Petulant and Contrary: Approaches by the Permanent Five Members of the Security Council to the Concept of 'Threat to the Peace' under Article 39 of the UN Charter

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Dedications

Dr Rob McLaughlin

You went out on a limb and supported me before there was any empirical reason to do so; for that, I will be forever grateful and will owe you a debt I cannot repay. A young academic could not ask for a better mentor, colleague and friend.

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Abstract

As both a political concept and a legal consequence, a determination that a 'threat to the peace' exists in a given situation has unparalleled ramifications—including enlivening the United Nations Security Council's (UNSC) powers and authorities under Chapter VII, which can in turn provide a foundation for military intervention. But for all of its political context and content, the UNSC's authority to make this threshold determination regarding the existence of a 'threat to the peace' is a legal obligation and does not receive a totally unfettered discretion. Such decisions must, among other requirements, at the very least remain within the limits of the Purposes and Principles of the Charter. Further, the ability to determine whether a 'threat to the peace' exists forms the normative cornerstone of the Security Council's mandate to maintain international peace and security. Situations in which the Security Council has opted to determine that a 'threat to the peace' exists are wide-ranging, and have included human rights violations in South Africa during apartheid, refugee concerns, international armed conflict, terrorism, civil war and the defence of democracy.

Aside from Article 51 of the United Nations (UN) Charter, a UNSC authorisation under Articles 39–42 in Chapter VII is the only exception to the prohibition of the use of force provided for in Article 2(4) of the UN Charter. To authorise military intervention within a given situation, particularly when using its Article 42 authority, the Security Council must first determine whether that situation constitutes a 'threat to the peace' under Article 39 of the Charter. The Charter has long been interpreted as placing few restrictions around how the Security Council arrives at such determinations; indeed, the phrase 'threat to the peace' was left intentionally undefined during the drafting of the UN Charter. Commentators have thus hypothesised that the phrase 'threat to the peace' is undefinable in nature and that such decisions are fluid, arbitrary and lacking in consistency. This thesis tests this hypothesis by undertaking critical discourse analysis of the Permanent Five's (P5) justificatory discourse surrounding individual decisions of this nature, and then performing a meta-synthesis of the case studies to demonstrate that each P5

member approaches the question in a very consistent manner, and that each member's consistent approach shows that they all have a working legal definition of what the phrase 'threat to the peace' means in the context of Article 39 of the UN Charter. The flow-on effect of this is that a Security Council-wide definition of 'threat to the peace' exists in a middle ground of these five national understandings. This in turn allows for greater levels of predictability when trying to ascertain when the Security Council will choose to act.

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