The Security Council's Non-Determination of a Threat to the Peace as a Breach of International Law

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This paper is focused on characterizing the inaction of the Security Council as a failure in the enforcement of international law in the field of collective security. Moreover, such lack is also believed to be a breach of the rule of international law which is to lead to responsibility of the United Nations as an international organisation. Security Council's omission in determining the situation in Iraq in 2014 a threat to international peace and security is seen as contrary to the primary rule of Article 39 of the Charter of the United Nations, which sets an obligation, not merely a possibility or a privilege realisable within a wide margin of discretion. Examples of its past actions in comparable situations are given in order to demonstrate the developed practice that has become established practice of determining threats to the peace in cases of humanitarian crises. A short overview of the General Assembly's and the Secretary-General's (in)activities is given as well.

Key words: Security Council, Iraq, international law, breach, obligation, responsibility

1. Introduction

Chapter VII of the Charter of the United Nations (Charter) bestows upon the United Nations Security Council (UNSC) the power to enforce international law, in the form it finds appropriate, for the purpose of keeping international peace and security, the first purpose of creation of the United Nations (UN), as in Article 1(1) of the Charter. Not only empowered, the UNSC bears the primary responsibility for the maintenance of international peace and security. In the words of the Charter, it *shall* [emphasis added] determine the existence of any threat to the peace and shall make recommendations or decide what measures shall be taken to maintain or restore international peace and security (Article 39).[1] Actions performed on this basis usually come under question mark when, to the rest of the world, it seems as if the UNSC had overstepped its authority, had executed it inappropriately or when it had failed to perform at all. The latter is the cause for examining UNSC's behaviour in this paper.

No wars have had more lasting impact on the UNSC's standing than those involving Iraq since 1980.[2] From the Operation Desert Storm, "the zenith of multilateral cooperation and the realization of many of the principles embodied in the UN Charter system", through its nadir, Operation Iraqi Freedom,[3] to

[1] "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 Art. 41 and 42, to maintain or restore international peace and security."

[2] J. Cockayne & D. M. Malone, *The Security Council and the 1991 and 2003 Wars in Iraq*, in V. Lowe, A. Roberts, J. Welsh & D. Zaum (Eds.), The United Nations Security Council and War: The Evolution of Thought and Practice since 1945, Oxford University Press, 2008, p. 384.

[3] C. M. Glen, *The United Nations Charter System and the Iraq Wars*, Public Integrity, Vol. 11, No. 4, 2009, pp. 309-326, p. 310.

complete neglect of the post-American Iraq and failure in realisation of its main purpose – the maintenance of peace and security. In the end of 2000s and beginning of 2010s, with a peak in 2014, a situation developed in Iraq which was in many an element very similar to situations when UNSC had determined a threat to international peace and security in other countries, as well as in Iraq itself 24 years beforehand. And when it had acted upon such determinations. In 2014 UNSC, however, remained deaf and blind to severe humanitarian crisis, heavy intra-state conflict and pleas from both the international public and Iraq itself for help. Such inconsistency inevitably raises issues regarding the correct functioning of the UNSC, in particular with respect to this UN organ's *obligation* [emphasis added] to enforce international law within the sphere of keeping peace and security.

This paper will address the issue of determination of a threat to the peace and security as an obligation arising as such clearly and directly from the Charter, and as established practice in situations where humanitarian crisis element is a predominant factor of the threat. UNSC's inaction in the case of modern-day Iraq[4] will be portrayed as an example of enforcement failure and thus of a breach of the primary rule of international law, of the abovementioned Article 39, constituting internationally wrongful act according to Draft Articles on the Responsibility of International Organisations (DARIO).

2. The Situation in Iraq

After the tumultuous 1990s, which began with Iraq committing breach of peace[5] and the international community responding to it with the use of force, came the 2000s when that state went from the limelight of international law and community in 2003, suffering as a victim of an aggressive attack[6] which happened despite all the legal and political battles before the UNSC, to complete oblivion by the end of the decade culminating with the end of 18-year-long designation as a threat to international peace and security (end of 2008). Both during the occupation and afterwards,[7] however, the growing internal instability of Iraq mirrored in the long list of acts of violence, acts of terrorism, human casualties,[8] including UN staff, all occurring in the context of rising levels of general insecurity and inter-religious intolerance. In his 2013 July report to the UNSC, the UN Secretary-General could not but characterize the situation as "posing a major threat to stability and security in Iraq".

Unlike the 1990s, in 2012 and 2013 UNSC did not convene often with Iraq on its agenda: once a year to adopt a resolution extending mandate of UNAMI,[9] the other few (usually three) to host presentation of reports of the UN Secretary General's special representative in Iraq,[10] who did report on the grave

[4] The scope of the paper will not go beyond 2014, since the crisis became regional and the focus of attention of the international community was transferred mostly to Syria.

[5] SC Res. 660 (1990).

[6] In an interview to BBC, Kofi Annan, UN Secretary-General, when asked on the legality of invasion of Iraq, replied: "I have indicated it was not in conformity with the UN charter from our point of view, from the charter point of view, it was illegal." *Iraq war illegal, says Annan*, BBC News (16 September 2004), http://news.bbc.co.uk/2/hi/3661134.stm (10 April 2017).

[7] United States completed their withdrawal from Iraq on 18 December 2011.

[8] According to the Government of Iraq, total number of killed civilians in 2012 was 3102, and of injured 12146. According to UNAMI's data total number of killed civilians in 2012 was at least 3238, and of injured 10379. *Report on Human Rights in Iraq: July – December 2012*, 3, http://www.uniraq.org (10 April 2017).

[9] Assistance mission in Iraq established by the 2003 UN SC resolution 1500. SC Res. 1500 (2003).

[10] Mr Martin Kobler of Germany was replaced by Mr Nickolay Mladenov of Bulgaria in August 2013 as Special Representative for Iraq and Head of the United Nations Assistance Mission for Iraq (UNAMI).

situation and demanded the international community to take a stand against all forms of widespread and deliberate targeting of civilians.

In 2014 Iraq found itself in a state of non-international armed conflict,[11] with the Islamic State of Iraq and the Levant (ISIL) spreading terror at every turn.[12] By December 2014, ISIL was in control of large parts of the west and north of Iraq.[13] Acts have been committed that were yet to be officially confirmed as war crimes and crimes against humanity.[14] It seemed beyond doubt that ISIL's goals, as identified by Nickolay Mladenov, have truly been the destruction of Iraqi state and its replacement with a state of terror that is built on genocide, war crimes and crimes against humanity.[15] In his address to the UNSC, he characterised their activities as a threat to global peace and security, and consistently emphasized Iraq's inability to deal with this threat alone and the need for regional, interregional and international support.

The wider public, not to use the term 'international community',[16] has been aware of the grave situation of Iraq. The media have been present and deeply involved in the matter, and religious leaders around the world have condemned the violence ISIL had been committing and have invoked a help reaction.[17] But the UNSC simply would not react. On 10 January 2014, it held a meeting on the subject of Iraq resulting in a statement deploring the recent events in Iraq, condemning Al-Qaeda's and ISIL's attacks and expressing concern for the civilians, but going no further from this standard wording, except to condemn acts of terrorism as being criminal and unjustifiable.[18] After more than half a year,[19] on 30 July the UNSC met to adopt a resolution with regard to the situation in Iraq – only to prolong the UNAMI mandate.[20]

What followed only few days afterwards was the tragic Mount Sinjar 'episode', when the region fell under ISIL's control and tens of thousands of Yezidis found themselves in imminent danger for their lives.[21] It was then that the US President Barack Obama, at the request of the Iraqi government,

[11] Mr Mladenov presenting the report of the Secretary General on the activities of UNAMI before the SC at its 7314th meeting on 18 November 2014, S/PV.7314 7314th meeting, 18 November 2014, meeting record, p. 2.

[12] According to approximate, rounded numbers given by Mr Mladenov to the UNSC on 18 November 2014, from January until the end of October, at least 10,000 people were killed and almost 20,000 injured. According to casualty figures data at UNAMI website, the exact number (estimate) of civilian casualties from January till end of October 2014, not including Anbar governorate, was 8591 persons. The number of those injured, in the same time-period, again not including Anbar, was 13787. *ibid*.

[13] According to the report of Valerie Amos, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, on the situation in Iraq before the SC on 18 November 2014, the number of internally displaced persons exceeded two million and continued to rise. *ibid* p. 7.

[14] In the words of the UN High Commissioner for Human Rights: "it is possible that 3 out of the 5 offenses falling under the crime of genocide, as listed in the Genocide Convention and the Rome Statute, have been perpetrated by the (…) ISIL". *ibid* p. 5.

