provided for in articles 41 and 42 of the Charter, finding its own constitutional basis in article 41.36

There has been emerging practice, however, of expanding the scope of Chapter VII powers. The Security Council has invoked Chapter VII powers for policing and administrative purposes: for instance, to authorise UN missions to perform police functions within a sovereign state;37 to provide effective protection for UN and diplomatic missions in countries where they are stationed;38 and to establish transitional administrations in war-torn territories.39 Some of the Council’s decisions under Chapter VII have also taken on a quasi-judicial nature,40 for example: to declare the legality or validity of certain acts or situations;41 to affirm liability for damages;42 and to effect a binding demarcation of boundaries between states.43 Chapter VII powers have furthermore extended to law-making functions by imposing an obligation targeting a specific state to act in a specific manner,44 and even by engaging in a general legislative-like enterprise subject to no specification either of the target or manner in which the obligation is to be discharged.45

The proliferation of Chapter VII powers extending beyond the core function of the collective security system requires recharacterisation of the powers ‘less by its being taken against the will of the target State, but rather by its binding force regardless of the will of the States subject to it’ [italics original].46 While leaving

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35 Prosecutor v Tadic (Jurisdiction) (Appeals Chamber) (1997) 105 ILR 453, 468 [32].
36 Ibid 468-70. See also Prosecutor v Slobodan Milosevic (Preliminary Motions) (Trial Chamber) (2000) Case No IT-02-54-T.
37 See, eg, SC Res 837 (1993) (authorising the Secretary-General to ‘take all necessary measures against all those responsible for the armed attacks [against UN personnel] … including to ensure the investigation of their actions and their arrest and detention for prosecution, trial and punishment’).
46 Frowein and Krisch, above n 23, 706.
the exact legal basis for the expanded grounds in doubt, the reference to Chapter VII in general terms has become standard and established practice of the Security Council.\(^47\) Such practice has been found useful to circumvent some marginal issues such as the legal basis for military intervention in essentially domestic conflicts,\(^48\) and the legal basis for naval interdiction operations to ensure compliance with non-military sanctions under UN auspices.\(^49\) The question remains as to how far Chapter VII powers can extend beyond the limits of articles 41 and 42 of the Charter. In other words, how much room is there for Security Council measures falling outside the ambit of articles 41 and 42 to be justified under the aegis of Chapter VII? To examine this question, the next part describes the problematic nature of the proliferation of Chapter VII grounds over the last few decades.

### III. Necessity to Regulate Chapter VII Powers

Although Chapter VII powers were originally meant to authorise enforcement measures or sanctions, the central significance of such a role seems to have faded due to the expedient practice of using the powers expansively for performing peripheral functions. Considerable doubts have been expressed on such expansion, for example, as to whether the Security Council can perform judicial or legislative functions under Chapter VII. While some welcome such development,\(^50\) others call for caution against the creation and imposition of a general and abstract obligation having no basis in the Charter.\(^51\) At one extreme, the minimalist approach argues that Chapter VII powers should be confined to enforcement measures as originally

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envisaged. Yet the expansion, to a limited extent, is not necessarily groundless in theory. Article 24(2) of the Charter leaves the Council with the possibility of exercising a general or residual power, which may well provide an opaque ground for the expanded scope of activities in the nature of Chapter VII.

At the other extreme, therefore, the expeditious application of Chapter VII powers leads to the view that the Council’s action under Chapter VII is unbound by law. There is no doubt that the Security Council has the prima facie authority to decide when enforcement measures are warranted and what types of enforcement measures should be taken. The conventional understanding is that as a non-judicial organ the Security Council is by no means required to specify in its resolutions the Charter provisions upon which its actions are based. It is little wonder that, given the pressing political circumstances, the Security Council gives priority to unanimity over clarity in adopting resolutions to show its political willingness to deal with the disputes or situations brought before it.

A line has to be drawn, however, between the expedient application of the Charter by the Security Council to secure the unanimous adoption of a resolution on the one hand, and the objective and legitimate interpretation of relevant provisions to ascertain the Security Council’s power and competence vested under the Charter on the other. Danger is inevitable if one regards the political application based on the policy of convenience and convergence as a proper method of interpretation. Such application ‘might far too readily lead to political compromises which would

52 See, eg, Arangio-Ruiz, above n 8, 653-54.
53 Art 24(2) of the Charter provides that: ‘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’.
54 See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16, 52 [110]; J Delbrück, ‘Article 24’ in Simma (ed), above n 23, 442, 448; Gill, above n 9, 68-72. This general power of the Security Council as a UN organ is distinguished from the implied powers that the UN may exercise as an international organisation possessing a distinct international legal personality.
59 For the distinction between application and interpretation, see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits) [1986] ICJ Rep 14, 117 [225].
undermine the very foundation of the United Nations'. Judge Fitzmaurice also cautioned against the political interpretation, stating that:

Without in any absolute sense denying that, through a sufficiently steady and long-continued course of conduct, a new tacit agreement may arise having a modificatory effect, the presumption is against it, – especially in the case of an organization whose constituent instrument provides for its own amendment, and prescribes with some particularity what the means of effecting this are to be.

The issue, therefore, should not simply be left to the discretion of the Security Council as a matter of political preference and expediency. Such expansive and expedient application of Chapter VII powers with reliance on political discretion may well lead to the inadequate use of the powers for the following three reasons.

First, it has allowed the Security Council to abandon the flexible approach in the selection of its course of action in dealing with conflicts. The upsurge of Chapter VII operations over the last few decades ostensibly shows that the Security Council has adopted a policy to refrain from taking action on its own initiative until such time as the situation constitutes a threat to the peace, wherein it can invoke Chapter VII powers to intervene in the conflict. Emerging conflicts have thus been left within the diplomatic realm, often in the hands of the UN Secretary-General, whilst the Security Council stays stagnant until the situation has become such that political pressure mounts to push it into taking enforcement measures. The flexible approach to conflict management should be restored by the more cautious use of Chapter VII powers so that the Security Council can discharge its primary responsibility for the maintenance of international peace and security in a proactive, decisive, and consistent manner even outside the realm of Chapter VII.

