THE SECURITY COUNCIL AND ARTICLE 39 OF THE UN CHARTER

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**The Security Council and Article 39 of the UN Charter**   
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| **Table of Abbreviations:** | |
| --- | --- |
| ECMFM | European Common Market Foreign Ministers |
| HIV | Human immunodeficiency virus |
| ICC | International Criminal Court |
| ICISS | International Commission on Intervention and State Sovereignty |
| ICJ | International Court of Justice |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for Former Yugoslavia |
| NATO | North Atlantic Treaty Organization |
| PLO | Palestinian Liberation Organization |
| R2P | Responsibility to Protect |
| SC-R | Security Council - Resolution |
| UNGA-R | United Nations General Assembly - Resolution |
| UNSCOM | United Nations Special Commission |
| UNSC-R | United Nations Security Council - Resolution |
| UNSG | United Nations Secretary General |
| USSR | Union of Soviet Socialist Republics |

**Introduction**

The UNSC is one of the six organs of the UN as stipulated by article 7 of the UN Charter. Its main jurisdiction and mandate is based upon the idea of maintaining and preserving the international peace and security.This idea finds its roots and basis in chapters VI and VII of the UN charter where the former tackles the «Pacific Settlement of Disputes» through soft means and authorizing measures by not resorting to force, and the latter gives the UNSC the right to take a further step if the SC considers that the measures taken by article 41 are inadequate or proved to be inadequate; thus authorizing the use of force necessary to maintain and restore international peace and security.

The article that paved the way for the UNSC’s flexibility in choosing to take or not to take measures to maintain and preserve the international peace and security is article 39 of the UN Charter. It provided the SC with discretionary powers to determine whether or not in a specific case there exists any threat to the peace, breach of the peace, or act of aggression and accordingly make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 of the Charter.Wood states that «the most two common instruments to issue from the council are resolutions and presidential statements»[[1]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn1" \o ") where the former is the Council’s traditional instrument; binds the states concerned according to article 25 of the UN charter; and is used for formal actions and more significant matters and the latter requires consensus of the SC members; is more ephemeral; and used when the Council wants to comment less formally on a particular development.

Consequently, many questions are raised about the effectiveness of the UNSC decisions on determining whether a case constitutes a threat or breach to the international peace and security. How these decisions, whether resolutions, presidential statements, or recommendations are taken and on what basis? Is the SC immune to political agendas or it is amenable to political wills of its permanent members while adopting a resolution? Who decides whether there is a breach of the international peace and security and on what criteria, if any, and what are the measures taken? Are these measures also taken based on the SC’s discretionary powers and resolutions or based on unilateral interventions?

This essay tries to answer the abovementioned questions briefly due to the space limit. In doing so, empirical critical analysis of the UNSC’s conduct and behavior will be adopted throughout the essay in order to draw concepts and have a clearer picture of the discretionary powers of the SC in defining and deciding which of the cases constitute a threat to the international peace and security on the one hand and the measures authorized by the SC to maintain and restore them on the other hand. Therefore, this essay is divided into three basic parts each of which entails some answers to the above questions. The first part is an introduction to the UNSC and its working mechanism through which the political and legal debates will be highlighted to see whether the SC has restrictions imposed by law to follow, or it has discretionary powers to decide upon each case. The second part tackles the evolution of what constitutes a threat to or a breach of the international peace and security thus widening discretionary powers of the SC by including human rights issues based on the ‘humanitarian intervention’ doctrine and the ‘R2P’ concept. The third part deals with the SC’s discretionary powers over the ICC and whether or not a specific case constitutes a threat to the peace, a breach of the peace, or an act of aggression and therefore should be referred to or deferred to the ICC. The essay then concludes with some important findings on the UNSC’s performance and suggests many steps that improve its efficiency and productivity.

