

QUALIFYING A PUBLIC HEALTH EMERGENCY AS “A  
THREAT TO INTERNATIONAL PEACE AND SECURITY” AND  
COVID-19: THE PRACTICE OF THE UN SECURITY COUNCIL  
REVISITED

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Abstract\*\*

This Article provides an analytical framework designed to assess whether a public health emergency constitutes a threat to international peace and security. In so doing, it challenges a common observation that the UN Security Council (UNSC) is largely free to frame public health issues of global concern as threats to international security. This Article instead argues that, for legitimacy and compliance purposes, the UNSC needs to establish that several determining criteria have been met before it can characterize a public health crisis as a threat to international security. Against this backdrop, this Article discusses a number of parameters which can be relied on in deciding whether or not to turn a public health event such as a global pandemic into a security issue at the international level. It then applies these determining criteria to the COVID-19 crisis to show that the UNSC, by failing to promptly and adequately react, betrayed its goal. This Article accordingly argues for a more coherent decision-making practice and rigorous reasoning of the UNSC. Such a more focused approach presupposes that certain qualifying criteria must be met to normatively justify and legitimize the characterization of a public health crisis as a threat to international security, thus enhancing the perceived fairness of the UNSC’s decisions.

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INTRODUCTION

Infectious disease outbreaks over the last two decades—most notably, the HIV/AIDS pandemic, the outbreak of Severe Acute Respiratory Syndrome (SARS), Avian Influenza H5N1, the pandemic influenza H1N1 (swine flu), Zika virus, and Ebola virus —have clearly demonstrated devastating consequences of regional health crises with a range of international security implications. The dangers of a pandemic have become a dire reality and have given rise to pressing security concerns globally.<sup>1</sup>

The recent outbreak of coronavirus disease COVID-19 and its rapid spread to virtually all parts of the world epitomizes how new diseases can in no time become global (economic and social) threats to all humankind. More alarmingly, it has shown the devastating and deadly effects of the appearance of a new virulent pandemic disease, especially in poor

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1. On a security dimension of the international protection against pandemic threats, see Vanja Rokvić & Zoran Jeftić, *Health Issues as Security Issues*, 67 VOJNO DELO 53 (2015).

countries with no effective healthcare system. In the international community, there is a limited range of recognized health security threats, including infectious diseases and bioterrorism. While there can be two main sources of public health emergencies—naturally occurring infectious diseases (either familiar, or new and mysterious ones) and manmade disease outbreaks—this Article is mainly concerned with the former.

The UN Security Council (UNSC) has the central role in coordinating the global response to infectious diseases posing threats to international peace and security within the meaning of Article 39 of the UN Charter.<sup>2</sup> Such a coordination of an international response may include using sanctions under Chapter VII of the UN Charter.<sup>3</sup> Indeed, if the UNSC is to contribute to addressing public health threats preventively, it must act at a sufficiently early stage and respond as robustly as to other global threats. In such situations, it needs to quickly act by either supporting the World Health Organization's (WHO) work on the matter or taking over direct responsibility for the coordinated international response to a public health emergency. It also needs to promptly decide what type of collective action the outbreak of an infectious disease necessitates—for example, establishing a sanitary cordon or quarantine measures in cases of extreme public health threat, or enforcement of trade and travel recommendations.

In the case of communicable disease outbreaks, however, the executive organ of the UN has largely adopted an unprincipled approach. It has only on one occasion declared a highly infectious disease a threat to international peace and security: the 2014–2016 Ebola outbreak in West Africa.<sup>4</sup> On the other hand, the UNSC's response to some other evolving public health crises, including the most recent COVID-19 pandemic, has been shockingly slow, underresourced and anemic. In particular, the UNSC's immediate and rapid reaction to these epidemic/pandemic outbreaks in terms of early preventive action, based on good reporting and adequate capacities throughout the UN system, could have strengthened existing mechanisms for timely and effective international cooperation. For example, using its powers under Article 24 of the UN Charter, the UNSC could have appealed to a broad range of

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2. U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

3. U.N. Charter ch. VII (Action with respect to Threats to the Peace, and Acts of Aggression).

4. S.C. Res. 2177 (Sept. 18, 2014).

actors and resources, which could have then been streamlined towards the WHO and its mandate.<sup>5</sup>

As a critique of such an ad hoc, selective and “uneven approach by the [UNSC],”<sup>6</sup> this Article challenges a common observation that the UNSC is largely free to frame public health issues of global concern as threats to international peace and security. It instead argues that, for legitimacy and compliance purposes, the UNSC needs to establish that several determining criteria have been met before it can characterize a public health crisis as a threat to international peace and security.

Whereas the UNSC “is not bound to use uniform criteria in seemingly similar situations,”<sup>7</sup> it should strive to clearly define the substantive conditions that must be present for a public health emergency to qualify as a threat to international peace and security for two main reasons.

First, examining these criteria would help the UNSC quickly ascertain the gravity and scope of a public health crisis, as well as the nature of a threat and its overall potential impact on international peace and security, thus enabling the UNSC to respond in as prompt, appropriate, and efficient a manner as possible. In particular, the UNSC’s decision-making would significantly benefit from making a full evaluation of a public health issue based on a set of objective criteria, so as to quickly proceed with qualifying such an event or its continuation as a threat to international peace and security and decide on the measures to be implemented by the UN member states. This would allow for the UNSC to arrive at necessary conclusions in public health emergency situations quickly.

In this way, the UNSC could better fulfil its primary mission of acting as a quick and effective global response mechanism to curb and control the global spread of disease, and to prevent the pandemic’s escalation, continuation, and recurrence. This would help to bridge the time gap between the appearance of an immediate risk of public health emergency, or an actual infectious disease outbreak, and the UNSC’s urgent and united response to the existing public health crisis—an old problem that has once again come to the fore in case of the COVID-19 pandemic. No doubt, this kind of global response would demonstrate the additional value and relevance of the UNSC in these troubled times, thus countering common criticisms that the existing model of collective security is no longer fit for purpose.

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5. Armin von Bogdandy & Pedro A. Villarreal, *International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis* 22–23 (Max Planck Inst., MPIL Research Paper Series, Working Paper No. 2020-07, 2020), <https://ssrn.com/abstract=3561650> [<https://perma.cc/2KNR-DCPM>].

6. *Id.* at 23.

7. Karel Wellens, *The UN Security Council and New Threats to the Peace: Back to the Future*, 8 J. CONFLICT & SEC. L. 15, 47 (2003).

Secondly, and perhaps more fundamentally, pursuing such guiding and objective, though not binding, principles would help ensure a more coherent and universal human-centered decision-making practice of the UNSC in this subject area. In so doing, the UNSC would gradually move away from its current arbitrary practice of proceeding on a case-by-case basis when it comes to determining whether or not a public health issue constitutes a threat to international peace and security. Consequently, having identified a public health issue as falling under its responsibility, the UNSC would be expected to regularly and consistently assess a public health crisis against the provided criteria (objectively defined) when considering whether it should be qualified as a threat to international peace and security. This would lead to a greater certainty and foreseeability of its decisions with well-reasoned justifications, thus enhancing the overall legitimacy and authority of the organ.

The UNSC has to consider elements in order to qualify a public health crisis as a threat to international peace and security. Certain objective criteria serving as main qualifiers in discerning and declaring public health emergencies (and other similar events) as (latent) threats to international peace and security may provide the UNSC with some guidance for the future. Moreover, observing such threshold criteria is still in line with the UNSC's determination not to prejudice its ability "to respond to situations on a case-by-case basis" and "to respond rapidly and flexibly as circumstances require."<sup>8</sup> The inevitable case-by-case approach does not prevent the identification of some guiding criteria or parameters in the reasons and causes which have given rise to the UNSC's pronouncements or determinations. In fact, qualifying a public health issue as a threat to international peace and security against these criteria would facilitate such an approach of the UNSC.

It has been argued that the willingness of the UNSC members to expand the parameters of Article 39 of the UN Charter "may lead to a situation where it is difficult, if not impossible, to discern any objective criteria for determining what constitutes a threat to the peace."<sup>9</sup> Similarly, according to W. Michael Reisman, "[f]inding criteria to be applied . . . is not easy"<sup>10</sup> and "Chapter VII is . . . 'open-textured.'"<sup>11</sup> Thus, "'a threat to the peace' is, and was obviously designed to be, subjectively determined."<sup>12</sup>

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8. S.C. Pres. Statement 1994/22 (May 3, 1994).

9. Anna Hood, *Ebola: A Threat to the Parameters of a Threat to the Peace?*, 16 MELB. J. INT'L L. 29, 50 (2015).

10. W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 93 (1993).

11. *Id.*

12. *Id.*

While these statements may well be true, they should not stand in the way or discourage us from our attempts to establish some objective criteria. On the contrary, as Thomas M. Franck noted, the legitimacy of the UN system of delegation of limited sovereign powers to the UNSC requires open, “visible and effective checks on unsupportable aggrandizement by the Council.”<sup>13</sup> Indeed, providing a conceptual framework with certain parameters for understanding and framing public health threats as international security issues would definitely contribute to such greater transparency of the UNSC’s decisions in determining whether or not a threat to international peace and security exists.

At the same time, it would help us to better understand under what circumstances the UNSC could justifiably authorize the use of recommendations and, when necessary, coercive measures under Chapter VII of the UN Charter in the context of public health emergencies “as a matter of good conscience and good sense.”<sup>14</sup> Against this backdrop, the purpose of this Article is to identify and explain such baseline criteria for determining whether a public health emergency constitutes a threat to international peace and security.

Underlying the treatment of the subject matter are two core questions: What criteria, if there can be any, may qualify a public health emergency as a threat to international peace and security under Article 39 of the UN Charter? Judged by such objective criteria, has the UNSC, by not qualifying the COVID-19 pandemic as a threat to international peace and not addressing it as an international security issue in a timely manner, failed to exercise its primary responsibility for the maintenance of international peace and security?

In order to address these research questions, this Article analyzes the practice of the UNSC pertaining to this subject area and draws on the basic criteria of legitimacy that the UNSC should address in considering whether to qualify, and upon such a determination, accordingly act on, a public health emergency as a threat to international peace and security.<sup>15</sup> These criteria include the following six considerations: (1) seriousness, scale, duration, and intensity of a public health threat; (2) proper purpose of the UNSC’s qualification and ensuing action; (3) the necessity and appropriateness of the UNSC’s recommendations or enforcement measures (the “last resort” argument); (4) proportionality between the UNSC’s qualification and recommendations or enforcement measures on the one hand, and the existing public health threat on the other; (5)

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13. Thomas M. Franck, *The United Nations as Guarantor of International Peace and Security: Past, Present and Future*, in *THE UNITED NATIONS AT AGE FIFTY: A LEGAL PERSPECTIVE* 25, 37 (Christian Tomuschat ed., 1995).

14. U.N. Secretary-General, *Report of the High-level Panel on Threats, Challenges and Change*, ¶ 205, U.N. Doc. A/59/565 (Dec. 2, 2004).