Second, with the random application and multi-faceted meanings attached to Chapter VII, the Security Council has failed to bring the application of Chapter VII powers into an institutionalised framework, within which it can be ensured that every measure it takes on the basis of Chapter VII will not go beyond the authorised scope of its competence under the Charter. The reformulation of Chapter VII powers has blurred the legitimate scope of application in cases where the enforcement nature is questioned. It is argued that the transitional administration in war-torn territories under Chapter VII has concealed not only the exact legal basis and the nature of the operation but also possible abuse of the powers in the course of operations. This arguably resulted in the covert oppression of the right to self-determination and the illegitimate deprivation of the opportunity for peoples to achieve self-governance. Without an adequate safeguard, the expeditious and

60 Pollux, ‘The Interpretation of the Charter’ (1946) 23 British Year Book of International Law 54, 69.
61 Namibia Case, above n 54, 282 (Judge Fitzmaurice dissenting opinion).
65 See, eg, K Daglish and H Nasu, ‘Towards a True Incarnation of the Rule of Law in
ambiguous use of Chapter VII could well result in a de facto revision of the Charter or 'de-legalising' a situation at hand. Realists may favour the proliferation of Chapter VII powers even at the price of neglect of the rule of law, emphasising the effective function of the collective security. Yet the fact that the Security Council is a political body making political decisions does not preclude it from its responsibility to act as an organ of law governed by binding rules and procedures.

Third, the recourse to Chapter VII powers for political expedience may well conceal a violation of fundamental principles of the Charter, which would be unjustifiable or intolerable under any circumstances. Article 1(1) of the Charter mandates a peaceful settlement of international disputes or situations to be brought about ‘in conformity with the principles of justice in international law’, while no such reference is made in relation to collective security measures. This omission has led to a view that, in acting under Chapter VII, the Security Council is not bound by the principles of justice in international law. By expansively invoking Chapter VII, however, the Security Council may well circumvent the principles of justice and international law, which would otherwise have bearing upon the way in which the Security Council should operate. It is to be recalled that the phrase was inserted in response to the concern expressed by small- and medium-sized states so that the Security Council has no power to impose a settlement or to sacrifice the rights of any member states. Another example concerns the principle of non-intervention in the domestic jurisdiction of a state as embodied in article 2(7) of the Charter, which also exempts enforcement measures under Chapter VII from its application. To whatever extent the scope of domestic jurisdiction may have

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68 Art 1(1) of the Charter provides as one of the purposes of the UN: ‘To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to 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 in international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace’.


70 An example in point is Res 748 in response to the Lockerbie incident. Libya’s responsibility cannot be predetermined without offending the principle of justice and international law: see G P McGinley, ‘The I.C.J.’s Decision in the Lockerbie Cases’ (1992) 22 Georgia Journal of International and Comparative Law 577, 599. I am grateful to Dr Brett Williams for bringing this piece to my attention.

71 Gill, above n 9, 67.

72 Art 2(7) of the Charter reads that: ‘Nothing contained in the present Charter shall
been eroded, a real chance still exists that Chapter VII may well be used as an easy way out of the restriction to intervene in matters falling essentially within the domestic jurisdiction of a state. Given that the Security Council must make decisions in compliance with the purposes and principles of the Charter the possible circumvention of the foundation of the Charter, taking advantage of Chapter VII powers, is such that the neglect of the rule of law in favour of an incarnation of collective security is intolerable.

To prevent the improper use of Chapter VII powers, one may propose that the Council’s powers under Chapter VII be delineated in a manner analogous to governmental separation of powers – characterising the Security Council as an executive branch bestowed with policing power. There is no doubt that the concentration of all three functions as lawmaker, judge and executioner, as White warns, represents a recipe for abuse of power or the very definition of tyranny. It is arguable, moreover, that the political nature of the organ and the decision-making process influenced especially by the national interests of permanent member states disqualify the Council from performing judicial or legislative function. Yet the division and distribution of powers in the international system in general appears to be guided by the principle of subsidiarity: powers are allocated to an authority where the respective tasks can be most effectively dealt with. The Security Council is no exception to this principle, performing a wide variety of functions to deal effectively with issues that are put on its agenda, no matter how some of its decisions might be characterised. Hence the non-judicial nature of the Security Council may not necessarily preclude it from performing ‘quasi-judicial’ functions by reacting to, rather than adjudicating upon, violations of fundamental norms of international law in place of the injured states in matters that affect the interests of the international community as a whole.

authorise 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 VII'.

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74 T M Franck, Fairness in International Law and Institutions (1995) 219-21. This was arguably the case over the Lockerbie affair: see B Graefrath, ‘Leave to the Court What Belongs to the Court: The Libyan Case’ (1993) 4 European Journal of International Law 184, 192.

75 See de Wet, above n 7, 109-13.


77 See Kirgis, above n 40, 532; Harper, above n 40, 133-43.


create obligations in contravention of existing treaty obligations may validly give rise to a ‘quasi-legislative’ effect, by virtue of article 103 of the Charter,\(^{80}\) in that they would render the treaty obligations no longer performable, rather than abrogated or nullified, for the time the resolution remains in force.\(^{81}\)

Alternatively, it is argued that peripheral functions such as quasi-judicial and quasi-legislative decisions under Chapter VII should remain exceptional and be confined to cases where they are indispensable for, or proportional to, the exercise of peace enforcement functions.\(^{82}\) It is not so clear how the indispensability and proportionality should be assessed. Nor is it promising that such general requirement can impose any meaningful fetters upon the Council’s peripheral functions, for it is first and foremost the Security Council that possesses the power to decide what is dispensable for and proportional to the maintenance of international peace and security.

It is therefore submitted that a systematic set of criteria be established and applied against which the Council’s exercise of Chapter VII powers can be assessed and regulated.

**IV. Extending the Rule of Law over Chapter VII Powers**

The development of rules of administrative law in Australia may provide a new perspective in finding the epitome of the rule of law over the Security Council’s decisions under Chapter VII. Particular attention is drawn to Australian migration law. Some tension, similar to the tension discussed in the previous sections regarding the expansion of Chapter VII powers, has unfolded in extending the rule of law over open-ended discretionary powers conferred upon the Department of Immigration whose decisions are to be final and non-reviewable (privative clause decisions).\(^{83}\) In response to the expansion of discretionary power of the executive, Australian courts have developed the concept of ‘jurisdictional error’ signifying that a jurisdictionally flawed decision is not a valid decision.\(^{84}\) The notion has its origin...