[15] As put by Mr. Mladenov, ibid p. 2.

[16] The term dealt with in C. Tomuschat, *Die Internationale Gemeinschaft*, Archiv des Völkerrechts 33, 1995, pp. 1-20, pp. 1-6.

[17] Letter of the Holy Father to the Secretary General of the United Nations Organization concerning the situation in Northern Iraq, The Vatican, 9 August 2014, http://w2.vatican.va/content/francesco/en/letters/2014/documents/papa-francesco_20140809_lettera-ban-ki-moon-iraq.html (10 April 2017).

[18] S/PRST/2014/1, Statement by the President of the SC, 10 January 2014.

[19] A period in which more than 5596 civilian lives had been lost and more than 9495 civilians had been injured. All data exclude Anbar governorate. http://www.uniraq.org/ (27 April 2016).

[20] SC Res. 2169 (2014).

[21] In justified fear for their lives, tens of thousands of Yezidis fled their homes and climbed the barren Mount Sinjar trying to escape the ISIL. They remained there exposed to the heat and the sun without food or water, trapped, as the ISIL covered the

authorised military operations to help them, as was subsequently confirmed in a letter by Iraqi Minister for Foreign Affairs addressed to the President of the UNSC.[22] In the absence of UN-organised and authorised action, USA's military activity again took place on the territory of Iraq. This was another intervention, which, in light of all interventions outside UN activity under Chapter VII, could be considered questionable and against international law and the basic rule on refraining from the threat or use of force against the territorial integrity or political independence of any state (Article 2(4) of the Charter). This intervention, however, was the result of the agreement[23] of the intervening state and the state in which intervention took place, thereby underscoring the political independence of the latter. As for territorial integrity, force was used 'for' it not 'against' it. This was an example of one of rare types of interventions that could not be categorised as 'illegal', as it was an intervention upon request, legitimised through the consent of the Iraqi government.[24] The International Court of Justice termed such type of intervention 'allowable' in the *Nicaragua Case*.[25]

The UNSC met again on 19 September, when Mr Mladenov emphasised Iraq's need for the support ('collective measures') of the international community, calling the situation a "threat to the region and to international security".[26] All participants showed unanimity in their expressions of outrage at ISIL's activities, with only some emphasising the need for further collective action by the UNSC.[27] The meeting resulted in a statement by the President welcoming the newly formed Iraqi government and invoking national reconciliation within Iraq, as well as international support for that aim.[28] As for the gravest matter of all — the UNSC strongly condemned terrorist attacks and expressed its deep outrage for all the innocent lives lost, calling upon the Government of Iraq and the international community to work towards ensuring that all perpetrators be brought to justice.

The UNSC shifted the burden of dealing with massacres, genocidal acts, and loss of more than a third of its national territory to the government of a state so differentiated in ethnic, religious and political composition that the term 'unstable' was an understatement for its description. In 2014, as the terrorists were beheading people in public, raping and enslaving, the UNSC decided that it was time for Iraq to practice its sovereignty. Experience is indeed the best teacher. Thus the comments of the representative of Rwanda echo a simple but undoubtable truth: 'It is unfortunate that every time the UNSC defaults on

territory of the foot of the mountain, threatening them with death. Their tragic outcome was imminent – whether by forces of nature or man.

[22] S/2014/691, Letter dated 20 September 2014 from Permanent Representative of Iraq to the United Nations addressed to the President of the SC.

[23] "Iraq is grateful for the military assistance it is receiving, including the assistance provided by the United States of America in response to Iraq's specific requests. Iraq and the United States have entered into a Strategic Framework Agreement, and that Agreement will help to make such assistance more effective

and enable us to make great advances in our war against ISIL." Ibid.

[24] „…there seemed to be a tacit acceptance among the UN membership that interventions based simply on consent and without a Council authorising resolution were admissible under the Charter." Security Council Report Special Research Report Security Council Action Under Chapter VII: Myths and Realities, 2008 No. 1, 23 June 2008. www.securitycouncilreport.org (21 October 2017).

[25] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, p. 126, para. 246.

[26] S/PV.7271 7271st meeting, 19 September 2014, meeting record, p. 2.

[27] The Representative of Chile invoked "a forceful but legitimate response from the international community" – a response that "should come from this body [the UNSC], whose task it is to maintain international peace and security, in accordance with the Charter of our Organization and international law.", Ibid, p. 17.

[28] S/PRST/2014/20, Statement by the President of the SC, 19 September 2014.

its inherent responsibility, that of the maintenance of international peace and security, the human cost is just unbearable.'[29]

Did the UNSC default in Iraq in 2014?[30]

3. UNSC's Action under Article 39 of the Charter

Institutionalised and centralised enforcement[31] of international law, within the meaning of Abi-Saab's 'exogenous enforcement',[32] can first and foremost be attributable to the UN, and more specifically, to the UNSC within the domain of protection of international peace and security. Here, a true collective enforcement mechanism is in function,[33] one regulated in Chapter VII of the Charter and triggered by following the rule laid down in Article 39 – the "single most important provision of the Charter".[34] Which should, however, not be viewed too isolated from the rest of the Charter, in particular not without having in mind the "purpose of all purposes",[35] the maintenance of international peace and security, and then Article 24 – the first explicit duty setter upon UNSC (in Russian version of the text it is UNSC's *obligations* that are in question [emphasis added])[36]. Observing the wording of Article 39, both its subject and its object is the UNSC itself. UNSC is the doer, the executor, the active element of this norm, but also the addressee of it. It is to enforce the Article upon others by making a legal determination[37]

[29] S/PV.7271, p. 8.

[30] In line with the temporal scope of this paper (see note 4), UNSC's activity beyond 2014 is not analysed. However, for the sake of rounded information on the case, let it be mentioned that in 2015 UNSC adopted one resolution on Iraq (S/RES/2233(2015) extending again UNAMI's mandate, and noting, interestingly, "that the presence of ISIL on Iraq's sovereign territory is a major threat to Iraq's future, underscoring that the only way to address this threat is for all Iraqis to work together…". No longer, it seems, was that threat seen to anything else, but the poor State's future. In 2016, the same UNAMI-mandate-extension resolution was adopted (S/RES/2299(2016) with an interesting detail – "Welcoming the political, military and financial assistance to the Government of Iraq from Member States, and encouraging such assistance to continue and expand." – a detail, which, had it been combined with recognition of the situation as a threat to international peace and security and authorisation of the Member States to use force, could have easily been ex-post approval of military activities undertaken by the USA and other States.

[31] Enforcement of law can be described as securing the normative integrity of a system by executing its normative prescriptions or rather by their internalisation or integration into the behaviour of the subjects of the law in question and system's reaction to behaviour contrary to that prescribed or to violations of its rules with repressive means in order to compel the offender to comply with the rules again. This 'definition' is made from the combination of elements used by Abi-Saab to describe '*mise en oeuvre*' of international law and his description of '*l'execution forcée*'. G. M. Abi-Saab, *De la sanction en droit international: Essai de clarification*, in J. Makarczyk (Ed.), Theory of International Law at the Treshhold of the 21st Century: Essays in Honour of Krzysztof Skubiszzewski, Kluwer Law International, The Hague, 1996, pp. 63-66.

[32] According to Abi-Saab, international law can be enforced endogenously (internally), by the addressee of the rule himself, and exogenously (externally), by the community. Ibid pp. 63-64.

[33] "In order to reach the primordial goal of peace maintenance, States were ready to submit to the central organ in a manner unprecedented in the international order." B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.), *The Charter of the United Nations: A Commentary*, 3rd edition, 2012, p. 1240.

[34] *ibid* p.1273.

"[I]f any single provision of the Charter has more substance than the others, it is surely this one sentence, in which are concentrated the most important powers of the Security Council." J. Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 Northwestern Journal of International Human Rights 24, 2008, p. 36, http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1065&context=njihr (10 April 2017).

[35] B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 109.

[36] See note 65.