15. *Id.* ¶ 207.

reasonableness of the UNSC's determination and intervention, as well as balance of probable consequences of the UNSC's action or inaction; and (6) the need for a joint and coordinated international action.<sup>16</sup>

This Article moreover identifies the underlying rationales for the UNSC's unprincipled approach in designating various scenarios of disease outbreaks as threats to international security: (1) the specific context and nature of a public health crisis at issue; (2) the level of reliable information available to the UNSC and evidence to support its decision-making on the issue; (3) the link, however slight, between a public health event and a conflict or post-conflict situation; and (4) the political will of the UNSC members, notably those with permanent membership.<sup>17</sup>

However, the picture is further complicated by the current crisis of multilateral governance centered on the UN. Some of the UN member states are increasingly resisting and even actively undermining international cooperation, as the current issues, inter-state accusations, and disputes surrounding the ongoing COVID-19 crisis showcase.<sup>18</sup> These factors leave the precise contours of the UN securitization of global health undefined.

This Article begins in Part I by briefly outlining the development of the notion of a threat to international peace and security and its applicability to pandemics and other public health emergencies, and sets the scene for the forthcoming discussion. Part II of this Article surveys the relevant UNSC practice in determining the existence of a threat to international peace and security to flesh out what scenarios of infectious disease outbreaks may constitute such a threat. It discusses a number of determining criteria which can be relied on in deciding whether or not to turn a public health event into a security issue at the UN level.

Part III goes on to apply these criteria to the case study of COVID-19 to support the thesis that the UNSC, by not taking a sufficiently early stage a specific and resolute action in response to the global pandemic and designating it as a threat to international peace and security, betrayed its goal. Part IV turns to critically analyze the content and implications of the recent UNSC resolution on the COVID-19 pandemic, thereby also articulating its merits and shortcomings, and provides some insights on the next possible steps of the UNSC concerning this issue. Lastly, this Article offers conclusions in light of the research questions and briefly discusses the broader implications of the findings for other relatively new threats that may be considered to fall within the ambit of discretionary powers of the UNSC under Article 39 of the UN Charter.

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16. *Id.* ¶¶ 207, 209.

17. Wellens, *supra* note 7, at 21–22. Hood, *supra* note 9, at 38, 42.

18. Raymundo T. Treves, *The Health of International Cooperation and UNGA Resolution 74/274*, 70 *QUESTIONS INT'L L.* 21, 23–27 (2020).

## I. THE TRADITIONAL SCOPE OF THE CONCEPT “A THREAT TO INTERNATIONAL PEACE AND SECURITY” AND GLOBAL PANDEMIC AS A SECURITY THREAT OF OUR TIME

A cursory glance at its practice shows that the UNSC can be very creative and capable of extending considerably the scope and reach of its jurisdiction and the rules it is entrusted to interpret, including the concept of a threat to international peace and security.

First in this part, I set out the traditional scope of this concept and consider whether its extension to public health emergencies in any way erodes legal and political restraints. Then, I explain why the UNSC’s determination of a public health emergency as a threat to international peace and security and its subsequent decision on the ensuing measures is not in contravention of any restraining principles integral to or stemming from the UN legal framework and is therefore both legal and legitimate by its nature.

To substantiate this claim, I examine the legal and political limits accompanying the interpretation and application of Article 39 of the UN Charter in addressing public health events with an international element or of international repercussions. I accordingly contend and explain why neither such restraints nor the UNSC mandate are affected by an extended interpretation of the notion—a threat to international peace—and security—and its application to public health issues of international concern. Finally, I provide a brief historical overview of the development of interdependence between public health and international security in the practice of the UNSC.

### A. *Article 39 of the UN Charter and the Limits of its Interpretation and Application*

Helmut Freudenschuss, a former Representative of Austria in the UNSC, once wrote that Article 39 of the UN Charter represents “the true grey area in the practice of the SC.”<sup>19</sup> It is hard to disagree with this assertion. Indeed, it is not obvious how the UNSC could construe and apply the provisions of Article 39 to non-military sources of instability that *prima facie* have very little or nothing to do with international peace and security, as understood by the drafters of the UN Charter.<sup>20</sup>

At first sight, a public health event, such as the outbreak and spread of infectious disease, seems an excellent candidate for the kind of “non-traditional” international peace and security issues that could be subsumed under this notion. In order to ascertain whether pandemic and

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19. Helmut Freudenschuss, *Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council*, 46 AUSTRIAN J. PUB. & INT’L L. 1, 3 (1993).

20. It should be noted, though, that since the UN Charter is a living instrument, the views and intentions of the drafters are of decreasing relevance as time goes on.



other public health emergencies of a similar nature and gravity can even be considered to constitute a threat to international peace and security so as to trigger the application of Article 39 of the UN Charter, it is first necessary to examine the original meaning and later development of this rather nebulous concept, coupled with its increasingly broadened scope of application.

With its broad phrase, a threat to international peace and security, or, more precisely, “threat to peace,” Article 39 gives the jurisdictional minimum for the UNSC’s action.<sup>21</sup> In other words, to be able to define the minimum criteria that a situation involving a public health emergency must fulfill in order to permit action by the UNSC, it is important to determine what the concept itself entails. For this to be done, a closer look at the relevant practice of the UNSC is needed, as this seems to be the most suitable technique for interpreting the UN Charter and its individual provisions.<sup>22</sup> Moreover, because the UNSC is specifically mandated to use the concept, it would be preposterous to ignore its subsequent interpretation and action.<sup>23</sup>

The term “a threat to international peace and security” has traditionally been understood as involving situations of armed conflict (international and civil wars) or situations that are likely to give rise to “armed conflict . . . in the short or medium term.”<sup>24</sup> The latter situations include, for example, grave human rights violations, serious humanitarian crises, massive flows of refugees, and post-conflict states where there is a high level of instability.<sup>25</sup>

While these interpretations by the UNSC of the notion of a threat to international peace and security are now uncontroversial and widely accepted among the UN member states, other occasional attempts of the UNSC to expand the scope of the doctrine have not gathered sufficient support in the international community. Nor have they resulted in consistent and uniform practice over a longer period of time by the UNSC or the UN member states. Examples of such declarations by the UNSC that a particular situation, matter, or issue amounts to a threat to international peace and security include “general risks—such as the possibility of weapons of mass destruction falling into the hands of non-state actors.”<sup>26</sup>

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21. U.N. Charter art. 39.

22. Robert Cryer, *The Security Council and Article 39: A Threat to Coherence*, 1 J. ARMED CONFLICT L. 161, 164 (1996).

23. *Id.*

24. ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* 139 (2004). See also Nico Krisch, *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 39*, in 2 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1272, 1279 (Bruno Simma et al. eds., 3d ed. 2012).

25. See Cryer, *supra* note 22, at 178–81; see also Wellens, *supra* note 7, at 42–47.

26. See Hood, *supra* note 9, at 35.

It is thus possible to conclude that there needs to be at least some form of connection to armed conflict for the UNSC to be able to determine that a certain situation, issue, or matter constitutes a threat to international peace and security. Hence, public health emergencies do not appear to be part of this classic conception of a threat to international peace and security, which is mainly concerned with protecting the nation states from armed conflicts, rather than with the security of individuals. Yet, as it can be viewed from its practice discussed below (including Resolution 2177), the UNSC has nonetheless been able to find ways to reach the necessary consensus and express its interpretative creativity, at times even with bold manifestations of its discretionary powers, thus developing the concept of a threat to international peace and security in unexpected directions.

In regard to the possibilities and ways for the UNSC to qualify a public health emergency as a threat to international peace and security, a few other pertinent points need to be made. First, the notion of a threat to international peace and security has been described as a “very vague and elastic hypothesis which may cover the widest range of behavior by a State,”<sup>27</sup> as well as the “broadest and most indistinct concept in Art. 39.”<sup>28</sup>

Second, when referring to the concept, the UNSC has on occasion used different adjectives to highlight the gravity of the situation, issue, or matter in question—as a result of subsequent facts, events, or incidents—ranging from a “greater threat,”<sup>29</sup> an “increasing threat,”<sup>30</sup> a “serious and growing threat,”<sup>31</sup> a “most serious threat[],”<sup>32</sup> to an “aggravating threat[].”<sup>33</sup> Third, the notion can encompass the continuation of a situation that constitutes such a threat to international peace and security or both the continuation and the aggravation of a situation.<sup>34</sup>

Having briefly examined the original meaning and core content of the concept of a threat to international peace and security, as well as its subsequent extensions in the evolving practice of the UNSC, I shall now turn to consider whether the limited discretion of the UNSC in the interpretation and application of Article 39 of the UN Charter bars such

27. BENEDETTO CONFORTI & CARLO FOCARELLI, *THE LAW AND PRACTICE OF THE UNITED NATIONS* 223 (5th ed. 2016).

28. Jochen Frowein, *Article 39*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 605, 610 (Bruno Simma et al. eds., 1994).

29. S.C. Res. 1297, ¶ 6 (May 12, 2000).

30. S.C. Res. 1298, ¶ 13 (May 17, 2000).

31. S.C. Res. 1193, ¶ 5 (Aug. 28, 1998).

32. S.C. Res. 1377, ¶ 4 (Nov. 12, 2001).

33. S.C. Res. 841, ¶ 10 (June 16, 1993).

34. *Compare, e.g.*, S.C. Res. 713, ¶ 5 (Sept. 25, 1991) (“*Concerned* that the continuation of this situation constitutes a threat to international peace and security”), with S.C. Res. 721, ¶ 5 (Nov. 27, 1991) (“*Noting* that the continuation and aggravation of this situation constitute a threat to international peace and security”).

extensions in the context of public health emergencies. It bears recalling in this respect that the UNSC's authority to make the threshold determination regarding the existence of a threat to international peace and security (which itself is more of a political than legal concept) is a legal obligation and as such does not enjoy an unlimited discretion.

The determination of a threat to international peace and security is thus not—as Judge Schwebel argued in *Nicaragua v. USA*—a purely political decision, and as such solely within the UNSC's discretion.<sup>35</sup> This implies that decisions of the UNSC on whether or not a public health issue constitutes a threat to international peace and security must always be within certain limits.

In the first place, they must be “within the limits of the Purposes and Principles of the [UN] Charter” as required by Article 24(2) of the UN Charter and emphasized by the ICTY Appeals Chamber in *Tadić*.<sup>36</sup> The purposes and principles of the UN are set out in Chapter I (Articles 1 and 2) of the UN Charter. There are several among them that are particularly relevant for determining that a public health emergency constitutes a threat to international peace and security: the maintenance of international peace and security, the achievement of international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights, and acting as a center for harmonizing the actions of states in the attainment of these common ends.<sup>37</sup>

All of these purposes and principles can be seen as “flexible and evolutionary” by nature,<sup>38</sup> thus capable of many different interpretations, including those recognizing a serious public health issue as an international security concern. Therefore, by no means can the UNSC's determination that “a widespread outbreak of a deadly infectious disease constitutes a threat to international peace and security” be considered manifestly contrary to the purposes and principles of the UN Charter. Nor can the application of objective criteria for finding such situations as threatening international peace and security be seen as capable of modifying the purposes and principles of the UN Charter as regards the powers vested by States in the UNSC.

The UNSC's broad discretion is moreover to be exercised *bona fide* (in good faith) and as such should never amount to an abuse of its power.<sup>39</sup> Not only can a requirement of the UN organs (including the

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35. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 60 (June 27) (dissenting opinion by Schwebel, J.).

36. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 29 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

37. U.N. Charter arts. 1, 2.

38. See Cryer, *supra* note 22, at 168.

39. *Id.* at 169.

UNSC) to act in good faith be implied from the duty of respect for international law, it has also been purposefully integrated into UN Charter law (Article 2(2)). The principle of good faith as one of the basic principles regulating the creation and performance of legal obligations by subjects of international law (including international organizations) has been recognized in both international jurisprudence and international legal scholarship for many years.<sup>40</sup>

In practice, it would be very difficult to prove an actual case of the UNSC acting in bad faith by adopting a resolution on a public health emergency as an international security issue. It is more likely that, when appropriate, the UNSC will invoke good faith as a general principle of international law in such a resolution, for example, by reminding the UN member states to discharge their pertinent obligations and responsibilities fully and in good faith, in order to curb a dangerous spread of infectious disease and mitigate its harmful consequences.

Another potential limit on the UNSC's authority of a rather general nature is the doctrine of abuse of power. The doctrine was first mentioned in the *Namibia* case in the dissenting opinions of Judges Gerald Fitzmaurice and Gros.<sup>41</sup> Still broader articulations of this doctrine are to be found in the *Tadić* majority decision, and especially in the separate opinion of Judge Sidhwa, who pointed out that every decision of the UNSC needs to be "fair and not arbitrary or a feigned exercise of power."<sup>42</sup> It must be based on a proper evaluation of the evidence, "reasonable and fair and not arbitrary or capricious."<sup>43</sup>

Accordingly, any manifest irregularity in determining a public health crisis as constituting a threat to international peace and security would

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40. See *Nuclear Tests (Austl. v. Fr.)*, Judgment, 1974 I.C.J. 253, ¶ 46 (Dec. 20); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 158, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); JOHN F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW (1991); Markus Kotzur, *Good Faith (Bona fide)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2009); ROBERT KOLB, LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC: CONTRIBUTION À L'ÉTUDE DES PRINCIPES GÉNÉRAUX DU DROIT (2000); Michel Virally, *Notes and Comments: Review Essay: Good Faith in Public International Law*, 77 AM. J. INT'L L. 130 (1983); MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT (2006).

41. *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. 16, ¶ 114 (June 21) (dissenting opinion by Fitzmaurice, J.); *Id.* ¶ 28 (dissenting opinion by Gros, J.).

42. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Separate Opinion of Judge Sidhwa on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 61 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

43. *Id.*

call into question the legality of such a determination.<sup>44</sup> This implies that no objection can be taken to the exercise of its discretion when the UNSC makes a full appraisal of the evidence in light of the proposed qualifying criteria, and then determines on that basis, without any arbitrariness, whether or not a public health emergency falls within Article 39 of the UN Charter. However, in the situation of an increasingly secretive UNSC, a major challenge remains how to prove any such abuse of its power.<sup>45</sup>

The validity of the UNSC's decisions is also limited by international *jus cogens* norms, as defined in Article 53 of the Vienna Convention on the Law of Treaties.<sup>46</sup> While Article 103 of the UN Charter puts the Charter itself in a hierarchically higher position than all other international treaties, Article 53 of the Vienna Convention declares that all international treaties (including the UN Charter) that conflict with *jus cogens* are void.<sup>47</sup> Given that the UNSC draws its power from the UN Charter, its decisions cannot take precedence over *jus cogens*.<sup>48</sup> The view that the concept of *jus cogens* is a restraint on the UNSC's actions can also find support in some international judicial opinions.<sup>49</sup> It is, however, difficult to imagine a situation in which the declaration of a public health issue as constituting a threat to international peace and security could conflict with any peremptory norm of general international law.

Perhaps the most tangible current restraint on the UNSC's decision to classify a public health issue as a threat to international peace and security is that of political considerations. Article 27 of the UN Charter specifies that a resolution on non-procedural matters is adopted if it obtains nine positive votes and is not vetoed by any of the five permanent members of the UNSC.<sup>50</sup> It is also true that, as some authors have noted, the capability of the UNSC's resolution "to command respect, and thus compliance"<sup>51</sup> will depend on the level of perceived fairness of both the decision-making process of this organ and its resolution as the outcome of this process.

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44. See Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643, 671 (1994).

45. See Cryer, *supra* note 22, at 169.

46. *Id.* at 170; Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMPAR. L. Q. 55, 93 (1994).

47. Cryer, *supra* note 22, at 169.

48. *Id.*

49. See, e.g., Prosecutor v. Tadić, Case No. IT-94-1-I, Separate Opinion of Judge Sidhwa on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 20, 23, 35, and 74 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Provisional Measures, 1993 I.C.J. 325, ¶ 100 (Sept. 13).

50. U.N. Charter arts. 27.

51. See Cryer, *supra* note 22, at 172; THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 218 (Oxford Univ. Press 1995).

Assessing and qualifying a public health emergency as a threat to international peace and security on the basis of objective criteria would certainly enhance perceptions of fairness of the UNSC's decisions on this subject matter among the UN member states, and consequently improve their overall implementation.

The limitations on the power of the UNSC to determine the existence of a threat to international peace and security as examined above are necessary because of the danger of presenting any acutely controversial international situation as involving a potential threat to international peace and security, "even where it is really too remote genuinely to constitute one."<sup>52</sup> Indeed, without these restraints, the functions of the UNSC "could be used for purposes never originally intended."<sup>53</sup> Having established the (broad) limits within which the UNSC may determine threats to international peace and security, it remains to survey the raw material of its practice to examine the applicability of the concept to the situations of public health emergencies. This material is presented and further discussed in what follows.

#### B. *The Recent History of a Public Health-International Security Interrelationship in the UN Security Council*

Historically, public health and security were treated independently from each other—that is, as separate legal, policy, and practical issues.<sup>54</sup> They also formed part of different policy domains. Since the 1990s, however, this historical perception of a public health-security relationship has drastically changed.<sup>55</sup>

The main catalyst for this change has been the perceived increased risk of acts of bioterrorism and other military acts that may lead to the international spread of diseases (for example, the intentional release of biological, chemical, or radiological agents) as well as naturally occurring outbreaks of infectious diseases as a global public health risk.<sup>56</sup>

Hence, it was not until the early post-Cold War period—when the menace of inter-state armed conflicts considerably diminished—that the first tendencies in the direction of connecting public health protection and

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52. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1870 I.C.J. 16, ¶ 116 (June 21) (dissenting opinion by Fitzmaurice, J.).

53. *Id.*

54. Gian Luca Burci, *Ebola, the Security Council and the Securitization of Public Health*, 10 QUESTIONS INT'L L. 27, 33 (2014).

55. *Id.*

56. *Id.*

the maintenance of international peace and security began to emerge.<sup>57</sup> Such an understanding of global health securitization focused on the anthropocentric notion of “human security,” thus enabling consideration of international security dimension of infectious disease outbreaks as “non-traditional” threats to international peace and security.<sup>58</sup>

In this context, the first notable event under the auspices of the UNSC was the open debate held in January 2000 on “The situation in Africa: The impact of AIDS on international peace and security.”<sup>59</sup> Following this debate, the UNSC linked the mandates and training of peacekeeping operations to the prevention of the spread of disease, but in the end, it did not deem it necessary to qualify HIV/AIDS as a threat to international peace and security.<sup>60</sup> However, UNSC Resolution 1308 reconceptualized the HIV/AIDS pandemic as not only a humanitarian catastrophe, but a risk to national security and international stability.<sup>61</sup> Four years later, in 2004, the UN Secretary General (UNSG) convened the High-level Panel on Threats, Challenges, and Change. The Panel issued a report in which it called for an increased cooperation between the UNSC and WHO in enforcing, under Chapter VII of the UN Charter, effective quarantine measures and cordon operations.<sup>62</sup>

A further step in this process of converging global public health and international peace and security was the 2005 UNSG report “In larger freedom: towards development, security and human rights for all.”<sup>63</sup> In this report, the UNSG stated, inter alia, his readiness for acting under Article 99 of the UN Charter whenever needed, so as to bring to the attention of the UNSC, in consultation with WHO, any suspicious or overwhelming outbreak of infectious disease that may threaten the maintenance of international peace and security.<sup>64</sup>

The above-mentioned 2014 Resolution 2177 on the Ebola epidemic in West Africa remains the lone example of the UNSC’s qualification of a

57. Other prominent and controversial examples of the UNSC’s broadened interpretation of the term “a threat to international peace and security” can be found in its resolutions concerned with the internal situations in Somalia (Resolution 733), Bosnia and Herzegovina (Resolution 770), and Haiti (Resolutions 841 and 873) in the early 1990s. S.C. Res. 733 (Jan. 23, 1992); S.C. Res. 770 (Aug. 13, 1992); S.C. Res. 841 (June 16, 1993); S.C. Res. 873 (Oct. 13, 1993).

58. Gian Luca Burci & Jakob Quirin, *Ebola, WHO and the United Nations: Convergence of Global Public Health and International Peace and Security*, 18 AM. SOC’Y INT’L L. INSIGHTS (Nov. 14, 2014), <https://www.asil.org/insights/volume/18/issue/25/ebola-who-and-united-nations-convergence-global-public-health-and> [<https://perma.cc/KC94-VVTG>].

59. U.N. SCOR, 55th Sess., 4087th mtg. at 2, U.N. Doc. S/PV.4087 (Jan. 10, 2000).

60. S.C. Res. 1308, ¶ 3 (July 17, 2000).

61. *Id.* at 2.

62. U.N. Secretary-General, *Report of the High-level Panel on Threats, Challenges and Change*, ¶ 144, U.N. Doc. A/59/565 (Dec. 2, 2004).

63. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All – Report of the Secretary-General*, ¶ 105, A/59/2005 (Mar. 21, 2005).

64. *Id.*

public health crisis as a threat to international peace and security, even in the wake of the eerie COVID-19 pandemic outbreak. This resolution expanded the concept of threat to international peace and security and implicitly the scope of the powers of the UNSC under the UN Charter. As such, the resolution finds its legal basis in Chapter VII of the UN Charter, although in the given case the UNSC took no enforcement action under this Chapter.

While the resolution represents a significant departure from the UNSC's previous practice of declaring threats to international peace and security under Article 39 of the UN Charter, it cannot be regarded as a precedent; indeed, it has so far had no precedential effect. Nonetheless, according to some commentators, this document has a remarkable declarative value, for it represents "the most cogent recognition to date of the security implications of widespread outbreaks of lethal infectious diseases."<sup>65</sup>

In 2019, the UNSC unanimously adopted a resolution on the 2018–2020 Ebola outbreak in the Democratic Republic of the Congo (DRC), which addressed the dangerous spread of the disease in the DRC and wider region, but only peripherally and indirectly. The resolution also included measures under Chapter VII of the UN Charter. However, it was the protracted armed conflict in the country, rather than the risk of spreading the disease itself that prompted the UNSC to impose the enforcement measures.<sup>66</sup>

There was also a much delayed response of the UNSC to the ongoing COVID-19 pandemic. This delay has worsened the suffering of innocent civilians and the humanitarian crisis in the midst of the COVID-19 pandemic, further undermined the stability and deteriorated the political and security climate in the most affected countries and regions, and even led to instances of civil unrest and social and inter-ethnic tensions in some countries.