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\(^{80}\) Art 103 of the Charter reads that: ‘In 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’. For the view that the obligations under the Charter also include the Council’s binding decisions, see, eg, R Bernhardt, ‘Article 103’ in Simma (ed), above n 23, 1292, 1295-96; R H Lauwaars, ‘The Interrelationship between United Nations Law and the Law of Other International Organizations’ (1984) 82 Michigan Law Review 1604, 1606-7.


\(^{82}\) Frowein and Krisch, above n 23, 708; Arangio-Ruiz, above n 8, 642; S Talmon, ‘The Security Council as World Legislature’ (2005) 99 American Journal of International Law 175, 182-85. See also *Namibia Case*, above n 54, 147 (Judge Onyeama separate opinion).

\(^{83}\) See above n 12.

\(^{84}\) The landmark case on this issue is *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. See also, C Beaton-Wells, ‘Restoring the Rule of Law – Plaintiff S157/2002..."
in *R v Hickman; ex parte Fox and Clinton*,85 where Dixon J propounded a compromise interpretation of a clause ousting judicial review in the following terms:

Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.86

Jurisdictional error is an elastic term,87 representing ‘a term of conclusion’ that the decision is invalid when it is used in the context of judicial review.88 The notion itself provides only scant guidance on the nature of errors that can be characterised as jurisdictional, except that an error is jurisdictional where it involves the breach of an inviolable, imperative or indispensable condition on the exercise of power in the light of the statute as a whole.89 While some adopt a restrictive view,90 an increasing number of others have expressed their support for a wider understanding of the notion so that it embraces a number of different kinds of error of law.91 The question as to what constitutes jurisdictional error must be answered in the context of the particular empowering document by examining under what circumstances the conditions precedent to a valid decision are or are not met.92

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85 (1945) 70 CLR 598.
86 Ibid 615. The subsequent cases added another limb by requiring that it does not display a jurisdictional error on its face. However, doubt has been cast on the necessity of having this component independent from other limbs especially from the third limb: see *Plaintiff S157/2002*, above n 84, 500; *Mitchforce v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212, 230-31 (Spigelman CJ).
88 See *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs (S215 of 2002)* (2003) 199 ALR 43, 49 [27].
92 See *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12, 24 [51] (Gummow and Hayne JJ); *S157/2002*, above n 89, 45-6 [76]-[78]. See also Beaton-Wells, above n 84, 156-60.
Can and should municipal rules of administrative law be translated into international law governing the Security Council’s actions? One way to answer this question is to establish the notion of jurisdictional error as a general principle of law in the sense of article 38(1)(c) of the International Court of Justice (ICJ) Statute. Yet the use of general principles of law as a source of international law has been limited mainly to judicial administration for the settlement of a dispute between states. Even if the underlying policy and principles to limit the jurisdictional grounds for discretionary action can be found common to many countries and appropriately adapted to the international sphere, there would be significant difference as to the way in which jurisdictional limits are ascertained and regulated in each country.

The failure to establish the legal status as a general principle of law does not necessarily indicate that international law governing the Security Council’s actions should not be subject to an ‘analysis’ in terms of the values and ideas of national legal systems. Attempts have in fact been made to examine whether and to what extent ideas from domestic administrative law can help solve issues surrounding global governance. The constitutional and public law analogies have also been drawn by way of interpretation of and adaptation to the Charter provisions including notably the application of the doctrine of implied power, which originates from the United States constitutional practice. While the analogies have been primarily used to extend the competence of the UN vis-à-vis sovereign member states, there seems no reason why it cannot be relied upon to limit the power of its organs. It is thus argued that the notion of jurisdictional error may help analyse and clarify jurisdictional limits that are inherent in the provisions and structure of the Charter. Given the incontestable nature of privative clause decisions and almost likewise of Security Council decisions, there is ample space where the notion of jurisdictional error may provide a useful guide to ascertain a systematic set of jurisdictional limits.

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93 For an authoritative account of this source of international law, see, International Status of South-West Africa (Advisory Opinion) [1950] ICJ Rep 4, 148 (Lord McNair).
94 See generally Brownlie, above n 73, 15-8.
95 See Sarooshi, above n 3, 14-7. In fact, the principle of good faith could be regarded as a general principle of law purporting to restrict the exercise of discretion: B Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953) 132-36.
From a municipal law perspective, doubt may well be cast on the application of the notion of jurisdictional error, given that the notion has been developed within the constitutional context of the separation of powers in delineating the role of courts so as not to interfere with the merits of decisions of the executive. In Australia, section 75(v) of the Constitution has provided the engine room for the entrenched minimum provision of judicial review. The concept of separation of powers does not strictly apply to the UN, nor is there the same level of protection of judicial review in the Charter. Yet the traditional common law approach distinguishing public policy from legal principle can provide a valuable perspective emphasising the central role that the formal conception of the rule of law can play in restricting the exercise of discretionary power. It is distinguished in this respect from the ultra vires doctrine, in that the legislative intent does not lay the ground for ascertaining jurisdictional error. The development of jurisdictional error in response to the attempts to oust judicial review has thrown into sharp relief the minimum extent to which a discretionary decision can be subject to judicial review. Advantage can be taken of this notion in relation to Security Council decisions in that the validity of decisions can be assessed without interfering with the substantive merits of the way in which discretionary powers under Chapter VII are exercised.

The following section examines five standard grounds of judicial review at common law that have potential application to Security Council action under Chapter VII:

- duty to act within the power;
- duty to act for proper purposes;
- jurisdictional fact;
- considerations: relevance, reasonableness and rationality; and
- procedural fairness.

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101 See above nn 75-81 and accompanying text.
102 Cf UN Charter, art 92.
104 There has been doctrinal debate, especially in England, on whether judicial review of executive action is justified by the ultra vires doctrine (judicial review as an implementation of the will of Parliament) or by the common law doctrine (judicial review as the inherent power of the courts to develop the common law): compare, eg, C Forsyth, ‘Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review’ (1996) 55 Cambridge Law Journal 122; with P Craig, ‘Ultra Vires and the Foundations of Judicial Review’ (1998) 57 Cambridge Law Journal 63; Allan, above n 89.
It is not suggested that all of those grounds of judicial review provide the basis for jurisdictional error. The question as to what constitutes jurisdictional error must be answered by examining an inviolable, imperative or indispensable condition on the exercise of power in the light of the structure and provisions of the Charter as a whole.