[37] "The determination that there exists a threat to the peace is a legal determination, because it constitutes a qualification (or characterization) of a factual situation, which then draws (albeit in the discretion of the Council) certain legal consequences, namely sanctions or other enforcement action under Art. 41 or 42."

that someone threatens the peace[38] or has breached the peace or committed an act of aggression, thus opening its way towards enforcement of peace, and automatically, by directing the UNSC's activity towards another subject, the norm *i.e.* the law[39] is enforced as well.[40]

The norm of Article 39 contains only disposition, lacking both hypothesis and sanction, an imperfection most unfortunate, since it is exactly this norm that provides the UNSC with the basis for adopting decisions binding on all other Member States.[41] The absence of clearly prescribed conditions for determining those three situations has led to a belief that the UNSC is under no obligation to make them. If the UNSC decided to do so, it would be purely the result of its discretionary will to act,[42] it is claimed, and only then would the UNSC be under obligation[43] to take any necessary provisional measures and focus on a long-term solution to the situation by making recommendations or deciding which more serious measures to take.[44] The view expressed in this paper is the opposite – determining, or rather engaging in a discussion in order to determine,[45] the existence of a threat to the peace, breach of the peace, or act of aggression is indeed seen as an obligation, one set clearly by the Charter, itself a source of international law.[46] If the Charter's main purpose is maintaining peace and security, not only a purpose but an obligation under it,[47] and the UNSC was entrusted with principal responsibility and corresponding duties to achieve the realisation of that purpose, how was it ever devised as a serious instrument for insuring peace and security in a post-world-war world if the UNSC was conceived as never really having to determine a threat to the peace?

Aside from 'general obligation' to act, there is also an obligation, stemming from the established practice of the UNSC, to act in situations involving severe humanitarian crises.

A. Tzanakopoulos, *Disobeying the Security Council. Countermeasures against Wrongful Sanctions*, Oxford University Press, 2011, p. 62.

[38] "The determination by the SC of a threat to the peace might become relevant as a preliminary finding that certain norms of international law, in particular those creating *erga omnes* obligations have been breached." B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 1267.

[39] On the law enforcement and peace enforcement within Chapter VII see H. Nasu, *Chapter VII Powers and the Rule of Law: The Jurisdictional Limits*, Australian Year Book of International Law, Vol 26, pp. 87-117, p. 92.

[40] Not quite identical to this view, but Orakhelashvili also recognizes the different roles of enforcing both international peace and international law by the UNSC, since, in the end "…the concept of peace is firmly premised on the observance of fundamental principles of international law, and that compliance with international law is a condition for peace.", A. Orakhelashvili, *Collective Security*, Oxford University Press, 2011, pp. 18-19.

[41] Art. 24(1) of the Charter: "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."; Art. 25 of the Charter: "The Members of the United Nations agree to accept and carry out the decisions of the SC in accordance with the present Charter."

[42] But, as A. Peters explains, discretion is *per definitionem* subject to some outer limits. And, in a way, it is the opposite of arbitrariness. A. Peters, *The Security Council's Responsibility to Protect*, International Organizations Law Review 8, 2011, pp. 15-54, p. 31.

[43] According to Kelsen, the UNSC is not even then under obligation, but only has authority to take enforcement action. H. Kelsen, *The Law of the United Nations, A Critical Analysis of Its Fundamental Problems*, Stevens & Sons Limited, London, 1950, pp. 264-265.

[44] Measures not involving the use of armed force (Art. 41 of the Charter) or should they be inadequate, "it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" (Art. 42 of the Charter).

[45] Determination itself is a result of the vote, and as such could not be imposed as an obligation.

[46] M. N. Shaw, *International law*, Cambridge University Press, 2014, p. 66.

[47] See note 58.

3.1. Article 39 of the Charter – The UNSC's Obligation or Prerogative?

The central question of this paper is whether the UNSC was obliged to act and if, by its inaction, it committed a breach of international law, as set out in Article 39 of the Charter, read in conjunction with Articles 1(1) and 24(1), making the UN thus responsible for international wrongful act under the DARIO. UNSC, political and wilful as it might be, is not unbound by law.[48] Such was also the reasoning of the ICTY in Prosecutor v Dusko Tadic, which found that neither the text nor the spirit of the Charter conceives of the UNSC as *legibus solutus*.[49] But, how is it bound?

Nature of Article 39 is seen by many as not creating an obligation, even though the future permanent members of UNSC called it themselves exactly that in their statement on the "Yalta formula" on voting: „In view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the *obligation* to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred."[emphasis added].[50] In the Commentary of the Charter, Simma and others argue that it stems clearly from the wording of Article 39 that the UNSC was meant to enjoy broad discretion also in deciding whether to act at all in a given situation.[51] They believe that both the history of the Charter and subsequent State practice show that the UNSC is under no obligation to make a determination under Article 39, even if it considers that a threat to or breach of the peace exists. Its "relatively assertive wording (shall determine)", they find, empowers but does not oblige the UNSC to act. They admit, however, as does the ICTY,[52] that the UNSC is not unlimited in its discretion. Another *ad hoc* tribunal, the International Criminal Tribunal for Rwanda, allows the UNSC greater freedom as it considers their assessments of a threat to international peace and security non-justiciable.[53] In her article on the UNSC's duty to decide, Spain establishes that the UNSC "has neither a duty to decide nor any other commitment mechanism that clarify its decision-making responsibilities. Currently, neither the Charter nor the UNSC's own procedural rules address the question of whether or when it must pass decisions. It enjoys wide discretion to do as it pleases. It has no obligation to take up matters in a consistent way or based

[48] „The Council is not, however, a free agent acting according to a private agenda outside the scope of international law able to pick and choose issues and decide on measures without due respect to the rule of law." N. Elaraby, *Some Reflections on The Role of the Security Council and the Prohibition of the Use of Force in International Relations: Article 2(4) Revisited in Light of Recent Developments*, in Verhandeln für den Frieden Negotiating for Peace Liber Amicorum Tono Eitel, Springer, 2003, pp. 41-67, p. 56.

[49] ICTY, Appeals Chamber, *Prosecutor v Dusko Tadic*, Decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, 1995, para. 24. and 28.

[50] Statement at San Francisco by the delegations of the four Sponsoring Governments (China, the UK, the USA and the USSR) on "The Yalta Formula" on Voting in the Security Council, UNCIO, 1945, Vol. XI, pp. 710-14, 713.

[51] B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, pp. 1275-1276.

[52] "The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)." *Prosecutor v Dusko Tadic* para. 28.

[53] "Although bound by the provisions of the Chapter VII of the UN Charter and in particular Art. 39 of the Charter, the Security Council has a wide margin of discretion in deciding when and where there exists a threat to international peace and security. By their very nature, however, such discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by this Trial Chamber." ICTR, Trial Chamber II, *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on Defense Motion on jurisdiction of 18 June 1997, (1997), para. 20.

on defined criteria".[54] Ronzitti believes that as a political organ, it would be difficult to conceive of the UNSC's inaction as constituting a violation of international law, or of the Charter, since it has discretionary powers in connection with the determination of an act of aggression, a threat to peace or a breach of peace.[55] In their claims of not finding UNSC under obligation, the abovementioned and others rely heavily on Hans Kelsen, according to whose firm belief UNSC could be considered to be only under moral obligation, but not legal, due to the absence of the sanction in the norm.[56]

It should never be forgotten that the Charter is a treaty, and treaties oblige. They are concluded with certain goals to be achieved, and achievement of those goals is an obligation of the parties, whether to realise them themselves or via another agent designated or created for that purpose. Charter was signed to achieve peace and security in the world. Its parties, the states, were obliged to refrain from the threat or use of force, and the newly created organ, the UNSC, was assigned with the duty of dealing with the situations of endangered peace and security. The rights and duties of the UN must depend upon its purposes and functions as specified or implied in the Charter and developed in practice.[57] To claim that realisation of the main purpose of treaty is not an obligation for the parties to that treaty and agents established by it for realisation of that purpose would go against the reason of a treaty's origin and existence.[58] Orakhelashvili so defends the position of Article 39 clearly posing an obligation, claiming that "the structural inter-connection between the pertinent provisions of the Charter compels us to view the Article 39 determination power as part of the imperative mandate of the Council, which does not admit selectivity in confronting threats."[59] He goes on invoking Resolution 294(1971) where the UNSC itself admits: "*Conscious* of its duty to take effective collective measures for the prevention and removal of threats to international peace and security and for the suppression of acts of aggression,".[60] Tomuschat shares the same line of thought when, speaking of UNSC's Somalia 1992 (see *infra* 2.) reasoning, he says that the UNSC *must* deal with the situation even if there were no cross-border effect.[61] [emphasis

[54] Spain finds this deficit a threat to the SC's legitimacy, and argues that the SC should have a clear duty to decide, which would require it to take up decisions about whether or not it will take action in crises under its jurisdiction. A. Spain, *The U.N. Security Council's Duty to Decide*, Harvard National Security Journal, Vol. 4, 2013, pp. 320-384, pp. 320-325, http://harvardnsj.org/wp-content/uploads/2013/05/Vol.4-Spain_Final-Revised3.pdf (10 April 2017).