**The legal vs. political debate of the UNSC’s nature**

When the UNSC takes decisions and determines a case to be a threat to the peace, a breach of the peace, or an act of aggression according to article 39 of the Charter, does it do so based on legal or political motivations and/ or basis? The answer to this question is vital to determine whether the SC enjoys flexible and broad discretionary powers since if its decisions were legally driven, then it has to abide by what the law stipulates; but if its decisions were politically driven, then it can be flexible and take decisions that put an end to the threat or breach of international peace and security of a case brought before it without being limited to the application of the law or considering previous decisions to similar cases. This brings to the fore the legal versus political nature of the SC decisions’ debate that will be highlighted in detail in this section. Therefore, this section discusses the SC’s performance during the timeline of its establishment in the aftermath of the WWII until the beginning of the 21st century. In doing so, this section highlights the most important events that challenged the unity and efficiency of the SC including the Cuban Missile Crisis, the US diplomat hostages held by Iran following the Islamic Revolution in 1979, and the UNSCR 425. This section also reflects the conduct and behavior of the UNSC in defining what constitutes a threat to the international peace and security on the one hand and the measures taken according to that on the second hand.

On the matter of political aspect overcoming and superseding the legal within the UNSC, the academic literature reflects the gap between both notions. The situation is best described by the statement of the Ivory Coast ambassador to the UN while discussing the Cuban Missile Crisis in the 1960s. The Ambassador mentions that within the UNSC «if there was a dispute between a small power and a great power, the small power disappeared; if there was a dispute between two great powers, the Security Council disappeared»[[2]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn2" \o "). In other words, the political might of the great powers is superior to any consideration to law within the SC since their problems will be solved in accordance with compromises and not by resorting to law.

Moreover, within this context, it is worth noting what the Brazilian representative to the UNSC stated during the deliberations at the SC to adopt a resolution dealing with the Corfu Channel dispute that recommended both parties to refer the case to the ICJ (UNSCR 22) since it took place at the early times of the SC and questioned the political and/ or legal structure of the organ. Before supporting the resolution, he stated that «the Security Council in this case had been asked to function as a tribunal, which it was not»[[3]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn3" \o ") concluding that the SC’s function is political and not juridical. Similar stance was adopted by the Egyptian representative to the UNSC while discussing the Suez Canal’s Crisis in 1947 where he stated that he’s not relying on the juridical considerations since the Council isn’t limited to the legal aspect of a dispute brought before it[[4]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn4" \o ").

UNSCR 425 is an interesting resolution of the SC’s early days that reflects the discretionary powers of the UNSC in activating article 39, as a whole or in part, and the influence of political agendas of the SC member states on resolutions. The latter resolution was adopted due to Israel’s invasion to Lebanon in 1978 under the name of «Operation Litani», through which Israel aimed to destroy Palestinian bases located in the south of the ‘Litani river’ that were used to launch attacks against Israeli targets[[5]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn5" \o "). UNSCR 425 was cautiously worded and did not reflect any explicit reference in defining the Israeli invasion to Lebanon as being threat to peace, breach to peace, or act of aggression according to article 39 of the UN Charter. Instead, the resolution expressed in its introduction the SC’s grave concerns about the «deterioration of the situation in the Middle East and its consequences to the maintenance of international peace»and thereforethe resolution took measures to insure «restoring international peace and security»[[6]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn6" \o ") through establishing the UN Interim Force for Southern Lebanon that still operates up till now. By doing so, one can implicitly conclude that the UNSC used the second part of article 39 through taking measures in accordance to articles 4 and 42 to maintain or restore international peace and security by establishing the UN Interim Force for Southern Lebanon although without defining a timetable or a mechanism for doing so on the one hand and UNSC deliberately avoided determining the Israeli invasion as being a threat to the peace, breach of the peace, or act of aggression on the other hand. The 1978 Israeli invasion of the ‘Southern Litani River’ was followed by a bigger and wider invasion to Lebanon in 1982 where the Israeli occupiers reached Beirut, the Lebanese capital, and forced the PLO to withdraw from Lebanon. The UNSCR 425 didn’t serve its purpose because the Israeli occupiers didn’t withdraw from Lebanon as a result of implementing the resolution itself that deliberately lacked the appropriate teeth by virtue ofavoiding the use of force due to the influence of supportive policy of certain SC members towards Israeli interests. Israel kept on occupying most of Southern Lebanon for twenty two years until year 2000 where Israel was forced to withdraw from Southern Lebanon as a «default strategy»[[7]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn7" \o ") due to the armed Lebanese national resistance that targeted the Israeli occupiers and their proxies, known as the «South Lebanese Army»[[8]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn8" \o ") (SLA), and not due to the UNSCR 425 as many Israeli politicians claimed. The military operations held by the Lebanese armed resistance accompanied with psychological warfare forced Israel to re-evaluate its cost-benefit analysis in Lebanon and found out that the cost they are paying to occupy Southern Lebanon is unaffordable and much higher than the benefits they are receiving due to the excessive loss in human lives as a result of the military operations of the Lebanese resistance. Thus, the UNSCR 425 is a vital case that reflects the political nature of the UNSCRs on the one hand and the role of politics in shaping, wording, and issuing such resolutions on the other hand.

