
The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action

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Abstract

The United Nations Security Council (UNSC) is, in many ways, a unique institution. It exercises legislative, judicial and executive powers; operates with few legally binding checks and balances and has even been described as being 'unbound by law'. The Council has broad powers to maintain international peace and security, most notably under Chapter VII of the UN Charter, and its decisions are binding on UN members. At the same time, some of the Council's actions have been labelled as ultra vires and the lack of a binding, legal oversight mechanism to reign in Council action has been decried. Accepting that there is a difficulty in imposing legally binding checks and balances on the UNSC, this article argues that approaching the Council's Chapter VII powers as a form of emergency powers may help to illuminate the role that non-legal restraints can play in curbing its power. In particular, this article uses Oren Gross' 'extra-legal measures model' to conceptualize the Chapter VII regime and restraints upon it. It shows how the extra-legal measures model offers a descriptive account of UNSC action under Chapter VII and then builds on the gaps in the application of the model to the Council to highlight areas for the development of better restraints, in particular, in areas that may be missed by a traditional legal analysis.

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1 Introduction

The United Nations Security Council (UNSC) is, in many ways, a unique institution. It exercises legislative, judicial and executive powers;¹ operates with few (if any) legally binding checks and balances and has even been described as being ‘unbound by law’.² The Council has broad powers to maintain international peace and security, most notably under Chapter VII of the UN Charter,³ and its decisions are binding on UN members.⁴ At the same time, many commentators have labelled some Council action as *ultra vires* and decried the lack of a binding, legal oversight mechanism.⁵ Accepting the difficulty of imposing legally binding checks and balances on the Council, this article argues that approaching the Council’s Chapter VII powers as a form of emergency powers may help to illuminate the role that non-legal restraints can play in curbing abuses of power. In particular, this article uses Oren Gross’ ‘extra-legal measures model’ to conceptualize the Chapter VII regime and restraints upon it.⁶ This article shows how the extra-legal measures model offers a descriptive account of Council action under Chapter VII and then builds on the gaps in the application of the model to highlight potential areas for the development, in particular, of areas that may be missed by a traditional legal analysis. The second part of this article introduces the dominant, legal approaches to restraining the Council. The third part provides a summary of emergency powers theory and its relevance to the Council’s Chapter VII powers. The fourth part then describes the extra-legal measures model, before the fifth part shows how the model can be applied to the Council when acting under Chapter VII and identifies potential problems with its application. Finally, the sixth part sets out lessons that can be learned for Council governance in light of the extra-legal measures model.

¹ Harper, ‘Does the United Nations Security Council Have the Competence to Act as Court and Legislature?’, 27 *New York University Journal of International Law and Politics* (1995) 103, at 107–108, 126; Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (2011), at 7; Elberling, ‘The Ultra Vires Character of Legislative Action by the Security Council’, 2 *International Organizations Law Review (IOLR)* (2005) 337, at 348.

² Oosthuizen, ‘Playing the Devil’s Advocate: the United Nations Security Council Is Unbound by Law’, 12(3) *Leiden Journal of International Law (LJIL)* (1999) 549. See also *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United States; Libya v. United Kingdom)*, Provisional Measures, 14 April 1992, ICJ Reports (1992) 115, at 142 (Judge Shahabuddeen), noting that a lack of legal limits on UN Security Council (UNSC) power would be ‘potentially curious’ but not ‘necessarily unsustainable in law’. Cf. ICTY, *Prosecutor v. Tadić – Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Tadić)*, 2 October 1995, Case no. IT-94-I-AR72, at 28; Akande, ‘The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?’ 46(2) *International and Comparative Law Quarterly* (1997) 309, at 315–316.

³ Charter of the United Nations, chs VI, VII.

⁴ *Ibid.*, Arts 24(1), 103.

⁵ See, e.g., Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004); Roberts, ‘Second-Guessing the Security Council: The International Court of Justice and Its Power of Judicial Review’, 7 *Pace International Law Review* (1995) 281, 312ff; Akande, *supra* note 2; Alvarez, ‘Judging the Security Council’, 90(1) *American Journal of International Law (AJIL)* (1996) 1, at 2–3.

⁶ Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?’ 112 *Yale Law Journal (YLJ)* (2003) 1011, at 1096–1134.

The importance of the extra-legal measures model for the purposes of this article is its insights into restraining the use of power in the absence of a comprehensive legal regime. In particular, given the current difficulties in realizing legal oversight of the UNSC,⁷ the extra-legal measures model shows how this does not necessarily mean the Council is therefore unrestrained in its actions. The extra-legal measures model also illuminates the potential for restraints outside of those usually focused on – judicial review by the International Court of Justice (ICJ),⁸ intervention by the UN General Assembly,⁹ judicial review by municipal courts¹⁰ or legally justified disobedience by states¹¹ – and provides lessons for how such restraints can be improved.