The same danger to SC's legitimacy is perceived by Roscini who believes that the "selective and opportunistic approach of the Security Council with regard to, inter alia, the enforcement of international humanitarian law could in the end affect its legitimacy: even though '[n]o system of collective security can be realistically expected to respond to every transgression of the prevailing order or effectively respond to every breach of the public peace[,] … [it must nonetheless] show a reasonable degree of coherence, consistency and effectiveness." M. Roscini, *The United Nations Security Council and the Enforcement of International Humanitarian Law*, Israel Law Review, 43(2) 2010, pp. 330-359, p. 353.

[55] N. Ronzitti, *The Current Status of the Principle Prohibiting the use of force and legal justifications of the use of force*, paper presented at the international conference on 'Redefining Sovereignty, The Use of Force after the End of the Cold War: New Options, Lawful and Legitimate?' Frankfurt, 2002, https://www.ciaonet.org/catalog/12362 (10 April 2017).

[56] Kelsen 1950, p. 264.

[57] ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C. J. Reports 1949, p. 174, p. 180.

[58] Though, according to Simma and others, it is a matter of controversy whether the purposes of the UN as contained in Art. (1) of the Charter are meant to be legally binding. It is the place of the purposes in the Charter, as they say, that would qualify them as legally binding, whereas their wording is more appropriate for political objectives. B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 108.

[59] Orakhelashvili 2011, p. 151.

[60] SC Res. 294 (1971).

[61] „Damit steht nunmehr fest, daß auch ein allgemeiner Zustand der Anarchie und Gesetzlosigkeit in einem Lande, selbst wenn davon keine grenzüberschreitenden Auswirkungen ausgehen, vom Sicherheitsrat aufgegriffen werden kann, ja im Grunde muß, denn eine gegebene Zuständigkeit kann niemals nach Lust und Laune oder Willkür ausgeübt werden, sondern steht vor allem unter dem Gebot der Gleichheit." Tomuschat 1995, pp. 12-13.

added] And Judge Elaraby finds the UNSC *duty-bound* to adopt measures to maintain international peace and security without freedom of picking and choosing issues to deal with.[62] [emphasis added] Since the same claim in this paper is based on the word of the Charter, analysis of its relevant parts is the most logical way forward.

3.1.1. Wording of the Charter[63]

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.[64] And words used in Article 24(1) of the Charter[65] to describe the UNSC's role within the collective security system are: '*primary responsibility*' in correlation with '*duty*'[66] [emphasis added]. When read in conjunction with Article 39 of the Charter, which uses an ultimate modal verb expressing a command – 'shall' ("The Security Council shall determine the existence of any threat to the peace") – it becomes very difficult not to notice the element of obligation.[67] As Kelsen himself puts it, the *demanding* element of the rule of law is expressed by the statement that one 'shall' observe the conduct prescribed by the law.[68]

'Shall' is indeed an ambiguous word in English legal drafting. Even though under strict standards of drafting only its mandatory sense of 'has a duty to' is acceptable,[69] in reality 'shall' can bear five to eight senses even in a single document, expressing permission, conditional duty, entitlement, false or real future tense.[70] However, in a construction 'subject + shall + action by the subject (in a clear active mode)' the meaning is taken to convey an obligation, a duty on the subject of the sentence, being thus the most traditional and correct use of the term 'shall'.[71] When 'shall' is used in that construction

[62] Elaraby 2003, pp. 56, 63.

[63] The emphasis of this analysis is placed on the English version, since the drafting did occur in that (and French) language. According to the Charter itself, though, 5 language versions (Chinese, French, Russian, English and Spanish) are equally authentic.

[64] Identical Art. 31(1) in both Vienna Convention on the Law of the Treaties and Vienna Convention on the Law of the Treaties between States and International Organizations or between International Organizations

[65] In French version („Afin d'assurer l'action rapide et efficace de l'Organisation, ses Membres confèrent au Conseil de sécurité la responsabilité principale du maintien de la paix et de la sécurité internationales et reconnaissent qu'en s'acquittant des devoirs que lui impose cette responsabilité le Conseil de sécurité agit en leur nom.") those words are „la responsabilité principale" and „devoirs". In Russian version („Для обеспечения быстрых и эффективных действий Организации Объединенных Наций ее Члены возлагают на Совет Безопасности главную ответственность за поддержание международного мира и безопасности и соглашаются в том, что при исполнении его обязанностей, вытекающих из этой ответственности, Совет Безопасности действует от их имени.") the corresponding words are „главная ответственность" (closer to French „la responsabilité principale" than to English „primary responsibility") and, quite a strong one, „обязанность" which translates as „duty" but also „obligation".

[66] Kelsen finds the word 'duty' in Art. 24 not correct due to the absence of the sanction in the norm. It is interesting, though, how in speaking of GA's responsibilities for the maintenance of international peace and security, Kelsen himself uses the word 'duty' to emphasise the difference between that and other organ's competences: „…, the responsibility of other organs certainly does not imply the duty or competence of 'prompt and effective action by the United Nations'." H. Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, The American Journal of International Law, Vol. 42, No 4, October, 1948, pp. 783-796, p. 786.

[67] Both French and Russian versions use only a present tense of the main verb („Le Conseil de sécurité constate l'existence d'une menace contre la paix,…", „Совет Безопасности определяет существование любой угрозы миру,…").

[68] H. Kelsen, *General Theory of Law and State*, Harvard University Press, 1949, p. 35.

[69] B. A Garner (Ed.), *Black's Law Dictionary*, Tenth Edition, p. 1585.

[70] Bryan A Garner, *Garner's Dictionary of Legal Usage*, Oxford University Press, Third Edition, p. 952.

[71] *ibid.*

throughout the Charter,[72] in most cases there is no dispute whatsoever on the obligatory nature of the rule in question (ex: "All Members shall refrain in their international relations from the threat or use of force",[73] "The General Assembly shall consider and approve the budget of the Organization."[74] *etc.*). And identical words in the Charter should be presumed to carry the same meaning.[75] If all those '*shalls*' were to be put under question mark, like the 'shall' of Article 39,[76] there would happen a relativisation so vast that the meaning of the entire Charter, and beyond, the nature of international law itself would again need to be defended. Judge Weeramantry in his dissenting opinion to Provisional Measures in Lockerbie case sees clearly an obligatory nature of Article 24(2)'s 'shall' calling the duty there expressed "imperative".[77] The linguistic constructions of Articles 24(2) and 39 are the same. It also needs to be emphasised that the Charter does not use another word for expressing obligations, whereas it does use 'may' where it wants to read 'is permitted to' or 'has discretion to'. It is in that sense interesting to notice the wording of Article 99, dealing with the matter of same scope but referring to different organ: "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." Here, an evident discretion is in question, not an obligation. According to the ordinary meaning of the words used, there is no doubt that the drafters wanted to oblige the UNSC to action, and, as seen in the Yalta statement, the future UNSC was aware of it and accepted it. The lack of sanction in that norm does not make that duty[78] any less mandatory, than, for example, the duty for all states to refrain from the use of force. As for the object and the purpose, which are also to be taken into account when interpreting a treaty, in the words of Judge Sir Percy Spender "The purpose pervading the whole of the Charter and dominating it is that of maintaining international peace and security and to that end the taking of effective collective measures for the prevention and removal of threats to peace. Interpretation of the Charter should be directed to giving effect to that purpose, not to frustrate it."[79]

3.1.2. UNSC Practice in Determining Threats to International Peace and Security

As mentioned above, the rule of Article 39 of the Charter lacks a hypothesis where all the conditions for the conduct demanded in disposition would be clearly enumerated. After 70 years of practice, though, it would be unrealistic to pretend that all the cases in which this was invoked or acted upon do not, when

[72] It should be noted that according to the 'American rule' in legal drafting, 'shall' means only 'has a duty to' and the Charter was drafted on the territory of the United States of America.

[73] Art. 2(4) of the Charter.

[74] Art. 17(1) of the Charter.

[75] Absent specific indications to the contrary. B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 771.

[76] One cannot disagree with Kelsen interrelating impossibility of obligation with voting duty. It is indeed difficult to see how determining the threat to peace and security can come to be realized if the vote results on the matter turn negative. Kelsen 1950, 265. It does not, however, minimize the obligation of the UNSC, asserted in this paper, to only tackle the matter and take on the voting, the results be what they may.

[77] ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3., p. 62.

[78] For the purpose of demystifying the word 'duty', used by some for 'softening' the meaning of the UNSC's tasks under the Charter, it should be mentioned that in English language, „duty" is defined as „a moral or legal obligation". Oxford Dictionaries, https://en.oxforddictionaries.com/definition/duty (24 March 2018), Collins English Dictionary, https://www.collinsdictionary.com/dictionary/english/duty (24 March 2018), Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/duty (24 March 2018).