According to Higgins[[9]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn9" \o "), the emphasis on the political activity of the Security Council is used to avoid specific legal requirements. This notion was reflected in the ICJ’s ruling in the case of Libya against the USA and the UK on Lockerbie and the Pan Am bombing which resulted in limiting the judicial review over the political body. In that sense, when Libya complained to the ICJ about the USA and UK, it asked the Court to look over the legality and validity of the SC’s decisions (namely UNSCR 748). The majority of the ICJ’s judges noted that the SC’s decision was valid based on article 103 of the UN charter[[10]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn10" \o "). The situation is best described by Judge Shahabuddeen[[11]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn11" \o ") who questions if there are any limits to the Council’s powers of appreciation in characterizing a situation as one justifying the making of such decision and ends his statement by asking «if there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?» To add to the political aspect of the SC’s decisions in accordance with the flexibility characteristic of article 39 of the Charter, Sohn[[12]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn12" \o ") asserts that according to chapter VII of the Charter, the Council doesn’t need to tackle cases based on a communication by a state. He adds that «the Council is the sole judge of the timing of its intervention in any dispute»[[13]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn13" \o ") and gives some empirical examples on how the SC was passive towards specific cases in 1973 and 1983.

Bianchi[[14]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn14" \o ") criticizes the current UNSC system for lacking institutionalized framework and normative basis for its actions on the one hand and for lacking consistency, predictability and fairness on the other hand. He therefore calls the current performance of the SC in determining whether or not in a given case there exists a threat of peace, a breach of peace, or an act of aggression which consequently results inpaving the way to intervention to protect human rights as being «ad-hocism. « He then pinpoints the fact that although many of the SC’s actions were inspired by human rights protection, the SC has carefully avoided setting precedents based on that[[15]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn15" \o "). Moreover, Bianchi states that by providing ad-hoc solutions, the SC failed to accomplish its task and opened the door for unilateral intervention by states not necessarily authorized by the UNSC. He then gives many empirical examples of how the UNSC dealt with cases based on ad-hoc measures and solutions and not on normative standards and well defined grounds such as in the cases of the Iraq during the gulf war in 1990 and Kosovo in 1999. He regards both as lost opportunities to constitutionalize the SC.

In contrast to Bianchi, Osterdahl[[16]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn16" \o ") criticizes Bianchi’s criticism and therefore is in favor of the UNSC’s ad-hocismnature stating that the «ad-hocist practice of the Security Council contributes to the creation of new norms or to the modification of the old ones. «He bases his article on the performance and practice of the SC on humanitarian intervention and argues that the SC is still making law even through inconsistent or repeated practice. In doing so, she empirically analyzes the UNSCRs that authorized the use of force on humanitarian intervention starting from the end of cold war to see whether the humanitarian interventions were justified on the basis of the ‘uniqueness’ of the cases. She concludes that the SC has shifted its pre-cold war policy in exceptionalizing the situations of military interventions. But the post cold war era was marked by switching the exception into the rule through authorizing military interventions to cases not of interstate conflicts, but rather of internal conflicts of various types that was accompanied by gross human rights violations that needed to be stopped by military intervention. In doing so, the SC was cautious in labeling each and every situation as being ‘unique’ and / or ‘exceptional’ in terms of the degree of suffering of human beings on the one hand and reflecting the notion of delivering an isolated decision to a special case as an exception to the rule of ‘non-intervention’ on the other hand just to avoid setting a rule or a precedence through which it obligated itself to follow the same path when facing similar situations or cases. It is worth mentioning that starting from 1991 and according to UNSCR 688 of 5 April 1991, Human Rights violations were considered to be a threat to the international peace and therefore the SC authorized the use of force to protect human rights. Furthermore, Amaral[[17]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn17" \o ") states that there are two essential conditions for the UNSC to intervene in cases to protect human rights; the first is when «violations of human rights must be interpreted as a threat to international peace and security» where the SC has discretionary powers of interpretation of  human rights violations; The second is when «the international community intervenes only when a state fails to face the effects of a humanitarian crisis» where measures adopted should be based on chapter VII.