2 Legal Restraints on UNSC Action

A *The UNSC and Its Powers*

The UNSC occupies a singular position in international law being the only institution that can (i) authorize the use of force (outside of measures taken in self-defence)¹² and (ii) make determinations that are binding on states regardless of their direct consent or other treaty obligations.¹³ Its creation embodied the principle of collective security, in an attempt to avoid future conflicts at the scale of World War II, by co-opting the ‘Great Powers’ and the ability of states to wage war within the structures of the UN Charter.¹⁴ This required a delicate balancing between giving the Great Powers sufficient incentive to be bound by the UN regime (in the form of their veto within the Council, and the Council itself having a broad range of powers at its disposal) and reassuring other UN members that their interests were still being protected (in the form of the principles and purposes of the UN found in Articles 1 and 2 of the UN Charter and arguably the restrictions on Council action pursuant to Article 24(2)).¹⁵ The history of the Council and debates over the limits

⁷ See the second part of this article.

⁸ See Peters, ‘Article 25’, in Bruno Simma *et al.* (eds), *The Charter of the United Nations: A Commentary*, vol. 1 (3rd edn, 2012) 787, at 835; Roberts, *supra* note 5.

⁹ See Akande, *supra* note 2, at 310.

¹⁰ See Cannizzaro, ‘A Machiavellian Moment? The UN Security Council and the Rule of Law’, 3 *IOLR* (2006) 189; Peters, *supra* note 8, at 837–840.

¹¹ See Tzanakopoulos, *supra* note 1.

¹² Charter of the United Nations, Art. 41; Henderson, ‘The Centrality of the United Nations Security Council in the Legal Regime Governing the Use of Force’, in Nigel D. White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (2013) 120, at 123–124; Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations* (2010), at 259–261.

¹³ Charter of the United Nations, Arts 24, 103.

¹⁴ See Fidler, ‘Caught between Traditions: The Security Council in Philosophical Conundrum’, 17 *Michigan Journal of International Law (MJIL)* (1996) 411, at 415–418; Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (2007), at 58–59.

¹⁵ Farrall, *supra* note 14, at 58–59, 68–69; Gill, ‘Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter’, 26 *Netherlands Yearbook of International Law* (1995) 33, at 72–90, 137.

to its powers can be seen in light of this tension, in concerns over sovereignty¹⁶ and, more recently, in the context of larger concerns regarding the rights of individuals subject to Council action.¹⁷

The ‘primary responsibility’ of the UNSC is the ‘maintenance of international peace and security’.¹⁸ This responsibility is the premise for the need of the Council to be able to take ‘prompt and effective action’.¹⁹ To that end, the UN members agreed that when acting the Council ‘acts on their behalf’.²⁰ The member states also agreed to ‘accept and carry out the decisions of the Security Council’, an obligation that, in combination with Article 103 of the UN Charter, makes decisions of the Council binding on member states even if they are inconsistent with other treaty obligations.²¹ These broad powers give the Council something of a supreme position in international law, given their unparalleled nature and their potential to bind even non-member states.²²

Under Article 39 of the UN Charter, it is for the UNSC to determine whether a threat to, or breach of, the peace, or act of aggression, exists that would justify its intervention under Chapter VII.²³ Once it has made such a determination, its options for action have been described as ‘carte blanche’.²⁴ While Chapter VII does contain a hierarchy of actions that the Council can consider when dealing with situations, namely (i) calling upon the parties to comply with provisional members,²⁵ (ii) implementing ‘measures not involving the use of armed force’²⁶ and, ultimately, (iii) implementing measures involving the use of armed force,²⁷ there is no need for the Council to ‘adopt the measures ... in any particular order’.²⁸ Rather the Council has broad discretion not only in relation to when it may act but also in relation to what types of action it can take.²⁹ Indeed, the only explicit UN Charter limitation on Council action is in Article 24(2), which states that ‘the Security Council shall act in accordance with the Purposes and Principles of the United Nations’.³⁰ This provision has been central to many attempts to limit the Council’s powers.

¹⁶ See, e.g., Roberts, *supra* note 5. In relation to the ‘differentiated international society’ created by the UN Charter, see Reisman, ‘The Constitutional Crisis in the United Nations’, 87(1) *AJIL* (1993) 83, at 83.

¹⁷ De Wet, *supra* note 5, at 219–226

¹⁸ Charter of the United Nations, Art. 24(1).