V. Jurisdictional Constraints upon Chapter VII Powers

(a) Duty to act within the power

Powers of the superior authority first and foremost must be exercised only with respect to certain subject-matter prescribed by the constituent instrument. The applicability of this doctrine is confirmed by reference to the Admission Case where the ICJ held that ‘[t]he 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’. Distinctions have to be made in respect of the UN between the competence of the organisation and the competence of an organ such as the Security Council, and also between the competence of an organ and its jurisdiction to exercise certain powers conferred by the Charter. The first distinction is important in that the implied power theory applies to international organisations that possess a distinct legal personality, and therefore it should not be used as a ground for the expansive use of Chapter VII powers. The second distinction signifies the wider scope of the Security Council’s competence as opposed to its jurisdiction to exercise Chapter VII powers. In other words, there are circumstances where the Security Council is authorised to seize a matter but is restrained from invoking Chapter VII powers.

As noted above, the Council’s general competence under article 24(2) of the Charter may well provide a residual legal ground for performing a wider variety of functions than those specified in the Charter. The unspecified functions may not necessarily fall within the purview of Chapter VII of the Charter. The Security Council may take unauthorised action even in acting within its general competence when it exceeds the powers conferred by the Charter, thereby committing a jurisdictional error. The scope of authorised powers can be ascertained by

107 Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion) [1948] ICJ Rep 57, 64.
110 See above n 54.
(a) implicit limitations inherent in the structure of the Charter, and (b) the purpose of the powers, which is separately examined in the next subsection.

The Security Council is not authorised to exercise Chapter VII powers in cases where it is only authorised to make recommendations. It would otherwise run counter to the travaux préparatoires of the Charter where it was assured that recommendations made by the Security Council possessed no obligatory effect for the parties.\(^{111}\) The Security Council is thus precluded from exercising its powers to impose terms or means of dispute settlement, which can only be recommended under articles 36 and 37 of the Charter. This implied limitation applies even in cases where a situation is regarded as a threat to the peace within the meaning of article 39,\(^{112}\) as Chapter VII powers should only be used to remove the threat, leaving the settlement in the hands of the parties.\(^{113}\) Such recommendations must also be in conformity with the rules of international law, inasmuch as the reference to 'the principles of justice and international law' set out in article 1(1) as one of the fundamental purposes of the Charter applies directly to the 'adjustment or settlement of international disputes or situations'.\(^{114}\) It is thus arguable that the demarcation of the Iraq-Kuwait border and the demand for handing over terrorist suspects in contravention of the existing rules of international law fell outside Chapter VII powers.\(^{115}\)

On the other hand, the confirmation of Iraqi liability by Security Council Resolution 687 arising from its invasion of Kuwait itself could well be characterised as the proper use of Chapter VII powers, in so far as it does not constitute an imposition of the terms of settlement.\(^{116}\) Likewise, the mandatory disarmament

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\(^{111}\) See UNCIO, vol 12, 162. The assurance was made by the US and UK delegates in response to the Belgian proposal for recourse to judicial review of the Security Council’s recommendations and decisions when they infringe on the essential rights of a state party: UNCIO, vol 3, 332.

\(^{112}\) Art 39 authorises the Council to make recommendations including arguably those under Chapter VI, but it does not allow for the enforcement of those recommendations: see B Conforti, *The Law and Practice of the United Nations* (3rd and revised ed, 2005) 179.

\(^{113}\) One possible explanation for rejecting this view lies in the functional link or a combination of powers between Chapter VI and Chapter VII, which could arguably allow for the enforcement of a proposed pacific settlement: N D White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (2nd ed, 1997) 94-5. But see Arangio-Ruiz, above n 8, 655-82.

\(^{114}\) See UNCIO, vol 6, 453-54 (Report of Committee I/1, Doc No 944).


\(^{116}\) See B Graefrath, ‘Iraqi Compensations and the Security Council’ (1995) 55 *Zeitschrift für ausländische öffentliches Recht und Völkerrecht* 1, 16-20. However, it does not preclude the Security Council and its subsidiary organ from committing themselves jurisdictional error in establishing and handling the compensation regime: see, below
program imposed upon Iraq can be justified on the basis of the Security Council’s general power to formulate plans for disarmament under article 26 as well as article 24. The mandatory disarmament is contrasted with other mandatory settlements imposed on Iraq that should have fallen within articles 36 and 37 of the Charter. It is one thing that the Security Council acted within the jurisdiction in confirming liability for war compensation or imposing mandatory disarmament, but it is a different matter whether the establishment and implementation of those regimes remained within the jurisdiction. The latter question requires a separate inquiry.

In cases where the Security Council delegates its powers to a subsidiary organ, the organ cannot exercise a power that the Security Council does not itself possess. While delegation itself is subject to certain restrictions and conditions, subsidiary organs are also required to act within power once powers are delegated. The limitations upon the exercise of powers are even stricter, varying according to the nature of the delegated powers. It has been suggested, for example, that when a subsidiary organ exercises judicial functions, it should only be exercisable to the extent that it gives due effect to the principles of independence, impartiality and even-handedness. The issue has also been raised for establishing an effective system of control over delegated powers.

The scope of delegated powers may not easily be ascertained in cases where the mandates and the nature of functions are ambiguous. The controversy over the legality of the UN Compensation Commission’s work can, for example, be ascribed to the ambiguity of the nature of delegated powers. It may well make sense if the work was part of the sanction against Iraq to enforce certain fundamental norms.

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118 Contra Happold, above n 51, 605-7.

119 White, above n 113, 98.


whereas it might have constituted jurisdictional error if the work was characterised as enforcing war compensation claims on behalf of victims,\textsuperscript{125} or as an adjudicatory institution delivering practical justice to the disputes among claimants,\textsuperscript{126} both of which should have been settled by peaceful means. A similar question was also raised with regard to the nature of Resolution 1267 Sanctions Committee.\textsuperscript{127} In such cases, it is difficult to decide whether subsidiary organs are acting outside the authorised jurisdiction.