[79] ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, Separate Opinion of Judge Sir Percy Spender, 186.

taken together, present a developed hypothesis within the meaning of customary law. Though this hypothesis may not rise to the level of general international law, it surely exists as a special UN customary law norm,[80] as, for example, in the case of non-realised idea on UN corps from Article 43[81] of the Charter and its replacement in practice with Member States' contingents.[82] Such practice of the UNSC's authorising the use of force by coalitions led by an individual States clearly differs from the main Charter vision of military action being under UN direction and control[83] but it is now widely accepted and beyond questioning, at least as a concept, individual cases aside. Also the matter of interpretation of the term 'concurring votes' in Article 27(3) of the Charter as including abstentions was based on the practice of the UNSC and general acceptance of member States, and concluded to form 'general practice of that Organization'.[84] If the Charter is considered 'living',[85] it would be unrealistic to expect one of its parts to remain immune to such changes.

From the following examples a regularity of reacting in cases similar to Iraq will try to be determined, in order to identify the existence of not only consistent subsequent practice, a means recognised for the interpretation of constituent instrument of international organisations,[86] but of established practice too, a quasi-customary rule in itself and part of the rules of the organisation.[87] The *travaux preparatoires* for Article 39 of the Charter reflect the drafters' intention to allow the UNSC to take enforcement action in a broad range of cases and not to subject it to severe restrictions in its decision when to act.[88] In particular, the category of threat to international peace and security, as the most important concept in Article 39,[89] has evolved rapidly as the perception of what meets this threshold has broadened.[90]

[80] "UN resolutions can directly create special, usually UN, law, but can only have indirect effects on general international law by acting on one of the constitutive elements of customary law." M. D. Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, European Journal of International Law , Vol. 16, No. 5, 2005, pp. 879 - 906, p. 905.

[81] "… this practice should be justified by affirming that it has given origin to a custom, within the Charter, or by reference to Article 48 of the Charter, which states that action required to carry out SC decisions shall be taken by all UN members or some of them, as the SC may determine." Ronzitti 2002.

[82] As Shaw notices in the case of Korea in 1950: "This improvised operation clearly revealed the deficiencies in the United Nations system of maintaining the peace since the Charter collective security system as originally envisaged could not operate, but it also demonstrated that the system could be reinterpreted so as to function.", Shaw 2014, p. 910.

[83] V. Lowe, A. Roberts, J. Welsh & D. Zaum (Eds.), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, Oxford University Press, 2008, p. 20.

[84] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, 22.

[85] D. Lapaš, *Pravo međunarodnih organizacija*, Narodne novine, Zagreb, 2008, p. 139.

[86] Conclusion 12: „1. Articles 31 and 32 apply to a treaty which is the constituent instrument o fan international organisation. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties." 'Third report on subsequent agreements and subsequent practice in relation in the interpretation of treaties' by Georg Nolte, Special Rapporteur, International Law Commission, A/CN.4/683, 213-214.

[87] C. Peters, *Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?*, Goettingen Journal of International Law 3 (2011) 2, pp. 617-642, doi: 10.3249/1868-1581-3-2-peters, pp. 618-620.

[88] B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 1274.

[89] *ibid* p. 1278.

[90] Shaw 2014, pp. 898-899. "…it established a common practice to take action with respect not only to interstate but also to internal conflicts, which had previously seemed problematic in light of the wording of Art. 39." B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, pp. 1241-1242. In the wording of The International Criminal Tribunal for the former Yugoslavia: "(…) there is a common understanding, manifested by the 'subsequent practice' of the membership of the United Nations at large, that the 'threat to the peace' of Article 39 may include, as one of its species, internal armed conflicts". *Prosecutor v Dusko Tadic*, para. 30.

Number of determinations of threat to peace and security under Article 39 in the period from 1946 to 1988 was almost negligible,[91] but even those few cases, actions on Rhodesia and South Africa, can be seen as first small steps towards the use of that power for achieving human rights objectives.[92] There were some interesting discussions, however, conducted in those early days on the nature of Article 39 and action under it: on the relation with Article 2(7) and the action of UNSC being exempted from the principle of non-intervention in matters of domestic jurisdiction, on the difference between 'potential threat' and 'real threat' and therewith related fear of too narrow an interpretation of Article 39,[93] on the lack of adjective 'international' before the noun 'peace' in the first part of Article 39 and the meaning of it.[94] There were even proposals to have criteria established for determining threats to peace, but were rejected as unacceptable attempts to give definition of 'threat to peace'.[95]

1989 marks a beginning of a new and fertile period of UNSC's activity in this domain, both qualitatively and quantitatively. One of the first examples of this fruitful and, as afterwards generally seen, successful activity was Iraq itself. In 1991, after already determined breach of peace, through Resolution 688 (1991), the UNSC condemned the repression of the Iraqi civilian population in many parts of Iraq, "the consequences of which threaten international peace and security in the region".[96] This Resolution is often cited as a milestone in the UNSC's practice with respect to humanitarian crises, given its interpretation of what constituted a threat to international stability.[97] It is seen as a significant step in the development of the proposition that the Council could and should use its Chapter VII authority to deal with internal policies that threatened a humanitarian disaster where that disaster presented some plausible threat to the peace of the region.[98]

Staying on the same path, in 1991 UNSC was deeply concerned by the fighting in Yugoslavia, which had been causing heavy loss of human life and material damage and thought that the continuation of that situation constituted a threat to international peace and security,[99] only to confirm in the following year and determine explicitly that the situation in Bosnia and Herzegovina and other parts of the former Socialist Federative Republic of Yugoslavia indeed constituted a threat to international peace and

And not only those. Throughout the years, there have been very different situations proclaimed a threat to peace and security: non-extraditing own citizens (Libya and the Lockerbie case) and non-prosecuting them (Sudan and assassination attempt on Egyptian President), presence of a former president in a region (former president Taylor in relation to Liberia and Sierra Leone) etc.

[91] In relation to the Palestine question, Southern Rhodesia, South Africa. Repertoire of the Practice of the Security Council, http://www.un.org/en/sc/repertoire/actions.shtml (8 October 2017).

[92] M. J. Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War*, United States Institute of Peace, 2006, p. 46.

[93] Related to discussion on the Spanish question and the non-determining the Franco regime a threat to peace. Repertoire of the Practice of the Security Council.

[94] Unlike the representative of the United Kingdom who thought of it as a consequence of an oversight, the representative of the United States claimed the word 'international' was in fact replaced by the word 'any' to emphasise additionally the scope of situations to come under UNSC's review. *ibid*.

[95] This was proposed by the United Kingdom while discussing the Greek frontier incidents question. France replied the following: „SC would thus be committing itself in advance, if such situation would occur, it would have to consider it threat to peace.".*ibid*.

[96] SC Res. 688 (1991).

[97] J. M. Welsh, *The Security Council and Humanitarian Intervention*, in V. Lowe, A. Roberts, J. Welsh & D. Zaum (Eds.), The United Nations Security Council and War: The Evolution of Thought and Practice since 1945, Oxford University Press, 2008, p. 538.

[98] Matheson 2006, p. 51.

[99] SC Res. 713 (1991).

security.[100] Next came the large-scale humanitarian crisis situation in Somalia in 1992 that was determined to be a threat to peace with the explanation that "the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security".[101] The UNSC unanimously adopted resolution 794(1992) where, acting under Chapter VII, it authorised the use of all necessary means to establish a secure environment for humanitarian relief operations. This was one of the first cases where the use of force was authorised for a solely humanitarian purpose[102] and the UNSC was, alongside with voices expressing concern about it,[103] very aware of its precedent-setting nature,[104] and of beginning of new ways of adapting to new challenges.[105] International community simply could not tolerate a humanitarian disaster of the scale that was looming, and the UNSC acted.[106] Noteworthy example is also the case of Haiti in 1993, where the UNSC expressed concerns about the incidence of humanitarian crisis, including mass displacement of population, becoming or aggravating threats to international peace and security and determined that, in those 'unique and exceptional circumstances' the continuation of that situation threatened international peace and security in the region.[107] A year later, in 1994, the UNSC, deeply disturbed by the "magnitude of the human suffering", first expressed concern that the continuation of the situation in Rwanda constituted a threat to peace and security in the region[108] and later determined the existence of that threat due to "the magnitude of the humanitarian crisis"[109] authorising the use of force ('all necessary means') in order to achieve humanitarian objectives of contributing to the security and protection of displaced persons, refugees and civilians at risk, and providing security and support for the distribution of relief supplies. UNSC's reasoning followed the same line of thought in the case of Great Lakes Region, and in particular, eastern Zaire, where again, concerned by the humanitarian situation and the large scale movement of refugees and internally displaced persons, it determined the existence of a threat to peace and security in the region.[110]

[100] SC Res. 757 (1992). It is interesting to see that the UNSC had continued to determine situation in Bosnia and Herzegovina a threat to international peace and security until the present day, two decades after the end of war hostilities, and while recognizing the security environment to be calm and stable.