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Michaelsen, ‘The Competence of the Security Council under the UN Charter to Adopt Sanctions Targeting Private Individuals’, in Andrew Byrnes, Mika Hayashi and Christopher Michaelsen (eds), *International Law in the New Age of Globalization* (2013) 11, at 16.

²² See Farrall, *supra* note 14, at 65–67.

²³ Conforti and Focarelli, *supra* note 12, at 205; de Wet, *supra* note 5, at 133–149.

²⁴ Schott, ‘Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency’, 6(1) *Northwestern Journal of International Human Rights* (2008) 24, at 24.

²⁵ Charter of the United Nations, Art. 40.

²⁶ *Ibid.*, Art. 41.

²⁷ *Ibid.*, Art. 42.

²⁸ De Wet, *supra* note 5, at 184.

²⁹ *Ibid.*, 184–185.

³⁰ See *Tadić*, *supra* note 2, at 28–29.

B Restraining the UNSC: Legal Rules and Judicial Oversight

Article 24(2) is the starting point of much analysis of restraints on the UNSC. These restraints usually attempt to ascertain what legal rules apply to the Council and then to determine how the validity of Council conduct could be adjudicated in light of those rules.³¹ For example, David Schweigman reads Article 24(2) as requiring compliance with norms such as human rights, self-determination and the principle of good faith.³² Similarly, Erika de Wet recognizes the Council's broad powers but argues that it is still bound by *ius cogens* and the purposes and principles of the UN.³³ While there can be little doubt that the UN Charter itself creates a bare framework of the limits of Council action,³⁴ it also delivers 'scant clarity concerning the specific contours of those limits'.³⁵ The UN Charter's text is notoriously vague, making it difficult to use it to construct a meaningful regime to constrain the Council.³⁶

The other main avenue to ground legal limits to UNSC action is *ius cogens*.³⁷ As Alexander Orakhelashvili has argued, as states can never derogate from the peremptory norms of international law, this limitation must also carry over to institutions created by states.³⁸ Thus, it is argued, all international organizations are limited by *ius cogens* norms such as the prohibition on the use of force³⁹ and certain fundamental universal rights.⁴⁰ While, again, it seems clear that the Council cannot act contrary to *ius cogens*,⁴¹ ascertaining which norms fall within this rarefied category is difficult. Even if a hard core of peremptory norms were established, the extent of such a legal regime would be limited or at least contested.⁴² Thus, the project of binding the

³¹ See, e.g., de Wet, *supra* note 5, 133–177, 178–216; Farrall, *supra* note 14, at 68–77; David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter* (2001), at 202, 205, 210–286.

³² Schweigman, *supra* note 31, at 172, 202. See also Gowlland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case', 88(4) *AJIL* (1994) 643, at 662–663; Henderson, *supra* note 12, at 128–129; Tzanakopoulos, *supra* note 1, at 57–58. Cf. Reisman, *supra* note 16, at 93–94.

³³ de Wet, *supra* note 5, at 187–192.

³⁴ See *Tadić*, *supra* note 2, at 28–29. For a critical view on the applicability of human rights norms to the UNSC, see Alvarez, 'The Security Council's War on Terrorism: Problems and Policy Options', in Erika de Wet and Andrew Nollkaemper (eds), *Review of the Security Council by Member States* (2003) 119, at 125–129.

³⁵ Farrall, *supra* note 14, at 69.

³⁶ Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?', 10(3) *European Journal of International Law (EJIL)* (1999) 517, at 542. See also Koskeniemi, 'The Police in the Temple Order, Justice and the UN: A Dialectical View', 6 *EJIL* (1995) 325, at 327.

³⁷ See, e.g., Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', 16(1) *EJIL* (2005) 59; de Wet, *supra* note 5, at 187–191.

³⁸ Orakhelashvili, *supra* note 37, at 60.

³⁹ Cf. Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force', 32 *MJIL* (2011) 215.

⁴⁰ Orakhelashvili, *supra* note 37, at 63–67.

⁴¹ See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ICJ Reports (1993) 325, at 441 (ad hoc Judge Lauterpacht); Court of First Instance of the European Commission, *Kadi v. Council and Commission*, T-315/01, 21 September 2005 (2006) 45 *ILM* 81, at 226, 230; Akande, *supra* note 2, at 322.

⁴² See de Wet, *supra* note 5, at 187–191, for a discussion of the *ius cogens* norms that restrain the UNSC.

Council with hard legal rules is still very much in nascent form.⁴³ While these attempts have real merit and potential, it may be some time before they are sufficiently sophisticated to realize their theory in practice.