In the Resolutions following the UNSCR 688, Osterdahl[[18]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn18" \o ") Asserts that the SC didn’t bother to specify the uniqueness or exceptionality of cases to justify the military intervention for humanitarian reasons since «the SC does what it wants anyway. «Moreover, she argues that the «Security Council could hardly legally bind itself to act in the same way twice»[[19]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn19" \o ") and concludes that the SC will always be inconsistent but will make law.

The UNSC not only has discretionary powers to determine the situations enlisted in article 39 of the Charter on a case by case basis, but also has the discretionary power to evaluate the situations in the aftermath of a resolution following the determination of the situations enlisted in article 39 of the Charter. For instance the SC stated in one of its resolutions that «the situation in Iraq, although improved, continues to constitute a threat to international peace and security»[[20]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn20" \o ") without defining what acts exactly continued to constitute a threat to international peace and security.

Furthermore, Higgins emphasizes on the political aspect of the UNSC and the usage of law as a means to serve political ends. She therefore argues that the UNSC is a common place that parties to a dispute «use international law as a means of furthering their political case. If law is not a fig leaf to cover disagreeable political realities, it is a tactical device, a weapon in the armory of rhetoric»[[21]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn21" \o "). But even if it is so, the legal language still has to be based on legal grounds including international law and the UN charter where the justification of an action taken is acceptable by others. On the other hand, Higgins asserts that «when the reiteration of legal principles is so inappropriate to the facts, they cease to serve as a language which men can hold in common»[[22]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn22" \o ").  She derived this argument from the case of USSR’s invasion to Czechoslovakia.

Higgins acknowledges that the SC’s decisions are political but also notes that the political nature of the decisions are circumscribed by law that involves the Charter as a whole and more particularly article 1 (1). She then makes an important point based on the mandate of the SC that basically is to settle disputes and make recommendations calling this performance as «political operation within the law rather than decisions according to law»[[23]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn23" \o ") and concludes that the SC uses the law in different manner than a court since the former faces various situations that implies compromises for its role to be successful.

Another empirical example of the UNSC’s flexibility to act outside the limits of law is the UNSCR 687 through which it formulated and brought into existence the UNSCOM to handle the hunt for chemical and biological weapons that Iraq allegedly owned in the aftermath of the first gulf war of 1992 and they reported directly to the SC instead of the Secretariat[[24]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn24" \o ").

Although the UNSC as an organ has empirically shown its flexibility in dealing with certain situations, its members still do not speak with one voice and maybe they shouldn’t do so in the first place due to democratic requirements. But there are many differences in approaching the cases brought before the SC since each of its members has its own agenda deriving from its own political view. This issue of disagreement between the SC members has pushed the SC to the limits and jeopardized its existence and future so many times especially during the cold war era that was marked with so many uses of the veto power due to the Council’s division between the Western Camp, the Communist camp, and the non-aligned camp. Wood notes that «between 1946 and 1990 some 279 vetoes were cast on average seven a year»[[25]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn25" \o ") whereas the Global policy’s table[[26]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn26" \o ") reflects the fact that the USSR/ Russia (with 124 vetoes, mostly used between 1946 and 1965 when the cold war was in its climax) used its veto power the most to mainly block SC resolutions followed by the USA (with 82 vetoes). It is worth noting that the first time to use the veto power ever was by USSR in 1946 to block a resolution about «the withdrawal of British and French forces that were stationed in Lebanon and Syria»[[27]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn27" \o "). After the end of cold war, specifically between 1990 and 2008, only 19 vetoes have been used most of which by the USA (12) followed by China (4) and Russia (3). The decrease in the number of times the veto power used after the end of the cold war reflects the fact that the members of the UNSC agreed on the issues and how to deal with the cases brought before it more effectively.