[101] SC Res. 794 (1992).

[102] Welsh 2008, p. 539.

[103] S/PV.3145, Provisional verbatim record of the three thousand one hundred and forty-fifth meeting, 3 December 1992, representative of China, p. 17, the President, p. 51.

[104] „…any unique situation and the unique solution adopted create of necessity a precedent against which the future, similar situations will be measured. Since the situation in Somalia is the first of its kind to be addressed by the Council, it is essential that it be handled correctly." *ibid*, representative of Zimbabwe, p. 7.

[105] *ibid*, representative of France, p. 30, representative of the United States of America, p. 36-38, representative of Hungary, p. 47-48.

[106] „Unlike the previous situation in northern Iraq, the Somali situation did not present any immediate credible threat of interstate armed conflict. The judgement that the situation was a threat to the peace was based, rather, on the feared destabilizing effect on internal peace and order in neighbouring countries of massive refugee flows and uncontained civil conflict. But without doubt, the primary objective and motivating factor behind the use of Chapter VII was not the threat to peace as such, but the threatened loss of hundreds of thousands of Somali lives." Matheson 2006, pp. 53-54.

[107] SC Res. 841 (1993).

[108] SC Res. 918 (1994).

[109] SC Res. 929 (1994).

[110] SC Res. 1078 (1996).

Humanitarian reasons where underlying the determinations of a threat to peace and security in the cases of Sierra Leone,[111] Afghanistan,[112] East Timor,[113] Kosovo.[114]

Even though, initially, the UNSC framed such interventions as exceptional measures, and non-precedent setting, by the end of the 1990s it had become more confident in its expanded definition of threats to international peace and security, in particular in treating human rights as an integral part of the definition itself of international peace and security.[115] Thus, the change of language from stressing the unique and non-precedent setting nature of the SC's actions, to relying on the Charter, presents a clear move towards establishing consistent and reliable practice of intervening for humanitarian reasons that would serve the purpose of completing the scant written rule. This was also in line with the growing awareness of the concept of 'human security',[116] which other actors also dealt with. In his report to the UNSC,[117] Secretary-General Kofi Annan insisted that "massive and systematic breaches of human rights law and international humanitarian law constitute threats to international peace and security", thereby demanding the attention and action of the UNSC (including, if necessary, enforcement under Chapter VII). He also recalled instances from 1990s (such as Iraq and Somalia) where, he argued, such a precedent had been established. This call for greater attention and action was reinforced by Member States, who emphasised that because 'human security had become synonymous with international security', the principles of state sovereignty and non-interference, while still applicable, had certain qualifications."[118] UNSC itself responded by underlining its commitment to human security in Resolutions 1265,[119] 1296,[120] 1674,[121] 1738,[122] and 1894,[123] by affirming the view that "the deliberate targeting of civilians and other protected persons, and the commission of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict,

[111] „violence and loss of life…, the deteriorating humanitarian conditions", SC Res 1132 (1997).

[112] SC Res. 1267 (1999).

[113] In the case of East Timor there was an extenuating circumstance of Indonesian consent for the intervention. Welsh 2008, pp. 550-551.

[114] Judge Cançado Trinidade devoted almost in entirety his separate opinion in the Kosovo Advisory Opinion to underlining the element of humanitarian crisis that propelled the activity of the UNSC in the case, reflecting thus new directions of development of international law, its humanization. ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403, Separate Opinion of Judge Cançado Trinidade.

[115] Welsh 2008, p. 538. On the extended interpretation of 'threat to the peace': J. E. Alvarez, *International Organizations as Law-makers*, Oxford University Press, 2005, pp. 171-172. J. Delbrück, *Right v. Might – Great Power Leadership in the Organized International Community of States and the Rule of Law*, in Verhandeln für den Frieden Negotiating for Peace Liber Amicorum Tono Eitel, Springer, 2003, pp. 23-40, p. 29. C. Amorim, *Effectivness and Legitimacy of the United Nations Security Council: A Tribute to Tono Eitel*, in Verhandeln für den Frieden Negotiating for Peace Liber Amicorum Tono Eitel, Springer, 2003, pp. 5-18, p. 14. G. Wilson, *The United Nations and Collective Security*, Routledge, pp. 34-35. Matheson 2006, pp. 62-63.

[116] B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, pp. 1284-1285.

[117] S/PV.4130 4130th meeting, 19 April 2000, meeting record.

[118] Welsh 2008, p. 548.

[119] SC Res. 1265 (1999).

[120] SC Res. 1296 (2000).

[121] SC Res. 1674 (2006).

[122] SC Res. 1738 (2006).

[123] SC Res. 1894 (2009).

may constitute a threat to international peace and security".[124] Such practice is even seen, by High-level Panel on Threats, Challenges and Change as an emerging norm that there is a collective international responsibility to protect,[125] exercisable by the UNSC authorising military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[126] This was in fact the finding of, for that matter specifically established, International Commission on Intervention and State Sovereignty,[127] which set up a list of principles for military intervention[128] needed in such cases, resembling to those of classic *bellum iustum*, bestowing upon the UNSC the role of only right authority for authorising such intervention. 2005 World Summit reached similar conclusion declaring preparedness of the international community to take collective action through the UNSC and under the Chapter VII of the Charter for the purpose of protecting populations from genocide, war crimes, ethnic cleansing and crimes against humanity when national authorities are failing in that themselves.[129] Its specification 'on a case-by-case basis' may be seen by advocates of UNSC's freedom of action as confirmation of non-existence of obligation to act, but it actually only relies on the fact that non-existence of criteria for determining threats to the peace and security demands special approach in every case as opposed to standardised one, that was never accepted, not at the stage of drafting the Charter nor as later attempts.

The understanding of what can constitute a threat to international peace and security continued to develop thereafter. Terrorism itself, or more precisely international terrorism, was declared a threat to international peace and security by Security Council Resolution 1368 (2001) and was the subject of many other resolutions adopted under Chapter VII in the years to come. It thus became one of generic threats to international peace and security,[130] next to Africa's food crisis, proliferation of weapons of mass destruction, AIDS/HIV.

Why, then, having in mind this two and a half decade long practice, was the same not done in 2014 in Iraq, when the situation on the ground included an enormous number of displaced persons (over two million), tens of thousands of killed and injured civilians, genocide, war crimes, and terrorism, and the government, as in the case of East Timor, was in want of help? Indeed, the UNSC has acknowledged all

[124] The subsequent three resolutions on the protection of civilians in armed conflict, Resolution 2175(2014), Resolution 2222(2015) and 2286(2016) dealt only with certain groups of civilians (medical and humanitarian personnel and media workers).

[125] According to A. Peters, UNSC has already endorsed the responsibility to protect, in its Resolutions 1970, 1973 and 1975. This principle has, however, not yet become fully-fledged legal principle and not being such, it cannot yet lead to UN's responsibility of committing an illegal act in the case of inaction. A. Peters, 2011, pp. 15, 52.

[126] Report of the Secretary-general's High-level Panel on Threats, Challenges and Change, 'A more secure world: Our Shared Responsibility', 2004, United Nations, www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf (10 September 2017).

[127] The Report contained conclusion about the existence of international responsibility to protect in cases where a population is suffering serious harm, as a result of war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert that harm. 'The Responsibility to Protect', Report of the International Commission on Intervention and State Sovereignty, 2001, XI, http://responsibilitytoprotect.org/ICISS%20Report.pdf (10 September 2017)

[128] Just cause, right intention, last resort, proportional means, reasonable prospects, right authority. *ibid*, XII.

[129] GA Res. 60/1, 16 September 2005, p. 30.