At long last, on July 1, 2020, the UNSC unanimously adopted Resolution 2532 (2020) on cessation of hostilities in the context of the coronavirus disease (COVID-19).<sup>67</sup> With this long-awaited move the UNSC considered, once again, that the unprecedented extent of the COVID-19 pandemic may potentially endanger the maintenance of international peace and security,<sup>68</sup> but it did not go so far as to pronounce that the global pandemic does constitute a threat to international peace and security. Nevertheless, the resolution has confirmed and strengthened a recent trend to construe infectious diseases as security threats besides public health risks and thus to securitize public health emergencies,

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65. Burci, *supra* note 54.

66. *See generally* S.C. Res. 2439, ¶ 11 (Oct. 30, 2018).

67. S.C. Res. 2532 (July 1, 2020).

68. *Id.* at 1.



especially in countries involved in armed conflicts or affected by humanitarian crises and in post-conflict situations.

Other public health emergencies, such as the 2002–2004 SARS outbreak, the H1N1 influenza pandemic, and the Zika outbreak in the Americas were not addressed by the UNSC, notwithstanding that their health impact was of similarly grave international concern.<sup>69</sup>

This preliminary examination of the UNSC's ad hoc treatment of various situations involving a public health emergency of international concern reveals that an international security dimension is not a given in all such scenarios. In general, there seem to be four main factors that play a role in turning a public health issue into an international security matter: (1) the context and nature of the public health crisis in question; (2) the availability of relevant information and evidence on the issue; (3) the link, however slight, between a public health event and a conflict or post-conflict situation; and (4) the political will of the UNSC members.<sup>70</sup>

## II. CRITERIA FOR QUALIFYING A PUBLIC HEALTH EMERGENCY AS “A THREAT TO INTERNATIONAL PEACE AND SECURITY”

The effectiveness of the UN collective security system is predicated not only on the legality of the UNSC's decisions but also on the common perception of their legitimacy. To enhance this general perception, the UNSC's decisions should be “made on solid evidentiary grounds, and for the right reasons, morally as well as legally.”<sup>71</sup> In deciding whether to qualify a public health emergency as a threat to international peace and security, the UNSC should adopt and systematically address a set of agreed guidelines. While such guidelines will probably not ensure that “the objectively best outcome will always prevail . . . [they can] maximize the possibility of achieving Security Council consensus around when it is appropriate,” or even imperative, to declare a public health crisis a threat to international peace and security.<sup>72</sup> In so doing, they can “maximize international support for whatever the [UNSC] decides” concerning the concrete public health emergency situation, and “minimize the possibility of individual Member States bypassing the Security Council.”<sup>73</sup>

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69. In her essay, Josie Hornung offers some arguments why the Zika outbreak did not meet the threshold to make its international securitization appropriate. According to her, this public health event did not yet pose a sufficiently quantifiable and serious security risk. Josie Hornung, *Securitization of Zika*, E-INT'L RELS. (Aug. 17, 2016), <https://www.e-ir.info/2016/08/17/securitization-of-zika/> [<https://perma.cc/8Q9X-YE59>].

70. See Bodgdandy & Villarreal, *supra* note 5, at 22–23.

71. U.N. Secretary-General, *Report of the High-level Panel on Threats, Challenges and Change*, ¶ 204, U.N. Doc. A/59/565 (Dec. 2, 2004).

72. *Id.* ¶ 206.

73. *Id.*

The UNSC is authorized to objectively determine whether a public health issue qualifies under the UN Charter provisions as the kind of situation that is a threat to international peace and security. By “objective,” I do not necessarily mean that the UNSC’s decision is objective in the scientific sense of the word. Whilst, as we have seen above, this determination is to some extent based on certain legal criteria (limitations) as the UNSC’s decisions are subject to standards imposed by the UN legal framework and the UNSC cannot lawfully overstep these constraints, it is essentially a political decision. The expression “objective” in this sense signifies that it is a collective decision-making organ that makes a binding determination (under Articles 39 and 25 of the UN Charter) of how the situation of a public health emergency shall be classified (as a threat to international peace and security or not).

Based on the practice of the UNSC as developed so far, a certain number of variables can be put forward for the assessment of whether a public health emergency constitutes a threat to international peace and security. These guiding criteria for qualifying a public health crisis as a threat to international peace and security should be embodied in declaratory resolutions of the UNSC and the United Nations General Assembly (UNGA). While discussing each of the criteria below, I also identify, where appropriate, their merits and limits and engage with the most obvious counterarguments and potential objections to their applicability in the situations of public health emergencies.

A pragmatic caveat should be entered here. In order to be able to consider the appropriateness of qualifying a public health emergency as a threat to international peace and security, the UNSC must first have timely, accurate, and reliable information on the public health event and sufficient factual knowledge of the matter. Such relevant information may originate from a variety of sources, including reports submitted by the UN Secretary-General, other principal organs of the UN and relevant UN agencies, UN member states’ briefs, as well as views presented by external actors such as academia, the media, and NGOs. Given that the reports of the UN Secretary-General have been a major source of information, the UN Secretariat needs to ensure that the quality and speed of the flow of information and its analysis capacity suffice to support the decision-making process of the UNSC. The lack of such information or very limited knowledge of facts may be one of the reasons for inaction or belated action by the UNSC.

Another related issue is that of the burden of proof and evidence. In weighing the gravity of emergency cases, the UNSC also exercises its fact-finding function. Whether a public health emergency amounts to a threat to international peace and security is primarily “a question of evidence, a question of proving things,” rather than a question of legal

interpretation.<sup>74</sup> Acting in good faith, the UNSC should always reject fraudulent or inauthentic evidence and comply with the standard of preponderance of evidence (as generally considered to be sufficient for making recommendations or the imposition of measures not involving the use of force)<sup>75</sup> when assessing the public health emergency situation against the qualification criteria below. This being the case, one should also be aware that in urgent cases, where time constraints play a significant role, the UNSC is only capable of a *prima facie* evidence evaluation.<sup>76</sup>

#### A. *Seriousness of a Health Security Threat*

In determining whether a public health emergency constitutes a genuine threat to stability, security, and peace in the affected area or region, the UNSC should first consider the following question: is the threatened harm to state or human security of a kind, and sufficiently clear, quantifiable and serious, to justify *prima facie* such a qualification? In other words, a public health event has to reach a certain magnitude to give rise to international concern and subsequent pronouncement or determination of a threat to international peace and security by the UNSC. To contend that a public health issue may have a distant repercussion on the maintenance of international peace and security is not enough for the UNSC to avail of its function of global governance for that matter.

The UNSC members should deliberate on whether an unexpected public health event that carries implications beyond the affected state's national borders is serious, sudden, or unusual enough to require immediate and coordinated international action. For example, a formal declaration by the WHO that an extraordinary event which is determined to constitute a public health risk to other states through the international spread of an infectious disease amounts to a public health emergency of international concern (PHEIC) could be seen as fulfilling this minimum requirement.<sup>77</sup>

When evaluating the level of seriousness of a public health threat, the UNSC should take into account several factors. First, it should assess the prospects of chaos, tensions, and even conflict outbreak within the affected states or wider region because of social, humanitarian, political, and economic instability caused by a public health emergency. In other words, the UNSC should consider whether such a multidimensional destabilization either in individual states or in the region as a whole is of

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74. Wellens, *supra* note 7, at 23.

75. See Mary Ellen O'Connell, *Evidence of Terror*, 7 J. CONFLICT & SEC. L. 19, 22 (2002).

76. Wellens, *supra* note 7, at 24.

77. Since 2009, there have been six declarations of a PHEIC: the 2009 H1N1 (swine flu) pandemic, the 2014 polio declaration, the 2014 outbreak of Ebola in Western Africa, the 2015–16 Zika virus epidemic, and the ongoing 2018–20 Kivu Ebola epidemic and COVID-19 pandemic.

such a nature, gravity, and extent that it poses a real prospect of conflict occurring in the short- to medium-term. A special attention in this context should be dedicated to states involved in armed conflicts and post-conflict states with ongoing peace-building efforts and fragile social fabric and institutions.

Obviously, pandemic and other public health threats of similar gravity and scope aggravate the situation in states involved in armed conflicts and those facing humanitarian crises. It has been common for the UNSC to find that a threat to international peace and security exists in post-conflict situations where states are unstable and there is a reasonable prospect that conflict may ignite again.<sup>78</sup> Some challenging questions, however, remain for the UNSC to resolve. For example:

How much instability is required before a situation involving a public health emergency can be classified as a threat to international peace and security? What should the UNSC have regard to when examining whether there is instability in an affected state, area or region? How should the UNSC measure levels of instability within such states, areas or regions?<sup>79</sup>

An additional perspective that the UNSC should take and which is to be complementary to that of a “state, area, or region security” aspect, is to assess whether a public health emergency constitutes a threat to human security. The UNSC has not accepted the notions of human security as falling within the parameters of a threat to international peace and security where they arose without any connection with an armed conflict. Nevertheless, the UNSC should explore the immediate and potential devastating effects of a highly infectious disease on individuals’ lives, health, wellbeing, and personal security (as subsidiary evidence) before deciding on whether to qualify a public health crisis as a threat to international peace and security.

A public health emergency may also give rise to food crises and starvation, poverty, precarity, unemployment, deterioration in living standards, instill widespread panic and generate feelings of fear, anxiety, and insecurity in the affected populations. While sickness, poverty, and hunger do not directly cause conflicts, it is also true that situations of insecurity may arise in the wake of so many injustices resulting from a public health crisis. Taking into account all these elements, the UNSC should especially consider whether it is imperative for the international community to mobilize a coordinated response in order to prevent the existing situation from becoming a humanitarian catastrophe. Human

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78. Hood, *supra* note 9, at 38.

79. *Id.* at 44.

security concerns are thus also relevant to discussions within the UNSC about activating its Chapter VII powers through Article 39 of the UN Charter.

In the mainstream literature on the subject, both justifications and criticisms concerning the international securitization of public health crises can be observed. The main rationale behind the securitization of public health is the general perception that highly infectious diseases spreading beyond national borders may erode social, economic, and political stability in the affected countries and regions, thus deteriorating the whole situation by creating tensions, chaos, or even conflict and possibly leading to massive displacement of the population. All this may, in turn, affect the security perception of the countries not directly involved in the crisis but with interests in the affected region.<sup>80</sup>

Some scholars have identified the synergetic effects of a public health emergency as another rationale for the international securitization of public health.<sup>81</sup> They have reasoned that when a public health crisis hits, the first line of defense is the public health sector. For example, strengthening a public health system because of bioterrorism and possible use of biological weapons actually serves the purposes of both biosecurity and defending from naturally emerging infectious diseases. In addition, securitizing health may also entail that a larger share of national budgets initially doled out to the security and defense sectors will be redirected to public health resources and capabilities, while military forces will be much better prepared and equipped to help in outbreak response.