\textbf{(b) Duty to act for proper purposes}

Another limb of the inner limit to discretionary powers lies with the duty to act for proper purposes. It has been an established rule that discretionary powers given to the executive under a statute must be exercised for the purpose for which they were granted and not for an ulterior purpose.\textsuperscript{128} It is arguable in the same vein that the Security Council is prohibited from exercising discretionary Chapter VII powers for purposes other than the one for which the powers are granted. The proper purpose of Chapter VII is found in article 39 of the Charter: ‘to maintain or restore international peace and security’.\textsuperscript{129} It has been suggested that Chapter VII powers cannot be used for the purpose of overthrowing a government or the partition of a sovereign state.\textsuperscript{130} Security Council resolutions adopted under Chapter VII for an improper purpose, when the deviation is obvious, would constitute jurisdictional error.

It is legitimately expected, although it is by no means mandatory, that the purpose(s) of each action can be found in explicit terms in the preamble to the enabling resolution. Serious doubt was expressed about the legitimacy of Resolutions 1422 and 1487,\textsuperscript{131} whereby the Council addressed a general (as


\textsuperscript{130} See Namibia Case, above n 54, 294 [115] (Judge Fitzmaurice dissenting opinion); Brownlie, above n 97, 219.

opposed to specific) request to the International Criminal Court (ICC) to defer investigation or prosecution of any case involving personnel from non-member states over acts or omissions relating to a UN operation without specifying what constitutes a threat to the peace.\textsuperscript{132} The purpose was presumably to achieve through back doors the blanket exemption from ICC jurisdiction that the United States sought for itself during the negotiations on the Rome Statute. The determination that it is in the interests of international peace and security is surely not significant enough to invoke Chapter VII.\textsuperscript{133} The failure of identification as to what the resolutions aimed to achieve for the maintenance or restoration of international peace and security in those resolutions therefore indicates a manifest error of the Security Council in using its discretionary powers under Chapter VII for an improper purpose.\textsuperscript{134}

Exactly what an action aims to achieve is often left ambiguous as a result of political compromise reached under pressure. An example is the objective of the UN Interim Mission in Kosovo (UNMIK) to promote the establishment of ‘substantial autonomy and self-government in Kosovo’.\textsuperscript{135} Not only was the future status of Kosovo ambiguous,\textsuperscript{136} but also the extent to which it could be related to the maintenance or restoration of international peace and security was far from clear.\textsuperscript{137} Ambiguity of objectives makes it difficult to decide whether jurisdictional error was committed, which necessarily requires an inquiry as to what extent the stated objectives are truly related to the proper purpose of Chapter VII powers and how the adequacy of the stated objectives is to be assessed.


\textsuperscript{134} Those resolutions could also be based on a manifest error of jurisdictional fact: see part V(c).

\textsuperscript{135} SC Res 1244 (1999), preamble and [10]-[11].


\textsuperscript{137} It is argued, however, that the way in which it operated ran counter to the principle of self-determination embodied in art 1(3) of the Charter and thus went beyond the outer limit set by the Charter: see Daglish and Nasu, above n 65, 92-6.
(c) Jurisdictional fact

There is no doubt that Chapter VII powers, no matter how far they are stretched, are conditioned upon the Security Council’s determination under article 39 of the Charter regarding the existence of a threat to the peace, a breach of the peace or an act of aggression. Yet the question has been posed whether there are any limits upon the Security Council with regard to the factual determination under article 39. There are two schools of thought: some argue that the determination is entirely within the discretion of the Security Council and therefore is not reviewable; and others urge more principled determinations, claiming that a threat to the peace and security cannot be artificially created as a pretext for the realisation of ulterior purposes. Regardless of the correct position, it is alarming that the ‘threat to the peace’ has increasingly been losing its original meaning, and becoming a mere password permitting recourse to Chapter VII.

Attention should be drawn to two points of distinction. First, non-justiciability of Security Council determinations under article 39 of the Charter does not necessarily mean that the Security Council is free from legal restrictions in making such determinations. Second, and more importantly, even if article 39 determinations are not justiciable on their merits, it would not prevent the Court from examining the jurisdictional fact, based on which the Security Council exercises its discretionary power to make determination under article 39 of the Charter. While the common law position has been negative towards fact review, factual issues have been reviewed when they form a prerequisite for the exercise of

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139 Lockerbie Case, above n 56, 66 (Judge Weeramantry dissenting opinion); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Further Request for the Indication of Provisional Measures) [1993] ICJ Rep 325, 439 [98]-[99] (Judge ad hoc Lauterpacht separate opinion). See also Higgins, above n 23, 150.

140 See Gowlland-Debbas, above n 79, 94; Brownlie, above n 97, 219; Graefrath, above n 74, 195-97, 199; Kirgis, above n 40, 517.


142 See H Lauterpacht, The Function of Law in the International Community (1933) 386.

143 There are a number of different usages of this term: see, M Aronson, ‘The Resurgence of Jurisdictional Facts’ (2001) 12 Public Law Review 17, 21-4. The term is used here narrowly as the existence of requisite facts that provide a basis for the Security Council forming a determination under art 39.

144 See, eg, Yusuf, above n 91, 344 [63] (McHugh, Gummow and Hayne JJ); Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, 340-41 (Mason CJ).
power, especially in cases where the prerequisite is of special significance,\textsuperscript{145} where no evidence is proffered to support factual determination,\textsuperscript{146} and arguably where the fact-finding process is found to be irrational or illogical.\textsuperscript{147} It is thus arguable that Security Council action under Chapter VII cannot satisfy the prerequisite when it is based on an unsupported, speculative or irrational finding of a threat to the peace, given that such determination is the most important prerequisite for the exercise of Chapter VII powers. This limitation is distinguished from fact review in that it does not interfere with the merits of fact finding, but rather focuses on how the finding is formed.

The Security Council’s decisions in relation to the Lockerbie affair provided a conspicuous ground for challenging their validity on the basis of an error of jurisdictional fact.\textsuperscript{148} The evidence in support of charging two Libyan nationals for terrorist acts was collected solely by the United States and United Kingdom authorities and was never made available to the public.\textsuperscript{149} It was partly against this backdrop that the issue was raised as to whether the Security Council could enforce without a trial its decision against Libya on the premise that Libya was involved in and responsible for the terrorist act.\textsuperscript{150} It is arguable that the Council’s determination under article 39 of the Charter with regard to Libya was based on an unsupported, speculative or irrational finding, in so far as it relied on prejudiced information collected with subjective motives.\textsuperscript{151} In a similar scenario, the identification of a terrorist group in Resolution 1530 was indeed found to be a mistake resulting from relying on objectively untested information.\textsuperscript{152}

Investigation undertaken at the initiative of the Security Council under article 34 of the Charter is worthy of note in this respect, in that it can provide an authoritative


\textsuperscript{146} See, eg, Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 207 ALR 12, 21 (Gummow & Hayne JJ); SFGB v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 77 ALD 402, 407.