[130] Such development may not be widely acceptable though: "Despite obvious functional benefits, the move towards legislation goes well beyond the role contemplated for Chapter VII action in the initial conception of the Charter. The Charter does not assign legislative powers to any organ and only grants SC mandatory powers for action in specific crises, not for addressing generic threats through general norms." B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 1253.

this.[131] But the most important decision – the one of declaring this situation a threat to the peace, and acting upon it by using force (i.e. authorising Member States to use all necessary means to restore international peace and security in the area[132]) as the only measure adequate to face the terrorists and the threat they represented – was never adopted. In the absence of such a decision, not even an *ex post* authorisation endorsing action already in existence (of the USA and its allies) via a subsequent resolution was possible. Such inaction deviated from the UNSC's previous practice, wherein very similar situations were pronounced a threat to international peace and security. The consistency of proclaiming internal conflicts with large humanitarian crisis element a threat to peace and security was present and undisputable within UNSC's practice ever since its post-Cold War zestful awakening, followed by awareness of its existence.[133] As Alvarez puts it, even though some would not agree with seeing UNSC's enforcement measures as 'precedents', it is a known fact that prior practices within organizations are often a reliable guide to future actions, imposing on those resisting such action the burden of showing why something was permissible previously and is later unwise.[134] UNSC's action under Article 39 in the sense of determining threats to peace and security in cases of humanitarian crises was abundant, consistent and undisputed (yes, there were reservations in the form of stressing the uniqueness of situations, but there were no objections in the form of finding human sufferings unworthy of proclamation a threat to the peace) leading thus to the conclusion that established practice has emerged out of it. *Opinio iuris* of such quazi-customary law is not difficult to determine, as the established practice is based on the secondary law of the organization,[135] in this case on the binding resolutions of the UNSC, where, based on Article 25 of the Charter, there can be no protests. International Law Commission, though recognizing it as at least a supplementary element of the law of an international organization,[136] quite limits the scope of influence of the established practice, finding it related only to the internal operation of the organization and thus being capable of giving rise only to a 'kind of customary law of the organization, formed by the organization and applying only to the organization', without really being relevant to the formation and identification of customary international law.[137] It is difficult to keep the internal-external division when it comes to activities of the UNSC, since the internal rules made and applied by that organ indeed have a normative spill-over effect which reaches beyond the internal sphere of the UN.[138] The line between internal and external law-making is indeed fading,

[131] In the preamble to the SC Res. 2169 (2014), in the Statement by the President S/PRST/2014/20, in meetings, in listening to regular reports of the Special representative for Iraq.

[132] Under Chapter VIII of the Charter the UNSC is authorised to use regional arrangements or agencies for enforcement action under its authority. Here, however, a will and determination of such subjects to act would be a precondition for the UNSC's use of them. Since the (in)action of the UNSC is the focal point of this expose, no further attention is given to regional arrangements or agencies, as there have been none that the SC would in this case prevent in action by its passivity.

[133] During the discussion on the situation in Myanmar and as a response to China's claim that the situation should not even be discussed as it was an 'internal affairs of the country', the USA replied: „…since the adoption of resolution 688(1991) dealing with the refugee flows from Iraq after the first Gulf war, the Council had considered similar matters as threats to international peace and security,", Repertoire of the Practice of the Security Council.

[134] Alvarez 2005, p. 194.

[135] C. Peters 2011, p. 631.

[136] 'Third report on subsequent agreements and subsequent practice in relation in the interpretation of treaties' by Georg Nolte, Special Rapporteur, International Law Commission, A/CN.4/683, p. 31.

[137] Third report on identification of customary international law by Michael Wood, Special Rapporteur, A/CN.4/682, pp. 49-50.

[138] J. Wouters, P. De Man, *International Organizations as Law-Makers*, Working Paper No. 21 – March 2009, Leuven Centre for Global Governance Studies, p. 8.

since, at present day, most decisions of international organizations have both internal and external normative impact.[139]

3.2. The UNSC's Inaction as an Internationally Wrongful Act

The question that rises next is could the UNSC, *i.e.* the UN as a subject of international law, be held in breach of Articles 24(1) and 39 by not acting upon them.[140] As mentioned before, Article 39 lacks any sanction that would make the imposition of direct consequences for action contrary to its disposition almost impossible. However, with the opinion that the UNSC is not *legibus solutus*, it is appropriate to turn to the DARIO and to assess whether under these secondary rules, created less as a codification (due to limited practice) and more as a progressive development,[141] the UN could be considered responsible for an internationally wrongful act due to the UNSC's (in)activity in view of Article 39 of the Charter, primary rule of international law binding it.[142] Draft Article 4 enumerates two elements of an internationally wrongful act of an international organisation: that the conduct consisting of an action or omission is attributable to that international organisation, and that the conduct constitutes a breach of an international obligation of that organisation. International obligation, as in the case of State responsibility means an obligation under international law regardless of the origin of the obligation concerned.[143] In this case, the obligation is imposed by a multilateral international treaty, which also happens to be the organisation's constituent instrument, the Charter.

The conduct at issue is determining whether the situation in Iraq is a threat to international peace and security and undertaking activities necessary to restore the peace and security. As this action never took place, the conduct here takes the form of an omission. Omission, as such, is not easy to identify, since it is not susceptible to any material concretization. It corresponds to an abstention, an instance of inaction by an international actor; however, in contrast to those two terms, the word 'omission' presupposes to a certain extent an obligation to act which has not been fulfilled.[144] As for the conduct of UNSC being attributable to the UN, "normative conduct of the SC will always be directly attributable to the Organization as conduct undertaken by one of its organs".[145] With respect to the second element, Draft Article 10(1) offers the grounds for determining the existence of a breach of an international obligation: "There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned." One of the UN's main obligations is precisely to

[139] Ibid.

[140] „On the premise that the Security Council acts within the realm of law and that its decisions are subject to legal limits, there is no reason to desist from attaching legal consequences to the Council's omission to take a decision regarding international peace and security." B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 773.

[141] General commentary, Report of the International Law Commission, General Assembly Official Records Sixty-sixth session, Supplement No 10 (A/66/10).

[142] Simma and others do not share this view. Exactly the opposite, they claim that „it is clear that the notion of responsibility in Art. 24 does not relate to secondary obligations in the sense of the ILC Draft Articles on the International Responsibility of Organizations, which arise in the event of a breach of primary norms of international law". They do allow that the mentioned 'responsibility' implies a legal requirement to act. B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 766.

[143] General commentary, Report of the International Law Commission, General Assembly Official Records Sixty-sixth session, Supplement No 10 (A/66/10) , p. 99.

[144] F. Latty, *Actions and Ommissions* in J. Crawford, A. Pellet and S. Olleson (Eds.), The Law of International Responsibility, Oxford University Press, 2010, p. 357. Elaraby finds a 'benign neglect' a deviation from the rule of law. Elaraby 2003, p. 56.

[145] Tzanakopoulos 2011, p. 30.

maintain international peace and security, and to that end, to take measures for the prevention and removal of threats to the peace (Article 1 of the Charter). In not realizing this obligation, the UN's conduct was evidently not in conformity with the requirements of its foundational treaty, and was therefore, following Draft Article 10, in breach of the UN's international obligation. Both elements conditional for the existence of an internationally wrongful act appear to be present in this case.

As admitted in the General commentary itself, the provisions of the DARIO do not necessarily yet have the same authority as the corresponding provisions on State responsibility, and their authority will depend upon their reception by those to whom they are addressed. But even if there were no DARIO, if there were no notion of responsibility of international organisations, and no firmly established practice there would still be primary rule of international law, embodied in Articles 24(1) and 39 of the Charter, quite expanded by unquestionable subsequent practice and thus allowed to be interpreted wider than initially meant, that has remained unenforced. And if that rule is seen as an obligation, which is an assertion of this paper, then there was indeed a case of breach of a norm of international law. Simma and others, while not accepting the subsuming of UNSC's (in)actions under Articles 24(1) under the scope of the DARIO, admit that, with UNSC's responsibility being instrumental in realizing the overall objectives of the UN, that organ could be held accountable (not only politically but also legally) for not discharging its responsibility.[146] In not obeying the command directed to it in Article 39 of the Charter by not determining the existence of a threat to peace, the UNSC also failed in taking measures to restore peace and security. (Though its duty was not to succeed but to try, as its obligation is not an obligation of result but of conduct.)[147] In Iraq there has been no peace or security for the last few decades. Nor has there been in its neighbouring countries (most notably Syria). The consequences of this were death and misery on a level of the human individual, and the existence of an unenforced legal norm on the level of international law. Bearing in mind the definition of enforcement, one can conclude that the normative integrity of international law system was not secured as its normative prescriptions (provisions of the Charter) were not executed and the system has failed in reacting to the behaviour contrary to that prescribed.

All are aware that the UNSC is a political body. But it was conceptualized as such from the beginning, at the same time as its obligations were formulated. If its nature was to be completely incompatible with its duties, it is safe to presume that the drafters of the Charter, the majority of Permanent Members of the UNSC, would have conceived it differently. Since all agree that the task is not to find alternatives to the UNSC as a source of authority but to make it work better that it has,[148] focus should be on making its actions and its policy on the circumstances in which it will and will not act consistent, or at least rational and defensible, since its inconsistency hurts the view of justice (not treating like cases alike) and the rule of law (impartial administration of justice), and ultimately deprives it of credibility as the guarantor of the rule of law in international society.[149] And as the protector of peace and security.