These arguments in support of public health securitization have been challenged on several fronts. The first important criticism that can be leveled at the attempts to securitize public health emergencies pertains to the fact that historical evidence has not shown any link between communicable diseases and political stability. For example, the HIV/AIDS pandemic in Africa did not have any obvious impact on the political stability of affected countries.<sup>82</sup> Likewise, modern history has not confirmed that infectious diseases may become security threats to affected countries. Moreover, critical scholars have noted that panic and overly coercive responses by non-affected or little affected states generate a much greater threat than the epidemic/pandemic itself.<sup>83</sup>

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80. See Burci & Quirin, *supra* note 58, at 35.

81. See David P. Fidler & Lawrence O. Gostin, *BIOSECURITY IN THE GLOBAL AGE: BIOLOGICAL WEAPONS, PUBLIC HEALTH, AND THE RULE OF LAW* 121–45 (2008).

82. Alex de Waal, *Reframing Governance, Security and Conflict in the Light of HIV/AIDS: A Synthesis of Findings from the AIDS, Security and Conflict Initiative*, 70 *SOC. SCI. & MED.* 114, 116 (2010).

83. Alex de Waal, *Militarizing Global Health*, *BOS. REV.* (Nov. 11, 2014), <http://bostonreview.net/world/alex-de-waal-militarizing-global-health-ebola> [<https://perma.cc/8XZ2-CAVN>].

In a similar vein, some “other scholars have sought to make a strong case that considering diseases as security threats diverts the focus from where it should be—this is, away from civil society, toward military and intelligence organizations.”<sup>84</sup> In their view, securitization of health may also encourage and provide further justificatory ground for an authoritarian approach and coercive measures of some states, which may easily lead to human rights violations, discrimination, and stigmatization of victims without obvious benefits for public health issues.<sup>85</sup>

Some further challenges and limits can be noted regarding the applicability of the “seriousness” criterion in practice. For some authors, the lack of even the slightest link between a public health emergency and military violence or the prospect of armed conflict seems to be an insurmountable obstacle for the UNSC to be able to qualify such a situation as an Article 39 threat.<sup>86</sup> This view is, however, only partly substantiated, as today it is not only armed conflicts and military attacks which are the phenomena of great gravity and imminence that justify such a qualification by the UNSC. It is clear that, at the international level, public health events such as pandemics cannot be addressed merely as health issues as they involve multifaceted security dimensions.

In many cases, epidemic and pandemic outbreaks have also posed “existential threats” to people; that is, they have been extraordinary events that have threatened the existence of non-state actors such as civilians or peacekeepers. International securitization of infectious disease outbreak events thus also serves the higher purposes of protecting human lives and human health. As the heart of any security agenda should be protecting lives, a highly infectious disease that threatens everything from economic strength to peacekeeping clearly is an international peace and security threat of the greatest magnitude. To be sure, the UNSC should require state security and, in particular, human security to be threatened to a certain level of severity before it determines that a public health emergency amounts to a threat to international peace and security. The main concern in this regard, however, is that its judgments about the severity of the public health situation may not “be made on a purely objective basis.”<sup>87</sup>

It has moreover been noted that ideas such as an outbreak of an epidemic or the spreading of an infectious disease internationally cause social, economic, and political instability, severely threaten human security, and give rise to an emergency situation constitutes a threat within the meaning of Article 39 of the UN Charter without requiring the prospect of conflict considerably stretch the traditional conception of a

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84. Burci & Quirin, *supra* note 58, at 36.

85. *Id.*

86. See Hood, *supra* note 9, at 34.

87. *Id.* at 45.

threat to international peace and security.<sup>88</sup> For example, framing public health events as issues of “economic and social instability” within a state or region, “human security,” and emergencies, crises, or very grave situations that require international cooperation for their resolution bring to the discussion broad, vague, and malleable concepts and terms whose limits and parameters are difficult to discern.<sup>89</sup> This, in turn, makes it possible that a very wide range of situations, including public health issues, may come within the parameters of such concepts.

On the other hand, it has also been suggested at the international political level that it is high time that the UNSC embraced a broader understanding of the concept of a threat to international peace and security.<sup>90</sup> While its drafters may well have had armed attacks and hostilities in mind when they wrote the relevant provisions of the UN Charter, we should not close our eyes to other major international security threats of our time. As German Minister for Foreign Affairs Heiko Maas pointed out, “today, we know that a virus can be deadlier than a gun, that a cyberattack can cause more harm than a soldier, and that climate change threatens more people than most conventional weapons.”<sup>91</sup>

It is thus important to recognize new threats to international peace and security emanating from pandemics, climate change, and cybercrime. This was also emphasized at the UNSC open video-teleconference on the implications of COVID-19 on the maintenance of international peace and security, following the adoption of its resolution on COVID-19. As Nouredine Erray, Minister for Foreign Affairs of Tunisia, stated at this meeting, “it is clear that we cannot face such dangers using the same instruments we have inherited from the old times.”<sup>92</sup> Hence, a change of paradigm is necessary.

### B. *Proper Purpose of the UNSC’s Action*

Another important criterion for the UNSC to consider is whether it is clear that the primary purpose of qualifying the public health threat in question as a threat to international peace and security and of the proposed international action is to halt, avert and minimize such a threat in order to prevent its escalation to the level of a large-scale humanitarian catastrophe, whatever other purposes or motives may be involved.

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88. *See id.* at 44–45.

89. *Id.* at 43.

90. Press Release, Security Council, COVID-19 ‘Profoundly Affecting Peace across the Globe’, Says Secretary-General, in Address to Security Council, U.N. Press Release SC/14241 (July 2, 2020).

91. *Id.*

92. *Id.*

### C. *The UNSC's Action as the Last Resort*

The “last resort” reasoning is another guiding criterion that the UNSC should turn to when deciding whether to qualify a public health emergency as a threat to international security. Premature international securitization of a disease outbreak can have devastating effects on countries and regions dealing with a disease. In this respect, the UNSC should always ask itself whether every option for meeting the public health threat in question, other than non-military enforcement measures, has been explored, with reasonable grounds for believing that other measures will not succeed.

### D. *The UNSC's Intervention as a Proportional Means*

A further major consideration for the UNSC should be whether the qualification of a public health emergency as a threat to international peace and security, and on that basis, the scale, duration, and intensity of the proposed action (principally in the form of recommendations or, when necessary, non-military measures of enforcement) are the minimum necessary to meet the public health threat in question. This also implies that a coordinated response of the international community authorized by the UNSC needs to be commensurate in scale and pace with the enormity of the public health challenge.

As Louis Balmond has noted, the UNSC has under the UN Charter not only the discretionary power to find the existence of a threat to international peace and security; it can also choose the sort(s) of action to respond to such a threat.<sup>93</sup> In making full use of the possibilities provided by Article 39, the UNSC can decide to take different forms of measures, ranging from those least restrictive to those most restrictive or even coercive. It can reasonably be expected, however, that in most of the infectious disease outbreak events, the UNSC will typically consider it sufficient to adopt non-binding recommendations.

In the context of a pandemic or other public health crisis, imposing any kind of obligation appears inappropriate, disproportionate, and unduly strict. This is even truer of unarmed or armed coercion provided for in Articles 41 and 42, respectively. Such compulsory measures seem to have little sense in responding to global health security threats. Nevertheless, it is conceivable that the UNSC will find it necessary to use this discretionary power on substantive questions and proceed from recommendation to binding decision, for example, when it comes to the request addressed to States to apply safety and health protocols or to lift travel restrictions and restrictions at their borders imposed due to the epidemic.

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93. See Louis Balmond, *Le Conseil de sécurité et la crise d'Ebola: entre gestion de la paix et pilotage de la gouvernance globale*, 10 QUESTIONS INT'L L. 5, 17 (2014).



It is also possible that certain states adopt ineffective or over-restrictive public health measures not justified by medical necessity and sound scientific evidence, or that they fail to adequately implement temporary or standing recommendations issued by the relevant WHO Committees.<sup>94</sup> In such cases when states behavior threatens the international response to a public health crisis the UNSC could “put pressure on those states that do not cooperate in good faith to global disease control or even worsen the situation by failing to comply with the core obligations imposed by the [international health regulations] and human rights standards.”<sup>95</sup>

#### E. Reasonableness of the UNSC’s Intervention and Balance of Consequences

The next criterion for qualifying a public health emergency as a threat to international peace and security concerns the question of whether there is a reasonable chance of the recommendations or non-military enforcement measures being successful in meeting the public health threat in question, with the consequences of such an international intervention not likely to be worse than the consequences of non-intervention. It may be more reasonable and appropriate for the UNSC not to securitize a public health emergency in order to avoid generating unnecessary panic, scaremongering, scapegoating, and increased incidents of stigmatization, discrimination, and hate speech-related violence which could further endanger social, economic, or political instability in the affected countries or region(s).

Regarding the 2014–2016 Ebola outbreak in West Africa, for example, Katherine Harmon has noted that “misinformation and the resulting anxiety of publicized health crises are far more dangerous than the pathogens themselves.”<sup>96</sup> Similarly, Josie Hornung has argued that “Zika [did] not rise to the threshold of risk required to be considered a threat to international security.”<sup>97</sup> Because of the lack of reliable data on its impact at that time, it was better to conceptualize Zika as an unknown risk to the international community.<sup>98</sup> Given this lack of accurate information, the WHO and the Brazilian government’s responses to Zika

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94. Stefania Negri, *Communicable Disease Control*, in RESEARCH HANDBOOK ON GLOBAL HEALTH LAW 265, 296 (Gian Luca Burci & Brigit Toebes eds., 2018).

95. *Id.*

96. Katherine Harmon, *Measuring the Zika Virus's International Security Implications*, SEC. MAG. (Apr. 1, 2016), <https://www.securitymagazine.com/articles/87004-measuring-the-zika-virus-international-security-implications> [<https://perma.cc/2UNL-V8JW>].

97. Josie Hornung, *Securitisation of Zika*, E-INT’L RELS. (Aug. 17, 2016), <https://www.e-ir.info/2016/08/17/securitisation-of-zika/> [<https://perma.cc/XHB4-26DJ>].

98. *Id.*

crisis could be regarded as measured and appropriate.<sup>99</sup> Therefore, it was unnecessary to elevate the securitization of this public health emergency to the level of the UNSC.<sup>100</sup>

#### F. *The Need for a Coordinated International Action*

The experience concerning epidemic/pandemic situations in recent years demonstrates that both familiar and new infectious diseases require concerted, inclusive, comprehensive and global international action, with the UN playing a key coordinating role. Therefore, the UNSC should also examine each concrete public health emergency from the perspective of whether such a situation necessitates a substantial and coordinated global response to tackle it more effectively. In particular, the UNSC needs to consider whether it is itself the body of the UN that is best placed to coordinate and facilitate such efforts at the international level. However, the need for international attention, solidarity and assistance in combating a public health threat is *conditio sine qua non* (an indispensable condition) for the UNSC to address it and justify its characterization as a threat to international peace and security.