\textsuperscript{150} See Lockerbie Case, above n 56, 86 (Judge Ajibola dissenting opinion), 97 (Judge el-Kosheri dissenting opinion). See also, Weller, above n 149.

\textsuperscript{151} McGinley, above n 70, 599. Although one of the terror suspects was ultimately convicted, it does not support the Council’s original finding because (i) the jurisdictional fact concerns the formation, rather than the merits, of the finding and (ii) the conviction of the suspects does not necessarily prove that Libya was involved in or responsible for the terrorist act.

and objective basis for Security Council determination.\textsuperscript{153} Although the UN Monitoring, Verification and Inspection Commission (UNMOVIC) in Iraq was not based on article 34 of the Charter, its report provided a sound ground for denying jurisdictional fact by stating that they did not find evidence showing that programs of weapons of mass destruction were continued or resumed in Iraq.\textsuperscript{154} Even assuming that the Security Council has non-justiciable discretion to decide whether the situation is a threat to the peace and therefore warrants the use of force, it is difficult to see the way in which the Council reaches a finding adverse to the information that has been objectively and independently assessed as not being unsupported, speculative or irrational. Had the Security Council adopted a resolution authorising the use of force by coalition forces against Iraq, it might have constituted jurisdictional error on the basis of jurisdictional fact.

\textbf{(d) Considerations: relevance, reasonableness and rationality}

Disagreement has also existed as to what extent the Security Council has discretionary powers in deciding what measures are appropriate to avert a threat to the peace, a breach of the peace, or an act of aggression. At one pole is the virtually unlimited discretion of the Security Council’s power in this respect.\textsuperscript{155} At the other pole it is improper for the Security Council to impose upon a state Chapter VII measures having no reasonable relationship with the determination under article 39 of the Charter.\textsuperscript{156} Apart from the outer limit set by the purposes and principles of the Charter,\textsuperscript{157} are there any considerations that the Security Council must take account of in adopting measures under Chapter VII?

First, one may argue that the Security Council’s decisions are invalid when it has taken an irrelevant consideration into account or failed to take a relevant consideration into account. In the absence of express limitation, ‘the questions what are, and what are not, legitimate considerations for its exercise must always be disputable and open to wide differences of opinion’.\textsuperscript{158} Nowhere in the Charter can be found any specific considerations that must be taken into account or that must not be taken into account.


\textsuperscript{155} See Oosthuizen, above n 55, 554-55.

\textsuperscript{156} See Arangio-Ruiz, above n 8, 642.

\textsuperscript{157} Above n 9.

\textsuperscript{158} \textit{R v Trebilco; ex parte F S Falkiner & Sons Ltd} (1936) 56 CLR 20, 32 (Dixon J). See also, \textit{Minister for Immigration and Multicultural Affairs v Jia Legeng} (2001) 205 CLR 507, 565-66 [188]-[191] (Hayne J); \textit{Minister for Aboriginal Affairs v Peko-Wallsend Ltd} (1985) 162 CLR 24, 42 (Mason J).
Second, the adequacy of consideration may well provide a different spectrum. It has been suggested that the Security Council’s measures that have the effect of overriding the existing rights and obligations of states should be confined to those instrumental to genuine peace-enforcement measures within the bounds of reasonableness. Yet, the notion of reasonableness in international legal discourse indicates nothing more than the persistent problem with the legitimacy of an international legal order and the possibility of diversified and even contradictory interpretations, which may cause more harm than good without being subject to judicial reasoning.

Third, a more objective assessment is possible by narrowing the focus and applying the principle of proportionality, which requires a rational link between the legitimate objective and the methods chosen to achieve the objective. There does not seem to be a consensus as to whether the Security Council’s decisions are bound by the general principle of proportionality. Some argue that proportionality is irreconcilable with the flexibility that the Security Council needs and is entitled to in order to engage in prompt and effective action. Others find the principle of proportionality applicable by regarding the words ‘to restore international peace and security’ in article 39 of the Charter as the yardstick for determination. In any event, the possibility remains that this criterion may further develop and help in judging the appropriateness of Chapter VII measures more objectively. It is unlikely nevertheless that an unreasonable or disproportionate use of Chapter VII powers leads to a jurisdictional error, unless the requirement is established as mandatory and is subject to an objective judgment on substantive merits.

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159 See Arangio-Ruiz, above n 8, 625-30, 642. The classic English notion of Wednesbury unreasonableness – a decision is impugned if it is so unreasonable that no reasonable authority could ever have come to it (Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223, 229-30) – has lost its practical significance in England and Australia due not least to its restrictiveness.


(e) Procedural fairness

In broad terms, procedural fairness requires that persons be afforded a fair and unbiased hearing before decisions are taken that affect them.\(^{165}\) It is unreasonable to expect that the Security Council, even if acting in an adjudicatory capacity, would ensure procedural fairness to the same extent that courts do.\(^{166}\) However, the Charter in fact provides some minimum procedural requirements. For example, article 31 of the Charter gives member states a chance to participate in the discussion of any question that specially affects the interests of a state.\(^{167}\) Article 32 furthermore requires the Security Council to invite parties, in a dispute under consideration, for discussion whether the state is a UN member or non-member state.\(^{168}\) The interest of a state in participation within the meaning of article 31 is not confined to resolutions having a specific effect on the state, but applies generally even to those having the same effect on other members.\(^{169}\) Although the participation is in practice subject to the discretion of the Security Council, it arguably provides states with the right to participate and to be heard, in so far as the matter affects vital interests of all member states,\(^{170}\) especially when it involves a quasi-legislative or quasi-judicial determination.\(^{171}\) This procedural requirement has been generally observed,\(^{172}\) and has even seen the expansion of its scope.\(^{173}\)

Another possible minimum procedural safeguard is the *nemo judex in sua causa* principle,\(^{174}\) underlying the second clause of article 27(3) whereby a party to a

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166 See Koskenniemi, above n 47, 345-46.