Using the veto power also heated the debate over the future of the SC on the one hand and widened the gap between the liberal world and the communist world which was the outcome of the politically driven agendas of the SC members that didn’t have anything to do with its legality or international law. During the American hostages’ crisis that were held captive in Iran in 1979, the case was brought before the SC in 1980. The USSR vetoed the draft resolution and the resolution didn’t pass. Consequently, it should not have any legal value. Despite that, the US president of the time James Carter deliberately quoted the vetoed draft resolution in his announcement of the termination of the US-Iranian diplomatic ties. What was even more surprising is that the ECMFM not only quoted the vetoed resolution in April 1980, but also adopted paragraph 5 of the vetoed resolution. According to Reisman, the attitude and conduct of both Carter and ECMFM reflect the ‘majoritarian’[[28]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn28" \o ") notion within the SC since 10 out of the 15 members were in favor of the resolution and therefore this notion jeopardizes the basis of the SC since it tends to jump over the USSR’s veto[[29]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn29" \o "). Reismanthen concludes that careless language can erode the effectiveness of the veto power which is actually one of the essential pillars of the SC.

Moreover, Kunz[[30]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn30" \o ") questions the legality of the SC’s resolutions of June 25 and 27, 1950 regarding the Korean War in the absence of a permanent member. The Soviets and their allies including China, Poland, and Czechoslovakia regarded these two resolutions as being «illegal, not binding, and in violation of the charter»[[31]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn31" \o ") based on many arguments including that the USSR as permanent member wasn’t present during the voting process. Moreover, they argued that the representative of China didn’t have the authority to represent China and therefore it was considered to be absent from voting too. This resulted in adopting a resolution by the SC with the absence of two of its permanent members and therefore these resolutions are deemed to be illegal as the USSR and China argued. Kunz then concludes that these two resolutions were legal, valid, and in conformity with the Charter since the absence of a member of the SC doesn’t prevent the SC from adopting a resolution on the one hand and that the absence of a permanent member is considered to be equivalent to abstention from voting and not a veto on the other hand. The significance of these two resolutions is immense since they are the «first experiment in international enforcement action by military measures undertaken by the United Nations in the case of a breach of peace»[[32]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn32" \o ").

**New jurisdictions and mandates to the SC giving it more Discretionary Powers**

The question of the Council’s flexibility in determining a breach or threat to peace is getting more and more complicated as the Council is developing to cover new fields and its scope is widening to entail new concepts and theories that neither were covered by the Charter nor existed in the decisions of the Council in the past.

Following the fall of communism, the end of the cold war, and the break-down of the Soviet Union, new states were created that were in conflict in some instances. Yugoslavia was torn into six independent states that got into conflict later on. Eritrea seceded from Ethiopia. The world witnessed many violent events through which many people were killed by their own nations and the conflicts shifted into intra-state instead of the classical inter-state conflicts. The twentieth century resulted in the murder of approximately 170,000,000[[33]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn33" \o ") persons by their sovereign. Discrimination based on religion, race, or ethnicity has increased within a state and led in many cases to humanitarian disasters. This new status within a globalized world pushed the UN to deal with such problems that threatened, and most of the times, breached the regional and international peace, stability, and security. The UNSC had to face a stiff opposition to its interventionist approach from many states due to their classical argument of state sovereignty in accordance to article 2 (1), (4), & (7) of the UN charter. But the question remained whether human rights violations within a state’s boundaries fall within domestic jurisdiction or they elevate to the level of threats or breach international peace and security. In reply to that, the former United Nations Secretary-General Boutros Boutros-Ghali stated in his report to the UNSC in 1992 that «The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality»[[34]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn34" \o "). Moreover, the then UNSG Kofi Annan said in 1999 that «it is the peoples’ sovereignty rather than the sovereign’s sovereignty»[[35]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn35" \o ") and later developed a new doctrine of humanitarian intervention while addressing the GA of the UN through which the core interest of the UNSC was the individual sovereignty rather than the state’s sovereignty. Annan defined the individual sovereignty as «the human rights and the fundamental freedoms of each and every individual»[[36]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn36" \o "). Kofi Annan’s humanitarian intervention doctrine came into existence as a result of the UNSC’s failure to respond to the genocide of Rwanda in 1994 and Srebrenica in 1995 and Kosovo in 1999[[37]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn37" \o ") where in the latter case the NATO used force to stop ethnic cleansing without the SC’s authorization.Holzgrefe[[38]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn38" \o ") defines the term ‘humanitarian intervention’ as being «the threat or use of force across state borders by a state or group of states aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied».