### III. CONCEPTUALIZING THE COVID-19 PANDEMIC AS “A THREAT TO INTERNATIONAL PEACE AND SECURITY”

Using the above criteria for qualifying a public health emergency as a threat to international peace and security, this part proceeds by criticizing the approach that the UNSC has taken to address the COVID-19 pandemic with a twofold argument. First, I argue that the time factor plays a huge role in responding to the global pandemic, and therefore the UNSC should have acted much more promptly and efficiently than it did. Even the UNSC itself previously admitted that “the control of outbreaks of major infectious diseases requires urgent action and greater national, regional and international collaboration,” and emphasized “the crucial and immediate need for a coordinated international response” to such public health emergencies.<sup>101</sup>

Second, with all the available and accurate information on the recent COVID-19 outbreak, as well as robust data and analysis on the interplay of the pandemic and international security, I contend that the current pandemic presents a real and quantifiable security risk and as such meets the threshold criteria to make international securitization appropriate and legitimate, and accordingly, to conceptualize the pandemic as a threat to international peace and security within the meaning of Article 39 of the UN Charter. This is even more so in the present context, as considerable

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99. *Id.*

100. *Id.*

101. S.C. Res. 2177, at 2 (Sept. 18, 2014).

time has passed since the disease outbreak in Wuhan, China, in December 2019 and its subsequent rapid spread to other countries, regions, and continents.

### A. *Seriousness and Scale of the COVID-19 Pandemic*

The new coronavirus pandemic has been described as “the most challenging crisis . . . since the Second World War.”<sup>102</sup> It is, without a doubt, the greatest public health emergency of our times. While all the potential new impacts of the novel SARS-CoV-2 virus are not yet entirely known, the pathogen has thus far been shown to have significant international security implications. Following an increase in cases outside China, the WHO declared the outbreak a PHEIC on January 30, 2020, citing the alarming levels of spread and severity as reasons, particularly affecting countries without robust healthcare systems. Subsequent to this legally significant decision, the WHO declared the coronavirus outbreak a pandemic on March 11, 2020.<sup>103</sup> The declaration of the COVID-19 pandemic as a PHEIC was renewed on April 30, 2020.<sup>104</sup>

Due to the rapid spread of the virus, the humanitarian, human security, and health impact of the COVID-19 pandemic can hardly be overestimated. As I write, COVID-19 has spread to over 213 countries and territories across six continents (with Antarctica still being the only continent with no confirmed cases of the new coronavirus). The virus has infected more than 13 million people worldwide, already claiming more than half a million lives.<sup>105</sup> Despite its seemingly lower mortality rate when compared to both Ebola and SARS as similarly serious diseases, the high number of COVID-19 infections already resulted in a much higher number of eventual deaths. By way of comparison, a total of 28,652 confirmed cases and 11,325 deaths were reported in the case of the Ebola outbreak (which remained mostly limited to West Africa)<sup>106</sup>

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102. António Guterres, U.N. Secretary-General, Remarks at the Meeting on the Report on the Socio-Economic Impacts of COVID-19 (Mar. 31, 2020) (transcript available at <https://www.un.org/sg/en/content/sg/press-encounter/2020-03-31/transcript-of-un-secretary-general%E2%80%99s-virtual-press-encounter-launch-the-report-the-socio-economic-impacts-of-covid-19> [<https://perma.cc/48SA-GJQL>]).

103. Charles Clift, *Coronavirus: Public Health Emergency or Pandemic – Does Timing Matter?* (May 1, 2020), <https://www.chathamhouse.org/2020/05/coronavirus-public-health-emergency-or-pandemic-does-timing-matter> [<https://perma.cc/9Z5F-PJCR>].

104. World Health Organization, *Listings of WHO’s response to COVID-19*, (June 29, 2020), <https://www.who.int/news/item/29-06-2020-covid-timeline> [<https://perma.cc/4RD8-NRFF>].

105. *COVID-19 Pandemic*, EUR. CTR. FOR DISEASE PREVENTION AND CONTROL, <https://www.ecdc.europa.eu/en/covid-19-pandemic> [<https://perma.cc/PWH3-F3QY>] (last visited July 14, 2020).

106. *2014-2016 Ebola Outbreak in West Africa*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html> [<https://perma.cc/E8YB-2TTC>] (last visited July 15, 2020).

and during the period of SARS infection, over 8,000 people from 29 different countries and territories were infected, and at least 774 died.<sup>107</sup>

Just by looking at this official statistical data, one can safely say that COVID-19 poses a formidable threat to human life. Moreover, the extent of the catastrophe caused by a pandemic can be measured not only in human terms, but also in the fear and panic it instills in those it affects. The mental health and wellbeing of whole societies have been severely impacted by this crisis. Research on both past outbreaks of infectious diseases and the COVID-19 pandemic has highlighted the widespread negative impact of epidemics on individuals' mental health and wellbeing.<sup>108</sup> The overwhelming psychological distress in COVID-19 affected populations is evidenced in national surveys conducted thus far.<sup>109</sup> Indeed, "[t]he long-term impact of the [COVID-19 emergency] on people's mental health . . . should not be overlooked."<sup>110</sup>

Both the speed and the magnitude of the COVID-19 disease spread rightfully suggests factors favoring its designation as a threat to international peace and security.<sup>111</sup> Some members of the UNSC portrayed COVID-19 as a threat to international peace and security by drawing on notions that reflect conceptions of human security. For example, the representative of the Dominican Republic in the UNSC, Ambassador José Singe, stated that "the potential and unprecedented magnitude of the COVID-19 outbreak globally constitutes a threat to

107. *Summary of Probable SARS Cases with Onset of Illness from 1 November 2002 to 31 July 2003*, WORLD HEALTH ORG., [https://www.who.int/csr/sars/country/table2004\\_04\\_21/en/](https://www.who.int/csr/sars/country/table2004_04_21/en/) [<https://perma.cc/SQ77-F45S>] (last visited July 15, 2020).

108. See Paul S.F. Yip et al., *The Impact of Epidemic Outbreak: The Case of Severe Acute Respiratory Syndrome (SARS) and Suicide Among Older Adults in Hong Kong*, 31 *CRISIS* 86 (2010); James M. Shultz et al., *Fear factor: The Unseen Perils of the Ebola Outbreak*, 72 *BULL. OF THE ATOMIC SCIENTISTS* 304–10 (2016); Hector W.H. Tsang et al., *Psychosocial Impact of SARS*, 10 *EMERGING INFECTIOUS DISEASES* 1326 (2004); Hacer Belen, *Fear of COVID-19 and Mental Health: The Role of Mindfulness in During Time of Crisis*, *RSCH. SQUARE* (July 7, 2020), <https://www.researchsquare.com/article/rs-40529/v1> [<https://perma.cc/6JTA-7ZC6>].

109. See, e.g., Asghar Afshar Jahanshahi et al., *The Distress of Iranian Adults During the Covid-19 Pandemic – More Distressed than the Chinese and with Different Predictors*, 87 *BRAIN, BEHAV., AND IMMUNITY* 124 (2020); Jianyin Qiu et al., *A Nationwide Survey of Psychological Distress Among Chinese People in the COVID-19 Epidemic: Implications and Policy Recommendations*, 33 *GEN. PSYCHIATRY* 1 (2020); Nirmita Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, *KAISER FAM. FOUND.* (Apr. 21, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/> [<https://perma.cc/WKB7-MTTN>].

110. U.N. Policy Brief: COVID-19 and the Need for Action on Mental Health, 7 (May 13, 2020), [https://www.un.org/sites/un2.un.org/files/un\\_policy\\_brief-covid\\_and\\_mental\\_health\\_final.pdf](https://www.un.org/sites/un2.un.org/files/un_policy_brief-covid_and_mental_health_final.pdf) [<https://perma.cc/2EQJ-3B2K>].

111. Marko Svcevic, *COVID-19 as a Threat to International Peace and Security: What Place for the UN Security Council?*, *EUR. J. INT'L L. BLOG (EJIL:TALK!)* (Mar. 27, 2020), <https://www.ejiltalk.org/covid-19-as-a-threat-to-international-peace-and-security-what-place-for-the-un-security-council/> [<https://perma.cc/LXK5-FE89>].

international peace and security and could critically harm human security across the world.”<sup>112</sup>

Economic, social, and political stability in COVID-19 affected countries and regions also continue to be of real international security concern. In the words of Peter Maurer, President of the International Committee of the Red Cross (ICRC), COVID-19 “is deepening fragility, spiking humanitarian needs, accentuating the impact of violence, opening the doors to ‘alarming’ levels of stigmatization and reversing development gains.”<sup>113</sup> UNSC Resolution 2532 (2020) recognized this reality by stating that conditions of violence and instability in conflict and post-conflict situations can exacerbate the pandemic, and vice versa.<sup>114</sup>

By linking the (potential) COVID-19 pandemic implications to the post-conflict situations, the prospect of new incidents of violence and conflicts because of the disease’s effects over the stability of the affected countries, the situations in armed conflict-affected countries, or those affected by humanitarian crises, the UNSC followed the traditional (and fairly uncontroversial) way of rationalizing its pronouncement on the issue and legitimizing its engagement under Chapter VII of the UN Charter.

All things considered, there is an obvious interconnection between state security, human security, and international peace and security in the present case. More specifically, the threatened harm to international and human security is sufficiently clear, quantifiable and serious, to justify *prima facie* qualification of the COVID-19 pandemic as a threat to international peace and security. Both state security (in terms of armed conflict prospects as well as existing humanitarian crises in the conflict areas) and human security have been threatened to a high enough level to make such a determination by the UNSC normatively justified and legitimate.

### *B. Proper Purpose of the UNSC’s Action*

The underlying purpose that the characterization by the UNSC of the COVID-19 pandemic as a threat to international peace and security would serve is twofold: (1) to curb, control, and diminish to the extent possible the threat posed by the pandemic, with a particular emphasis on countries in need, including those in situations of armed conflict or affected by humanitarian crises; and (2) to call for a range of concrete measures and actions by states to minimize the disproportionate negative impact of the pandemic, “notably the socio-economic impact, on vulnerable population

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112. Press Release, Security Council, COVID-19 ‘Profoundly Affecting Peace across the Globe’, Says Secretary-General, in Address to Security Council, U.N. Press Release SC/14241 (July 2, 2020).

113. *Id.*

114. S.C. Res. 2532, at 1 (July 1, 2020).

groups, including women and girls, children, refugees, internally displaced persons, older persons and persons with disabilities.”<sup>115</sup> This main purpose of taking up the issue of COVID-19 and designating it a possible threat to international peace and security is also reflected in UNSC Resolution 2532 (2020).<sup>116</sup>

### C. *The UNSC’s Action as the Last Resort*

Needless to say, the UNSC has been uniquely positioned to address such a complex crisis as a global pandemic. Its pronouncement of the COVID-19 pandemic as a threat to international peace and security would enable the UNSC to appeal to a broad range of actors and resources and call for a number of concrete and operational measures for effective international cooperation in countering the global pandemic. In this way, the UNSC would serve as a principal forum to converge multilateral efforts to address this unprecedented and unpredicted global threat. As the time passed and the crisis developed, it became increasingly evident that the UNSC’s action was a must.

Other measures such as the two COVID-19-related resolutions adopted by the UNGA (Resolutions 74/270 and 74/274)<sup>117</sup> did not go much farther than being statements of joint, good intentions. For example, the latter resolution on the issue of access to vaccines, medicines and medical equipment to face COVID-19 does not contain any call or recommendation for member states to engage in international cooperation, including on the implementation of measures and regulations adopted by the WHO.<sup>118</sup> Consequently, these other measures proved to be of only little, if any, effect on the ground.