168 Art 32 of the Charter partly provides that: ‘Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute.’ The requirement is mandatory, yet dependent upon the Security Council’s determination as to whether the matter under consideration is in the nature of a dispute: *Namibia Case*, above n 54, 22-3.


170 See Talmon, above n 82, 187.


172 See Bailey and Daws, above n 167, 156-59.


174 ‘No one can be judge of his/her own case.’ The applicability of this principle in
dispute before the Security Council, whether a permanent member or not, may not vote on resolutions taken under Chapter VI.\(^\text{175}\) Yet this compulsory abstention does not extend to decisions under Chapter VII. Nor does it apply to matters characterised as a ‘situation’ rather than a ‘dispute’ or to a dispute to which the permanent member is allegedly not a party.\(^\text{176}\) Given more frequent recourses to Chapter VII these days, the permanent members can easily evade compulsory abstention by simply bringing the matter under Chapter VII or even by not indicating whether the resolution in question is being adopted under Chapter VI or Chapter VII.\(^\text{177}\) The expansive application of Chapter VII powers, particularly to the settlement of disputes such as the territorial dispute between Iraq and Kuwait and the Lockerbie dispute over the surrender of two terrorist suspects,\(^\text{178}\) may well cause concern in the light of fairness. Even if compulsory abstention should extend to some of Chapter VII decisions, difficulties remain as to the determination of a ‘party’ to the dispute and the characterisation of the matter at issue. In any event, procedurally defective decisions on this basis are unlikely to constitute jurisdictional error unless that particular affirmative vote by a party to the dispute was decisive to the adoption of the resolution.

\textbf{VI. Consequences of Jurisdictional Error and Accountability}

The Security Council in acting under Chapter VII is deemed to have committed jurisdictional error when it makes a decision in contravention of other provisions of the Charter, for apparently improper purposes, or based on an unsupported, speculative or irrational finding for the purpose of article 39 of the Charter. It is also arguable that the blocking of other member states from participating in discussion when the Security Council performs a quasi-legislative or quasi-judicial function could constitute jurisdictional error by virtue of the breach of procedural fairness. Purported decisions based on jurisdictional error are rendered null and void \textit{ab initio} – absolute nullity – as opposed to voidable.\(^\text{179}\) Jurisdictional error

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\(^{176}\) Art 27(3) of the Charter reads that: ‘Decisions of the Security Council on all other [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.’ For a detailed textual analysis, see B Simma, S Brunner and H-P Kaul, ‘Article 27’ in Simma (ed), above n 23, 476, 501-7.

\(^{177}\) Reisman, above n 62, 93.

\(^{178}\) See, e.g., Greig, above n 81, 199-200 (in relation to the \textit{Lockerbie Case}).

committed by subsidiary organs or member states in implementing the Council’s
resolution, on the other hand, may not necessarily render purported decisions null
and void \textit{ab initio}. To decide the legal consequences of jurisdictionally flawed
decisions in the course of implementing a resolution, it must be examined
whether it was a purpose of the resolution that an act done in breach of the
provision should be invalid.

Those grounds of jurisdictional error may not always provide clear-cut
boundaries against which the validity of Security Council decisions can be
objectively assessed. As examined above, for example, ambiguity may remain with
the mandates, the nature of delegated functions, the extent to which the stated
objectives are truly related to the proper purpose of Chapter VII powers, and with
how the adequacy of the stated objectives is to be assessed. When the objective or
nature of decisions under Chapter VII is clearly stated or can be reasonably
inferred, the grounds of jurisdictional error as identified above pose a ‘hard-edged’
question that leaves no room for legitimate disagreement, as opposed to a
‘soft-edged’ question that embraces legitimate disagreement such as what
constitutes reasonable or proportionate measures. As long as jurisdictional
elements as identified above are clarified in resolutions, formal requirements whose
breach would result in jurisdictional error, as opposed to substantive requirements,
can provide clear-cut boundaries for criteria against which the validity of Security
Council decisions can be more objectively assessed. Apart from \textit{jus cogens}, which
renders contradicting Security Council decisions null and void \textit{ab initio}, any
substantive criteria – such as reasonableness and proportionality – cannot render
decisions invalid without being so assessed by an independent judicial body.

It is an established principle in the field of the law of international organisations
that, but for the possibility of an act being \textit{ultra vires}, the decision of an organ
carries with it a prima facie presumption of validity.

\begin{itemize}
  \item \textbf{180} But see B O’Donnell, ‘Jurisdictional Error, Invalidity and the Role of Injunction in
    s 75(v) of the Australian Constitution’ (2007) 28 \textit{Australian Bar Review} 291, 296-99
    (proposing that jurisdictional error be ascertained by looking at the consequences of an
    error).
  \item \textbf{181} This was envisaged as a second step in the \textit{Hickman} principle: see \textit{Plaintiff S157/2002},
    above n 84, 31-2 [20]-[22] (Gleeson CJ), 43 [65]-[66] (Gaudron, McHugh, Gummow,
    Kirby and Hayne JJ); \textit{R v Murray; ex parte Proctor} (1949) 77 CLR 387, 400
    (Dixon J).
  \item \textbf{182} \textit{Project Blue Sky Inc v Australian Broadcasting Authority} (1998) 194 CLR 355,
    388-91 [91]-[93] (McHugh, Gummow, Kirby and Hayne JJ).
  \item \textbf{183} The Hon Justice B J Preston, ‘Judicial Review of Illegality and Irrationality of
  \item \textbf{184} The distinction is characterised by Osieke as between procedural \textit{ultra vires} and
    substantive \textit{ultra vires}: E Osieke, ‘The Legal Validity of Ultra Vires Decisions of
    International Organizations’ (1983) 77 \textit{American Journal of International Law} 239,
    243-47.
  \item \textbf{185} See above n 56. See also, J Crawford, ‘\textit{Marbury v Madison} at the International Level’
\end{itemize}
contentious proceedings where the legality of a resolution forms an incidental subject-matter. Critics may argue that, in the absence of judicial review, the criteria examined above including the notion of jurisdictional error serve no meaningful purpose in restricting the Security Council’s powers under Chapter VII. Yet the requirement that discretionary powers be legally authorised does not necessarily entail the requirement that all discretionary powers be judicially reviewable. Even in the absence of an appropriate court having compulsory jurisdiction over the legality of Security Council action, invalidity of Security Council action may exist when the action constitutes an absolute nullity.