Therefore, gross violations of human rights were considered to be threat to the international peace and security and the SCR 688 of 5 April 1991 paved the way for such doctrine, as explained in the previous section. Furthermore, Bosco comments on the SCR 688 and asserts that «thought not unprecedented, it acknowledged that a state’s internal policies could become the business of the Security Council»[[39]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn39" \o "). Boscois absolutely rightin his argument regarding the UNSCR 688 not being unprecedented, since the UNSC adopted previous resolutions in relation to human rights violations within the border of a sovereign state that threatens the international peace and security such as the UNSCR 418 of 1977 that imposed an economic embargo on South Africa because of its racial discrimination policy.

The humanitarian intervention issue necessitates the discussion of whether the SC should authorize it or not. This in turn instigates the argument about the legality vs. legitimacy of the humanitarian interventions. According to Curley[[40]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn40" \o "), article 2(4) of the UN Charter prohibits the unilateral usage of force by a state against another but there are two exceptions for that; one of which is to counteract military aggression; and the second is the UNSC’s authorization under chapter VII. Therefore, for a humanitarian intervention to be legal, it has to be authorized by the UNSC under chapter VII. On the other hand, even if force is used by a state or group of states without resorting to the UNSC or without the latter’s authorization, the forceful act will be illegal but it will still be legitimate since legitimacy, as Macklem asserts, is based on «ethical obligations»[[41]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn41" \o ") of states to protect human rights and not on what the UNSC may or may not say on the matter.

Following Annan’s humanitarian intervention doctrine, Canada established the ICISS that issued a report in December 2001,the title of which was «responsibility to protect». Gartner[[42]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn42" \o ") describes the R2P in terms of being the responsibility of the international community, namely the UNSC, to act against mass atrocities in a given state. But if the latter fails to do so in a reasonable time, then the R2P goes to the UNGA or to a regional or sub-regional organization and may involve the use of force. He then highlights that «R2P does not endorse unilateral action but leaves open the possibility that action does not have to be entirely dependent on Security Council authorization»[[43]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn43" \o "). The R2P was officially adopted by the UNGA world summit in 2005 to «help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity»[[44]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn44" \o "). Following the World Summit of 2005 many UNSCRs were based on the R2P including the Res 1674, 1706, 1894, and the latest UNSCR 1973 regarding the protection of the Libyan population.

The question remains whether the humanitarian intervention or the R2P is overstepping and undermining the SC, or is the latter turning its blind eye on such actions allowing them to happen and therefore implicitly authorizing them? This is a sound question stemmed from Simma’s[[45]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn45" \o ") argument of the NATO’s unilateral military action in Kosovo. Because of the Russian threat to use the Veto power, the NATO acted in Kosovo without the UNSC’s authorization. NATO justified its military actions on the humanitarian intervention doctrine after it safeguarded SCR 1199 in Sep 1998 under Chapter VII of the Charter which determined that «the deterioration of the situation in Kosovo constituted a threat to peace and security in the region»[[46]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn46" \o ").

**The Security Council’s Discretionary Powers and the ICC**

The ICC was established in July 1998 when «120 nations adopted the Rome Statute, the legal basis for establishing the permanent [ICC]»[[47]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn47" \o ") which entered into force in July 2002 after being ratified by 60 states. Article 5 of the Rome Statute names the crimes under the court’s jurisdiction as being the crime of genocide; crimes against humanity; war crimes; and the crime of aggression. Moreover, article 13 stipulates that the court could practice its jurisdiction regarding the mentioned crimes if such crimes are «referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations».  More importantly, article 16 stipulates that the ICC must refrain from investigating or prosecuting a case for 12 months if the UNSC under chapter VII adopts a resolution in that regards that can be renewed for a similar period.