### D. *The UNSC’s Intervention as a Proportional Means*

It is moreover obvious that designating the COVID-19 pandemic a threat to international peace and security and, in this context, recommending appropriate measures or, if necessary, declaring legally binding (non-military) measures of enforcement would be proportionate to the seriousness and scale of this global threat. UNSC Resolution 2532 (2020) demands a general and immediate cessation of hostilities in all situations on the UNSC’s agenda and highlights the enhanced need for solidarity and cooperation on the national, regional, and international levels in countering this pandemic. More particularly, the resolution “calls upon all parties to armed conflicts to engage immediately in a

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115. *Id.* at 2.

116. *See id.*

117. *See* G.A. Res. 74/270 (Apr. 2, 2020); G.A. Res. 74/274 (Apr. 20, 2020).

118. G.A. Res. 74/274 (Apr. 20, 2020); *See* Raymundo T. Treves, *The Health of International Cooperation and UNGA Resolution 74/274*, 70 QUESTIONS INT’L L. 21 (2020).

durable humanitarian pause for at least 90 consecutive days, to enable the safe, unhindered and sustained delivery of humanitarian assistance” and provision of related services. The aim of such a pause is to allow for medical evacuations, in accordance with international law, “including international humanitarian and refugee law as applicable.”<sup>119</sup>

However, the cessation of hostilities and the humanitarian pause “do not apply to military operations against the Islamic State in Iraq and the Levant (ISIL, also known as Da’esh), Al Qaida and Al Nusra Front (ANF), and all other individuals, groups, undertakings and entities associated with Al Qaida or ISIL,” and other UNSC-designated terrorist groups.<sup>120</sup> Resolution 2532 also calls for states’ concrete actions to mitigate the disproportionately negative socio-economic impact of the pandemic on the most vulnerable sectors of society so that they “ensure the full, equal and meaningful participation of women and youth” in their COVID-19 response efforts through the “development and implementation of an adequate and sustainable response to the pandemic.”<sup>121</sup> All these non-binding recommendations and measures cannot be considered excessive compared to the enormous danger threatening international peace and security.

#### *E. Reasonableness of the UNSC’s Intervention and Balance of Consequences*

In a case of such a huge and global threat as is the COVID-19 pandemic, it is of course more appropriate for the UNSC to pronounce on the issue, preferably declaring it a threat to international peace and security, and act accordingly. Treating the global pandemic merely as a potential threat or not even taking up the issue as an international security matter may result in much worse immediate and long-term consequences. In such situations, it is also sensible to expect that implementation of UNSC’s recommendations or enforcement measures not involving the use of armed force by the member states will ensure more successful coping with the pandemic’s implications.

#### *F. The Need for a Joint International Action and Regional Mobilization*

As far as the COVID-19 pandemic is concerned, the UNSC seems to be the organ of the UN which is best placed to facilitate a coordinated and common international response to a global threat that knows no borders. Unlike its resolution on the 2014 Ebola virus outbreak in some countries in West Africa, with which the UNSC for the first time considered an infectious disease outbreak a threat to international peace

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119. S.C. Res. 2532, 1 (July 1, 2020).

120. *Id.*

121. *Id.* ¶ 7.

and security, Resolution 2532 (2020) does not mention the critical role of the WHO.<sup>122</sup> Nor does it urge member states to implement the temporary recommendations issued by the WHO Director-General on January 30, 2020, and April 30, 2020, as Resolution 2177 (2014) did.<sup>123</sup>

Resolution 2532 is also silent on other relevant issues such as national and regional mobilization of capabilities in facing the COVID-19 pandemic, the continuing exchange of expertise, lessons learned and best practices, or the provision of urgent resources and assistance, including deployable medical capabilities, laboratory services, dedicated clinical services, and technical expertise. In that respect, it does not follow in the footsteps of its preceding resolution on Ebola which explicitly urged “member states, as well as bilateral partners and multilateral organizations, including the AU, ECOWAS, and European Union, to mobilize.”<sup>124</sup> The preceding resolution further urged members and partners to provide immediately to the affected countries and implementing partners essential resources, supplies, coordinated assistance, technical expertise, and additional medical capacity, including for rapid diagnosis and training of health workers at the national and international level.<sup>125</sup>

The above analysis of the UNSC’s response to the COVID-19 crisis in light of the suggested threshold criteria for qualifying the global pandemic as a threat to international peace and security has shown that these criteria were fully met. However, the UNSC’s approach was indecisive, feeble and, above all, painfully slow because of procedural and substantive difficulties it faced. The UNSC’s inability to act promptly and effectively in response to this global threat has renewed calls for UN reform.<sup>126</sup>

There are, of course, other intricate and related legal questions that merit closer examination. For example, as Anna Hood asked when it came to Ebola, “what effect does the declaration that [the pandemic] is a threat to the peace have for art 41 of the UN Charter and how well equipped is the Council to address health-related matters?”<sup>127</sup> Moreover,

122. Compare S.C. Res. 2177, 3 (Sept. 18, 2014) (mentioning WHO involvement), with S.C. Res. 2532 (July 1, 2020) (failing to mention the role of the WHO).

123. Compare S.C. Res. 2177, 5 (Sept. 18, 2014) (requesting implementation of International Health Regulations), with S.C. Res. 2532 (July 1, 2020) (failing to mention the role of the WHO).

124. Compare S.C. Res. 2177, 4 (Sept. 18, 2014) (requesting mobilization of member states among others), with S.C. Res. 2532 (July 1, 2020) (failing to urge mobilization of local and regional states and organizations in regard to exchange of resources and certain disease related information).

125. S.C. Res. 2177, 4-5 (Sept. 18, 2014).

126. Enrico Milano & Giulio Bartolini, *COVID-19 and Multilateral Governance at the United Nations between Risk-Prevention, Procedural Adaptation and Feeble Response*, 70 *QUESTIONS INT’L L.* 1, 3 (2020).

127. See Hood, *supra* note 9, at n.11.



an important jurisdictional question pertaining to the delicate balance of powers between the UN's two principal organs (UNSC and UNGA) arises: is the UNGA, in public health emergency situations like this one—when permanent five members of the UNSC are unable to achieve unanimity in addressing threats to international peace and security in a timely manner—entitled to take authority into its hands by invoking its Uniting for Peace resolution of 1950?<sup>128</sup> Can provisions of the UN Charter be interpreted to give the UNGA such powers in the present context? If so, what character (legal or political) and weight is to be ascribed to both UNGA resolutions dedicated to the issue of COVID-19 pandemic, given that they preceded the UNSC Resolution 2532 (2020)? These questions, however, are beyond the scope of this Article.

#### IV. UNSC RESOLUTION 2532 (2020) AND ITS IMPLICATIONS: BETTER LATE THAN NEVER?

UNSC Resolution 2532 (2020) marks the third time that the UNSC has dealt directly with a public health problem—the first two being with regard to HIV/AIDS and Ebola.<sup>129</sup> With its, in my view, “long overdue” resolution on cessation of hostilities during the COVID-19 pandemic, the UNSC, perhaps surprisingly, did not characterize this global pandemic as a threat to international peace and security. However, it did consider that it has the potential to become such a threat, by stating that “the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security.”<sup>130</sup>

As in previous cases of UNSC resolutions dealing with infectious diseases, there is no elaboration of the normative or factual basis for that consideration except that it seems to be linked to the risk of the pandemic outbreak exacerbating the adverse humanitarian impact of conflict situations in conflict-affected countries and reversing the peacebuilding and development gains of countries in transition and post-conflict countries.<sup>131</sup>

For our further discussion, it is useful to briefly outline the sequence of the major events that led to the adoption of the relevant resolution by the UNSC. In late March 2020, the UN Secretary-General issued a call for a global ceasefire because of the COVID-19 outbreak.<sup>132</sup> In early

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128. See G.A. Res. 5/377, ¶ 1 (Nov. 3, 1950).

129. See S.C. Res. 1308 (July 17, 2000) (dealing with the HIV/AIDS pandemic); S.C. Res. 2177 (Sept. 18, 2014) (dealing with the Ebola outbreak in West Africa); S.C. Res. 2532 (July 1, 2020) (dealing with the COVID-19 pandemic).

130. S.C. Res. 2532, 1 (July 1, 2020).

131. *Id.*

132. António Guterres, U.N. Secretary-General, Appeal for Global Ceasefire (Mar. 23, 2020), (transcript available at <https://www.un.org/sg/en/content/sg/statement/2020-03-23/secretary-generals-appeal-for-global-ceasefire> [<https://perma.cc/Z9SS-6XNQ>]).

April 2020, he delivered a detailed update, underlining that while parties had expressed their acceptance for his call for a global ceasefire, there were challenges to making ceasefires a reality and “robust diplomacy” was needed.<sup>133</sup>

In his subsequent remarks to the UNSC on the COVID-19 pandemic, the UN Secretary-General stressed that “the pandemic also poses a significant threat to the maintenance of international peace and security—potentially leading to an increase in social unrest and violence.”<sup>134</sup> Moreover, he highlighted the crucial role of the UNSC’s engagement in mitigating the international peace and security implications of the COVID-19 pandemic.<sup>135</sup> Requesting “a signal of unity and resolve” from the UNSC, he pointed to a much-needed “marshalling of the international community’s response to the international security implications” of the COVID-19 crisis, just like the UNSC did by fully engaging itself in the cases of the HIV/AIDS pandemic and the Ebola outbreak.<sup>136</sup>

It then took another three months for the members of the UNSC to finally agree on a statement on the matter. The UNSC unanimously adopted the resolution in a virtual meeting, after having considered all the collected and reliable information on the coronavirus and its effects, including the UN Secretary-General’s briefs and reports.<sup>137</sup> In the light of

133. António Guterres, U.N. Secretary-General, Press briefing to update on his Appeal for A Global Ceasefire following the Outbreak of Coronavirus (COVID-19) (Apr. 3, 2020), (transcript available at <https://www.un.org/sg/en/content/sg/press-encounter/2020-04-03/secretary-generals-press-briefing-update-his-appeal-for-global-ceasefire-following-the-outbreak-of-coronavirus-%28covid-19%29> [<https://perma.cc/VN9F-3DCF>]).

134. António Guterres, U.N. Secretary-General, Remarks to the Security Council on the COVID-19 Pandemic (Apr. 9, 2020), (transcript available at <https://www.un.org/sg/en/content/sg/statement/2020-04-09/secretary-generals-remarks-the-security-council-the-covid-19-pandemic-delivered> [<https://perma.cc/V54P-BJGN>]).