[146] Since they do not see the UNSC's responsibility to maintain peace and security as hard-and-fast-obligation under international law, at least not for the moment, they also do not see the UNSC's failure in taking up its responsibility as constituting international wrongful conduct under the law as it stands now. They do, however, envisage, the UNSC's responsibility hardening into a real legal obligation of conduct which could, then, be violated by UNSC's passivity or inadequate reaction, constituting thus an internationally wrongful act of the UN. B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, pp. 772-775.

[147] Ibid p. 774.

[148] 'A more secure world: Our Shared Responsibility', 2004, p. 61.

[149] V. Lowe, A. Roberts, J. Welsh & D. Zaum (Eds.) 2008, p. 36.

4. The Role of the Rest of the United Nations System

The primary responsibility for the maintenance of international peace and security does rest upon UNSC, but it is not exclusive. As ICJ puts it, the Charter makes it abundantly clear that the GA is also to be concerned with international peace and security.[150] After all, this universal body representing (almost) every State in the world today has a unique legitimacy that should be used for reflecting all the contemporary challenges of the international community and for approaching in an active manner the most compelling issues of the day.[151] There was nothing preventing GA from discussing the matter (Article 10) and calling the attention of the UNSC to it (Article 11), thereby exercising more pressure and, in a sense, 'extorting' the UNSC's reaction. According to Provisional rules of procedure of the Security Council,[152] the President shall call a meeting of UNSC if the GA makes recommendations or refers any question to the UNSC under Article 11(2) of the Charter.[153] Throughout its 68th and 69th session, covering the calendar year 2014, the GA nevertheless failed to do so. It failed to put the suffering of Iraq on its agenda and thus to help, or at least try to help, diminish it.[154] There were times when the GA, more interested in keeping international peace and security, devised means to act beyond its Charter authorities[155] while in this case it never consumed the basic at its disposal.

The Secretary-General is also an influence, if not a 'check',[156] on the UNSC's authority for keeping peace and security. Under Article 99 of the Charter, the Secretary-General has "formidable, but hitherto

[150] ICJ, *Certain Expenses of the United Nations* (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151., p. 163.

[151] 'A more secure world: Our Shared Responsibility', 2004, pp. 77-78.

[152] Rule 3, Provisional rules of procedure of the Security Council.

[153] „The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

[154] There were, fortunately, those who did not fail in performing their functions. Even though they did not concern the highest matter of peace and security, their endeavours need to be at least mentioned, if not for the recognition of work on those issues, then at least out of sheer respect for the devotion of individuals working under life-threatening conditions. Such work includes: UNICEF and the World Health Organisation (WHO) supporting the Iraqi Ministry of Health on a mass polio immunization campaign, UNICEF delivering assistance to internally-displaced people primarily through water distribution and sanitation programs, the WHO providing medicines and medical supplies, supporting health mobile clinics, and helping to strengthen disease surveillance systems, the UN refugee agency providing essential aid such as tents, mattresses, water jugs, hygiene kits and other emergency items, the International Organisation for Migration providing Iraqis with basic help such as blankets, mattresses, storage bins, kitchen cookware and toiletry items, the UN Development Program providing legal aid to refugees and internally displaced persons, helping local authorities maintain environmental sanitation in schools and communities which host large numbers of internally displaced persons, the World Food Program and the Food and Agriculture Organisation addressing food insecurity. These activities deserve praise and respect.

[155] The 1950 GA resolution 'Uniting for Peace' gives its author power when "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 in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression" to "consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security". "…the International Court of Justice in Certain Expenses clarified that the power of the General Assembly to act in the maintenance of international peace and security was a residual one, and did not include 'coercive', preventive or enforcement measures under Chapter VII." Schott 2008, p. 65.

[156] Ibid pp. 37-38. „…we are grateful for the promptness, indeed urgency, with which he has brought to the attention of the Security Council the grave and tragic dimension the problem of Somalia has recently assumed.", S/PV.3145, Provisional verbatim record of the three thousand one hundred and forty-fifth meeting, 3 December 1992, representative of Zimbabwe, p. 6.

much underutilized authority"[157] to "bring to the attention" of the Council "any matter which in his opinion may threaten the maintenance of international peace and security". Such action would, according to Rule 3 of Provisional rules of procedure of the Security Council, entail calling an UNSC meeting. In his capacity as the 'chief administrative officer' of the UN, performing functions entrusted to him by, the Security Council and other organs, the Secretary-General has occasionally played a significant role in influencing UNSC's Article 39 determinations. For instance, in Somalia, Boutros Boutros-Ghali's reports persuaded the Council that an Article 39 determination was warranted given the inadequacy of non-military measures and the "repercussions of the Somali conflict on the entire region".[158] The Secretary-General has also acted in matters of international peace and security without the invitation of the UNSC. In his first report to the Council on troop deployment in the Congo in 1960, Dag Hamarskjöld went even further, contending that the deteriorating situation in the country was "a threat to peace and security justifying United Nations intervention".[159] In 2014 not only did the Secretary-General not find the situation in Iraq sufficiently serious to bring it to the attention of the UNSC as a potential threat to international peace and security, but also failed to make even one special report devoted specifically to the situation in Iraq.[160]

The UN's other organs have little in the way of legally-ordained recourse in checking Council action under Article 39.[161]

5. Conclusion

From the beginning of 1990s onwards, the UNSC has been expanding the scope of application of Article 39 of the Charter by including more and more situations into those to be considered a threat to international peace and security, most notably internal armed conflicts, humanitarian crises and terrorism. When such a situation occurred in Iraq, UNSC failed to react even at the peak of crisis, in 2014. Despite the calls of the world public to do so, UNSC never determined that situation as posing a threat to peace and security and, consequently, it never provided much needed military assistance to the Government of Iraq in freeing its territory of terrorist occupation and saving lives of its civilian population. It also never gave subsequent authorisation of military assistance granted to Iraq by individual Member States. Though clearly acknowledging the gravity of the situation, and even being aware of the existence of war crimes, the UNSC was never even close to acting under Article 39 of the Charter. It never convened even only to discuss whether to determine that the situation constituted a threat to international peace and security, or the measures needed to restore a peace that had not only been threatened, but lost. With Article 24(1) of the Charter clearly indicating existence of duties for the UNSC ('obligations' in Russian version) for the purpose of achieving the realisation of its primary responsibility, maintenance of international peace and security, and with subsequent practice, in the application of Article 39, built up to established practice showing clear extension of the range of situations to be classified as a threat to peace and security, UNSC has, by its inaction, found itself not only in a state of utter political and moral insensitivity, but more importantly, in breach of this primary

[157] 'The Responsibility to Protect' 2001, p. 35.

[158] Schott 2008, pp. 37-38.

[159] Ibid pp. 37-38.

[160] The list of Reports submitted by / transmitted by the Secretary-General to the Security Council in 2014, http://www.un.org/en/sc/documents/sgreports/2014.shtml (10 April 2017).

[161] Schott 2008, p. 38.

rule of international law. Article 39 of the Charter, whose clear obligation-imposing wording, though without hypothesis and sanction, read together with Article 24(1), as well as with Article 1 on the purposes and principles of the UN, leaves no place to believe that action based upon it is purely discretionary and non-obligatory. However imperfect a legal rule may be, conduct contrary to its disposition is still a violation of that rule. According to the DARIO, whose nature is of a progressive development mostly, by such omission of its organ, the UN would in fact be responsible for internationally wrongful act. Subsuming UNSC's (in)action under the DARIO is not, for the moment, widely accepted, nor even seeing the responsibility for maintaining international peace and security as the UNSC's legal obligation, though positions indicate change *de lege ferenda*.[162] In order to have goals of a 73-year-old treaty more readily achievable, and for the wellbeing of the 'succeeding generations', that change better happen soon.

Though the 2003 aggression against Iraq is seen as a damage to the UN normative and institutional framework,[163] it would have been better for its role and reputation had something similar taken place in 2014. Had it even been blocked by a Permanent Member's veto, no one could accuse it of not acting in accordance with international law.

Despite having had the chance to act, the GA and the Secretary-General unfortunately only magnified the UNSC's aloof position, thereby attributing it to the UN more generally. Had there been no involvement by various international organisations focused primarily on humanitarian assistance, it would have appeared as if the international community (international organisations) was completely indifferent as to what would become of one State and of all its people.

[162] See notes 125 and 146.

[163] I. Johnstone, *US-UN Relations after Iraq: The End of the World (Order) As We Know It?*, European Journal of International Law, Vol. 15 No. 4, 2004, pp. 813-838, p. 833.