Even if the ICJ is unable to establish its jurisdiction over the issue or to find it justiciable, the jurisdictional issue can still be raised by member states, which arguably reserve the right of ‘last resort’ to raise opposition. Such opposition questioning the validity of decisions will carry more weight when it is so decided in domestic courts. When opposition is raised, the Security Council should be prepared, though it is not explicitly so mandated under the Charter, to explain and justify the exercise of Chapter VII powers not only to member states but more widely to the international community. This proposition is consistent with recent calls for the greater enhancement of accountability, in the strict sense of the word, both in international and domestic contexts.

For details, see literature cited above n 7.


Accountability in the strict sense of the word indicates the process through which one side asserting the right to call for the account seeks answers and rectification while the other side, being separate, external, and accountable to the former, responds to the call: R Mulgan, ‘“Accountability”: An Ever-Expanding Concept?’ (2000) 78 Public Administration 555, 555-56. The accountability of international organisations appears to have been given much wider meaning: see, eg, International Law Association, Final Report of the Committee on the Accountability of International Organizations (2004) available via <http://www.ila-hq.org/html/layout_committee.htm>. However, it involves confusion between two different categories of unlawful acts of international organisations – acts of a kind that can also be committed by states and those involving a reference to the special nature of international organisations deriving all their powers from a conventional or statutory source, only the latter of which accountability in the strict sense is concerned about: E Lauterpacht, ‘The Legal Effect of Illegal Acts of International Organisations’ in Cambridge Essays in International Law: Essays in Honour of Lord McNair (1965) 88, 89.

In enhancing the accountability of the Security Council not only to member states and targeted states but also to the international community as a whole, the mere reference to Chapter VII would not be sufficient to explain and justify the validity of the power it exercises. The recent Council action against Iran has in fact demonstrated the benefit of identifying the specific basis for action so as not to give any indication that the mandate can be expansively interpreted to authorise military enforcement measures. International lawyers might have been negligent in respect of the Security Council’s decisions by not demanding that the Security Council identify the exact legal basis for its action. The Security Council should be required to identify (i) the specific legal basis within the Charter, (ii) the purpose(s) of the action, (iii) the factual basis for the action, (iv) the function that it performs by the action, and preferably (v) how the specified action can effectively and reasonably achieve the purpose(s) in compliance with the purposes and principles of the Charter including human rights norms. By spelling out those details either in the resolution or in an explanatory memorandum, issues surrounding the validity of Security Council decisions will be better addressed.

What should be called for is the fostering of the ‘culture of justification’, whereby some clear, well-accepted, and legally embedded procedures can be developed, by requiring the Security Council to provide reasons for action. The political reality that often results in compromise and ambiguity in the wording of resolutions, important as it may be, should not be seen as an excuse for failing to justify actions with sufficient clarity. Legal considerations have reportedly had some bearing on decision-making processes in the Security Council as conveying the ‘power of the better argument’. The ‘power of the better argument’ will carry more weight in a regularised process of interaction and exchange. Such regularised procedures can serve primarily for the establishment of alleged nullity of Security Council decisions but may also address the substantive merits of decisions if the procedures also play a role as a forum of discussion to develop shared grounds for assessing the ‘adequacy of justification’.

VII. Conclusion

Chapter VII powers have undergone significant reformulation and expansion during the past few decades. Although the reference to Chapter VII was first meant to be nothing more than a general application of enforcement measures or sanctions under

193 See, UN SCOR (5612th mtg), UN Doc S/PV.5612 (2006), 2 (Russia), 8 (Argentina).


articles 41 and 42 of the Charter, it has grown into the standard source of authority justifying a wide range of Security Council decisions. The expansion of Chapter VII powers entails the risk of losing flexibility in the Council’s approach to conflict management, blurring the authorised scope of Chapter VII, and allowing circumvention of fundamental principles of the Charter. Yet an attempt to limit the Council’s powers under Chapter VII by simply drawing an analogy to governmental separation of powers or by requiring an indispensable and genuine link to the exercise of peace enforcement functions does not provide a satisfactory answer. This article instead proposed that more systematic criteria be established and applied against which the Security Council’s wide variety of actions can be more objectively assessed.

Drawing upon jurisprudence from municipal courts that have developed principles of judicial review for supposedly unreviewable decisions the notion of jurisdictional error can be established on the grounds of the duty to act within the power, the duty to act for proper purposes, jurisdictional fact, and procedural fairness. These procedural limits provide a systematic set of criteria by reference to which the jurisdictional limits to Security Council decisions under Chapter VII can be ascertained. It is thus possible to render null and void ab initio such decisions as those made in contravention of other provisions of the Charter, for apparently improper purposes, based on a unsupported, speculative or irrational finding of a threat to the peace, and arguably in breach of certain fundamental rules of procedural fairness when the Security Council performs quasi-legislative or quasi-judicial functions. Difficulties remain when an objective judgment is required to determine jurisdictional error, due, for example, to ambiguity regarding the aims of a decision or the nature of action. Yet the development of regularised procedures by way of fostering a culture of justification may help deal with such difficulties. The first step towards that end is to enhance the accountability of the Security Council by requiring it to identify (i) the specific legal basis within the Charter, (ii) the purpose(s) of the action, (iii) the factual basis for the action, (iv) the function that it performs by the action, and preferably (v) how the specified action effectively and reasonably achieve the purpose(s) in compliance with the purposes and principles of the Charter.

Achieving the supremacy of the rule of law over the discretionary powers of the Security Council under Chapter VII of the Charter is a fundamental challenge both to the rule of law and to the effective function of the collective security system. It is imperative to strike a fair balance between the regulation of Security Council actions under the rule of law and the effective function of the Security Council for the purpose of maintaining or restoring international peace and security. Time needs to be expended on developing a shared understanding as to how the discretion should be exercised. In the meantime the formal and jurisdictional requirements of the rule of law provide more objective grounds for restricting Chapter VII actions, for which the Security Council should be held accountable not only to the UN member states but also more widely to the international community.