135. *Id.*

136. *Id.*

137. Resolution 2532 (2020) was adopted 111 days after the WHO declared COVID-19 to be a global pandemic. One may wonder why it had taken such a long time before the UNSC adopted a single resolution on the matter. At least two reasons for a belated response of the UNSC can be identified. The first is of a procedural nature. It is obvious that the UNSC also was unprepared to grapple with the extraordinary circumstances that did not allow for meeting in-person. It thus struggled for quite some time with an internal challenge: how to ensure business continuity despite the closure of in-person meetings at its Headquarters in New York. In the face of this lockdown, it had to deal with a profound disruption of ordinary working methods and procedural rules and adapt them to the new reality. As a result, the UNSC has developed the practice of meeting virtually through a UN-developed video conferencing system and has established an unprecedented practice of voting in written form. The second and more substantive reason for the UNSC’s delayed response was a protracted and heated controversy between China and the United States over the role of the WHO in this crisis and over language on the origins of the virus, which made it impossible to reach the necessary agreement within the UNSC sooner. The voting procedure for the draft resolution (drafted by France and Tunisia) was launched on

this development, any fear that such a determination/pronouncement by the UNSC may be premature or disproportionate to the major health security threat that the COVID-19 pandemic currently poses to the international community is out of place. Hence, the collective decision of the UNSC members not to accept the UN Secretary-General's suggestion to designate the coronavirus pandemic as a threat to international peace and security seems inappropriate, if not incomprehensible.<sup>138</sup>

In its content, Resolution 2532 is limited to support for a global ceasefire, thus implying that the UNSC was unable to come up with a broadened resolution that would fully address the need for renewed member state commitment to transparency and accountability in the context of COVID-19. Nor does the resolution contain any clause calling for the lifting or suspension of economic sanctions that affected the delivery of medical supplies in the countries targeted by such sanctions.<sup>139</sup>

For the most part, the operative part of the resolution demands a cessation of hostilities from the parties to armed conflicts and calls for intensified international cooperation to tackle the pandemic.<sup>140</sup> The idea of a global ceasefire and “immediate 90-day humanitarian pause” in armed conflict areas throughout the world explicitly endorsed by UNSC Resolution 2532 is indeed unprecedented.<sup>141</sup> The resolution also requests the UN Secretary-General to provide routine updates to the UNSC on

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June 30, 2020, and concluded on July 1, 2020, in accordance with the special written procedure agreed to by the UNSC members. The final resolution makes no mention (not even an indirect one) of the WHO which was a bone of contention during lengthy negotiations on the text, notably between China and the United States. For all the challenges of working via video teleconferences, the UNSC members, and especially the permanent members, can nonetheless be criticized for “their inability or unwillingness to set up an emergency mechanism for a body that is supposed to meet regularly and continuously in order to accomplish its duties as the UN main organ with primary responsibility in the maintenance of international peace and security.” Giuseppe Nesi, *The United Nations Principal Political Organs and the Universal Pandemic: How to Meet, Negotiate and Deliberate Under ‘New, Extraordinary and Exceptional Circumstances’?*, 70 QUESTIONS INT’L L. 5, 20 (2020).

138. It might have been that China’s intransigent resistance to designate in the UNSC the COVID-19 pandemic as a threat to international peace and security prevented any such determination. We can only speculate on the reasons for such a strategic formulation that carefully excluded certain associations to any state, but it seems that this corresponds to the widest possible consensus that the UNSC members were able to reach on this issue.

139. The Russian mission to the UNSC signaled that it wanted a clause in the resolution addressing the issue of economic sanctions. However, this appeal largely fell on the deaf ears of other UNSC members, in particular, the United States. See Julian Borger, *US Blocks Vote on UN’s Bid for Global Ceasefire Over Reference to WHO*, THE GUARDIAN (May 8, 2020), <https://www.theguardian.com/world/2020/may/08/un-ceasefire-resolution-us-blocks-who> [https://perma.cc/GRX6-2NXX].

140. S.C. Res. 2532, ¶ 5 (July 1, 2020).

141. *Id.* at ¶ 2.

cease-fire implementation progress in conflict-affected and fragile states.<sup>142</sup>

It is perhaps too early to assess the normative value and real impact of the UNSC resolution on tackling the COVID-19 pandemic. Some UN experts have been rather skeptical about any potential impact of UNSC Resolution 2532, finding its adoption coming too late and its immediate effect too little to bring about positive changes on the ground.<sup>143</sup> Others have considered the resolution to be “more of a face-saving measure for the Council than a signal of renewed international resolve.”<sup>144</sup> Had the UNSC responded with greater resolve at the beginning of the crisis, when international concern about the coronavirus was at its peak, it might have more fundamentally altered the calculations of warring parties and signaled stronger international unity and cooperation to back up demands with prompt and coordinated action.<sup>145</sup> While the representatives and ambassadors of the member states in the UNSC as well as some other diplomats hailed the unanimous adoption of the resolution as a meaningful victory for multilateralism, it is questionable whether such a resolution coming months after the global spread of the pandemic will help bring international peace and security.<sup>146</sup>

With its rather pragmatic provisions, Resolution 2532 may prove to be of great practical value, in the sense that it may “further empower mediators and bolster humanitarian assistance efforts as COVID-19 cases rise in a number of the world’s worst conflict zones.”<sup>147</sup> First, it provides for an urgent, achievable, and time-limited goal by giving mediators “an urgent, yet achievable, impetus for parties to temporarily pause offensive operations.”<sup>148</sup> Second, it subjects belligerents to international scrutiny through creating a monitoring framework for documenting its worst abusers and regularly providing updated data to the UNSC on the progress of cease-fire implementation.<sup>149</sup> Given the right political pressure, such a control mechanism “may deter both state and non-state actors from resuming violence.”<sup>150</sup> Third, the resolution may help provide new or additional openings for critically needed humanitarian

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142. *Id.* at ¶ 5.

143. Maurizio Arcari, *Some thoughts in the aftermath of Security Council Resolution 2532 (2020) on Covid-19*, 70 QUESTIONS INT’L L. 59, 73 (2020).

144. Tyler Beckelman & Amanda Long, *U.N. Finally Endorses a COVID Cease-fire: Will it Make a Difference?*, U.S. INST. PEACE (July 8, 2020), <https://www.usip.org/publications/2020/07/un-finally-endorses-covid-cease-fire-will-it-make-difference> [<https://perma.cc/Q49C-J2E5>].

145. *See id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

assistance to address exacerbating conditions in the world's worst armed conflicts.<sup>151</sup>

The odds are also that, by adopting another resolution on the matter in the near future with a higher degree of its substantive involvement, the UNSC will reclassify the COVID-19 pandemic as a threat to international peace and security. Should this happen, the UNSC will be able to affirmatively act under Chapter VII of the UN Charter and take any enforcement action it deems necessary and appropriate to maintain or restore international peace and security. However, in such a case, the UNSC will most likely not determine any enforcement measures, unless there is a political target whose behavior is to be changed through coercion.

Yet, the use of Article 39 language for the COVID-19 pandemic would carry important symbolic and political weight, thus generating "momentum and additional political, operational and financial commitments by the international community."<sup>152</sup> For example, during the Ebola crisis in 2014, the UNSC managed to swiftly pass its Resolution 2177 "calling the virus a 'threat to international peace and security,' which inspired other nations to drum up their support in a powerful display of solidarity."<sup>153</sup>

It remains to be seen what the resolution will actually achieve, but had it immediately followed the UN Secretary-General's plea in March 2020 and designated the COVID-19 pandemic as a threat to international peace and security, it would have gained more traction. It is also worth noting that the adoption of this resolution is of high symbolic value. It has proved that should there be good political will and maturity, the UNSC members can go beyond their divergent views, prioritize the broader interests of the international community and convey a message of unity. In any event, the success or failure of Resolution 2532 in terms of its prompt and effective implementation by the UN member states "will depend on the extent to which member states use their diplomatic capital to make it a reality."<sup>154</sup>

## CONCLUSION

Where does the foregoing analysis of the UNSC's practice lead us in terms of its proper role in addressing public health emergencies and considering infectious disease outbreaks as threats to international peace and security? So far, its treatment of "non-traditional" threats to international peace and security, including infectious disease outbreaks, has been neither coherent nor settled. In previous cases of epidemic

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151. Beckelman & Long, *supra* note 144.

152. Burci & Quirin, *supra* note 58, at 29.

153. Beckelman & Long, *supra* note 144.

154. *Id.*

outbreaks, including the global COVID-19 pandemic, the UNSC's responses were usually too slow and too inefficient to effectively combat the infectious diseases. This is mainly because construing a public health emergency as a matter of international security brings into play a threat-defense logic, which often complicates the international political environment and negotiations around a public health issue and entangles them with a wider set of international political disputes.<sup>155</sup>

On the other hand, however, it is also true that the narrative of public health emergency as an international security issue in the UNSC and its direct involvement in the most serious cases of infectious diseases outbreak may generate much political traction by raising the political profile of the public health situation at hand. As Gian Luca Burci has suggested, the intervention of the UNSC through declaring a public health event a threat to international peace and security may also incentivize and step up political commitments by the UN member states, mobilize additional financial and human resources and facilitate "the deployment of military assets with the required logistical, organizational and enforcement capacity."<sup>156</sup>

What criteria, then, may qualify a public health emergency as a threat to international peace and security under Article 39 of the UN Charter? This contribution has argued that in securitizing public health emergencies, the UNSC should appeal to objective criteria, such as those discussed above, to rationalize, normatively justify, and legitimize its determinations of threats to international peace and security. It has also examined the normative bases for such UNSC determinations, most notably the nature, scale, and seriousness of a public health emergency. While the UNSC will not normally deem the spread of the disease to be an international peace and security issue, it may nevertheless find it reasonable and necessary to treat it as such in certain serious cases under the conditions discussed above. In that respect, the article has claimed that any public health emergency that leads to large-scale death or lessening of life chances and undermines the social, political, and economic bases for stability of states as the basic units of the international system amounts to a threat to international peace and security, and should be considered as such by the UNSC.

By providing operative criteria for qualifying an infectious disease outbreak as a threat to international peace and security and applying such criteria to the COVID-19 case study, this Article has moreover illustrated how the UNSC can legitimately become the pre-eminent guardian of global public health. Within a "broader and broadening notion" of "a threat to international peace and security" which may legitimately

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155. See Stefan Elbe, *Haggling over Viruses: The Downside Risks of Securitizing Infectious Disease*, 25 HEALTH POL'Y & PLAN. 476, 483 (2010).

156. Burci & Quirin, *supra* note 58, at 39.

encompass large-scale and extreme public health threats such as the COVID-19 outbreak, the “role of the [UNSC] should be limited to situations,” matters, and issues “whose potential or actual security implications are assessed on the basis of a more holistic” and rigorous analysis (including the consideration of the qualifying criteria proposed here) “rather than conclusions that are predicated on unqualified or anecdotal assumptions.”<sup>157</sup> “Such an analysis could be provided by the UN Secretariat in collaboration with other relevant international organizations including WHO.”<sup>158</sup>

Finally, has the UNSC, by not addressing the COVID-19 pandemic as an international security issue in a timely manner and not qualifying it as a threat to international peace and security, failed to exercise its primary responsibility for the maintenance of international peace and security? Having analyzed the way and substance of the UNSC’s response to the COVID-19 pandemic against the objective criteria proposed herein, it is possible to conclude that the main political organ of the UN did not properly fulfill its mandate as regards this global security threat for two obvious reasons: (1) its response was far too slow; and more importantly, (2) it failed to determine that the global pandemic constitutes a threat to international peace and security. By not responding with urgency and from the heart, the UNSC has missed the early window of opportunity to give substantial political weight to the UN Secretary-General’s call for a global ceasefire.

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157. *Id.*

158. *Id.*