Therefore the Security Council enjoys ‘power over’ the ICC by either referring or deferring a case to, it both of which have to be based on resolutions in accordance to chapter VII of the Charter. In doing so, the UNSC has massive discretionary powers since it has the necessary flexibility to decide or not to decide the instigation of an investigation or prosecution in a given case. Abba and Hammer[[48]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn48" \o ") doubt the independence of the ICC and highlight that the SC retains a «formal stop and go power over investigations and trials through article 16 of the Rome Statutes. «[[49]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn49" \o ")So far, the UNSC has referred two cases to the ICC, namely Darfur due to UNSCR 1593 of 2005 and Libya due to UNSCR 1970 of 2011.It is worth noting that the UNSCR 1593 was adopted «by a vote of 11 in favour with 4 abstentions (Algeria, Brazil, China, and United States)»[[50]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn50" \o ") whereas the UNSCR 1970 was adopted unanimously.[[51]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn51" \o ") Even the USA voted in favor of the latter resolution which was an unprecedented action.

In reflecting the political aspect of the UNSCRs’power in referring cases to the ICC and therefore reflecting the fact that the UNSC has discretionary powers in determining what constitutes human rights violations that threatens the international peace and security, the former chief Prosecutor for the ICTY and the ICTR Louise Arbour similarly acknowledged that:

«…international criminal justice cannot be sheltered from political considerations when they are administered by the quint essential political body: the Security Council. I have long advocated a separation of the justice and political agendas, and would prefer to see an ICC that had no connection to the Security Council. But this is neither the case nor the trend»[[52]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn52" \o ").

What is Ironic about the relation between the ICC and the UNSC is that the USA, being one of the permanent members of the UNSC, still didn’t ratify the Rome statute. The USA instead has an immense allergy towards the ICC because of its ‘war on terror’ on the one hand and the threat that the ICC imposes on the USA to try its soldiers before the ICC for committing international crimes on the other hand. The US negative stance towards the ICC was reflected publicly in the statement of the U.S. ambassador for war crimes issues at the UN while discussing the referral of the Darfur case to the ICC where he said that «we [the Americans] don’t want to be party to legitimizing the ICC».[[53]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn53" \o ")

The US responded to the ‘threats’ imposed by the ICC by adopting the American Service members’ Protection Act of 2002 and simultaneously signing impunity agreements with states signatory to the Rome statute to guarantee the immunity of its soldiers. The USA furthermore threatened to reject all peacekeeping operations by using its veto power in the UNSC unless the latter secured «blanket immunity»[[54]](https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter" \l "_ftn54" \o ") for American soldiers.The USA pressed on the SC to get perpetual impunity from investigation or prosecution by the ICC to nationals of states that have not ratified the Rome Statute, when such persons are involved in operations established or authorized by the United Nations. Although the USA used broad terms to include nationals of states that are not party to the ICC statute while striving to ensure blanket immunity to them, its main concern was to ensure that American soldiers will never be brought before justice. Therefore, the UNSC yielded to the American pressurewhichresulted in the adoption of the UNSCR 1422 in July 2002 that was renewed for another year in June 2003 (Resolution 1487). On 23 June 2004, due to the pressures practiced by the international community and other political key players, the USA withdrew its attempt to renew Resolution 1487 for another year, thus ending the blanket impunity enjoyed mainly by its nationals i.e. soldiers.

**Conclusion:**

Although the Security Council was established in accordance with law, namely the UN’s charter, but the Council itself is a political body that is driven by political wills and agendas of its members. Accordingly, law isn’t the only source for the Council’s behavior and performance; it is rather one of many. Since the main objective of the SC is to maintain international peace and security, it therefore should follow the requirements of each case and act accordingly without limiting itself to the necessities neither of the international law nor to its previous decisions and resolutions while discussing similar situations. The UNSC has widened the scope of what constitutes a threat to or a breach of the peace and security and therefore it followed an inclusion policy of many concepts including human rights issues which adds to its discretionary powers not only to decide on what constitutes a threat to the peace, a breach of the peace, or an act of aggression, but also on what constitutes human rights violation worthy of the UNSC protection. That is in addition to deciding on whether in a given case there is a human rights violation or not. For the UNSC to function properly within the current context, it has to base its decisions on political perspective and seek consensus or, at least, set a minimum understanding between its members to avoid using the veto power which, in case it is used, will obstruct many solutions and resolutions tackling human rights issues. Although the UNSC’s decisions have some minor legal aspects, the essence and core of such decisions almost certainly are politically driven, thus giving the SC discretionary powers to act in harmony with article 31 of the UN Charter. Unless the UN Charter is amended to include other fields within the jurisdiction of the SC, the latter is self-evolving and is using its discretionary powers to act in accordance with and implement article 31 of the Charter into new fields such as the UNSCR 1308 of 2000 and UNSCR 1983 of 2011 regarding considering the effect of the HIV epidemic on the peace and security in Africa.

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**مجلس الأمن والمادة 93 من شرعة الأمم المتحدة**

مجلس الأمن في الأمم المتحدة هو إحدى الهيئات الست الأساسية المكونة لمنظمة الأمم المتحدة وفقًا للمادة السابعة من شرعة الأمم المتحدة. سلطته ومهمته الأساسية تقوم حول فكرة صون الأمن والسلام الدوليين والمحافظة عليهما.  
طُرحت عدة أسئلة حول فعالية قرارات مجلس الأمن في تحديد ما إذا كانت قضية ما تشكل تهديدًا أو خرقًا للأمن والسلام الدوليين أم لا. كيف تُتخذ هذه القرارات أو البيانات الرئاسية أو التوصيات وعلى أي أساس؟ هل مجلس الأمن محصّن حيال الأجندات السياسية أم أنه معرّض لضغوط الإرادات السياسية للأعضاء الدائمي العضوية عند اتخاذ القرارات؟ من يقرر ما إذا كان هناك خرق للسلام والأمن الدوليين أم لا ووفقًا لأي معايير وما هي الإجراءات التي تُتخذ؟ هل تُتخذ هذه الإجراءات بالاعتماد على القوى الاستنسابية في مجلس الأمن أم أنها تقوم على تدخلات أحادية الجانب؟  
هذا المقال يحاول الإجابة عن هذه الأسئلة المطروحة باختصار نظرًا إلى ضيق المساحة المتوافرة. عبر قيامنا بذلك، سيتم اعتماد التحليل النقدي التجريبي لسلوكيات مجلس الأمن وتصرفاته خلال هذا المقال بهدف رسم مفاهيم وتكوين صورة أوضح عن القوى الاستنسابية في تحديد وتقرير القضايا التي تشكل تهديدًا للسلام والأمن الدوليين من جهة والإجراءات التي يسمح بها مجلس الأمن للحفاظ على الأمن والسلام الدوليين والمحافظة عليهما من جهة أخرى.  
لذلك فإن هذا المقال ينقسم إلى 3 أجزاء رئيسة تقدم بعض الإجابات على الأسئلة المطروحة. الجزء الأول عبارة عن مقدمة حول مجلس الأمن في الأمم المتحدة وعن آلية العمل فيه وسيتم التركيز من خلال هذه المقدمة على النقاشات السياسية والقانونية لنرى ما إذا كان لدى مجلس الأمن أي ضوابط يجب اتباعها بحسب القانون أم أن ثمة قوى استنسابية تُتخذ بواسطتها القرارات في كل قضية.  
الجزء الثاني من المقال يتطرّق إلى تطوّر ما يشكّل تهديدًا أو خرقًا للأمن والسلام الدوليين ما يزيد بالتالي من القوى الاستنسابية لمجلس الأمن عبر ضم حقوق الإنسان بناءً على عقيدة «التدخلات الإنسانية الطابع» ومبدأ «R2P»  
الجزء الثالث من المقال يتناول السلطات الاستنسابية لمجلس الأمن وهيمنتها على المحكمة الجنائية الدولية  وما  إذا كانت قضية معينة تشكل خرقًا أو تهديدًا للسلام  أو عملًا عدائيًا وبناءً عليه يجب إحالة هذه القضية إلى المحكمة الجنائية الدولية.  
بعدها يُختتم المقال باكتشافات مهمة حول أداء مجلس الأمن ويقترح العديد من الخطوات التي تحسن فعاليته وإنتاجيته.

- See more at: https://www.lebarmy.gov.lb/en/content/security-council-and-article-39-un-charter#sthash.luhgWaHd.dpuf