Even if the limits of Council action were clear, the more difficult question then becomes what body could adjudicate on the validity of Council action. As Jeremy Farrall notes, the ‘key question ... is how to ensure that the Security Council observes and respects those legal limits’.⁴⁴ To many scholars, the ‘favoured mechanism is judicial review’.⁴⁵ However, a proposal for institutionalized judicial review of the Council – for example, by the ICJ – was rejected during UN Charter negotiations.⁴⁶ Thus, attempts to subject the Council to judicial review face jurisdictional issues, particularly if the decision is to bind the Council. The ICJ is still the most promising candidate for institutionalized judicial review of the Council;⁴⁷ however, its contentious jurisdiction could, at best, decide upon the legality of a Council action as it applied between states party to a dispute.⁴⁸ Its advisory opinions, though they carry substantial weight, would not be binding,⁴⁹ and it is politically difficult to have such opinions requested from the ICJ.⁵⁰ Domestic and regional courts have become more emboldened to review Council resolutions or, at least, their implementation by states and bodies such as the European Union (EU).⁵¹ Thus, they may also provide a judicial forum for review. However, again, jurisdictional issues here mean that the decisions of these municipal courts cannot bind the Council.⁵² Further, the fragmented nature of municipal oversight and rules

⁴³ Hovell, ‘A Dialogue Model: The Role of the Domestic Judge in Security Council Decision Making’, 26(3) *LJIL* (2013) 579, at 585.

⁴⁴ Farrall, *supra* note 14, at 73.

⁴⁵ *Ibid.* See also Nasu, ‘Who Guards the Guardian? Towards Regulation of the UN Security Council’s Chapter VII Powers through Dialogue’, in Jeremy Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (2009) 123, at 126. See also Tzanakopoulos, *supra* note 1, at 110–111.

⁴⁶ *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Certain Expenses Advisory Opinion)*, Advisory Opinion, 20 July 1962, ICJ Reports (1962) 151, at 168. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Namibia Advisory Opinion)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16, at 45; Akande, *supra* note 2, at 326.

⁴⁷ Though international tribunals have also considered Council resolutions: see, e.g., *Tadić*, *supra* note 2; International Criminal Tribunal for Rwanda, *Prosecutor v. Kanyabashi (Decision on the Defence Motion on Jurisdiction)*, Trial Chamber, Case no. ICTR-96-15-T. The International Criminal Court (ICC) may also find itself faced with legal dilemmas resulting from Council referrals: see Akande, ‘The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir’s Immunities’, 7(2) *Journal of International Criminal Justice* (2009) 333, regarding the legal issues involved in the Council’s ICC referral of the Darfur situation. See also Andrea Bianchi, ‘Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion’, 17(5) *EJIL* (2007) 881, 912ff.

⁴⁸ Alvarez, *supra* note 5, at 5; Peters, *supra* note 8, at 835. See also Akande, *supra* note 47, at 332; Martenczuk, *supra* note 36, at 527.

⁴⁹ Farrall, *supra* note 14, at 75; Alvarez, *supra* note 2, at 6.

⁵⁰ See also Nasu, *supra* note 45, at 126.

⁵¹ See Tzanakopoulos, ‘Domestic Courts in International Law: The International Judicial Function of National Courts’, 34 *Loyola of Los Angeles International and Comparative Law Review* (2011) 133.

⁵² Peters, *supra* note 8, at 837; *Her Majesty’s Treasury v. Ahmed* [2010] UKSC 2, at 217. See also Genser and Barth, ‘When Due Process Concerns Become Dangerous: The Security Council’s 1267 Regime and the Need for Reform’, 33 *International and Comparative Law Review* (2010) 1, at 4. See also Tzanakopoulos, *supra* note 51, at 160–161

being applied may also prove problematic if such courts become more interventionist in their review of Council action.⁵³ Finally, in addition to courts, states themselves may rely on legal arguments to justify non-compliance with Council decisions; although whether or not they would be legally justified in doing so is controversial.⁵⁴

This summary of the dominant approaches to restraining the UNSC is critical; however, the overall project is institutionally helpful and will likely bear fruit.⁵⁵ Indeed, legal language already plays a role in current debates over the legitimacy of Council action and is an important factor in Council decision making.⁵⁶ At the same time, however, history shows an aversion by states to institutionalizing the legal oversight of the Council.⁵⁷ Further, attempts at reform face stiff opposition.⁵⁸ Thus, while accepting the value of legal rules to restrain the Council, this article suggests that (at least in relation to its Chapter VII powers), the Council is better viewed at present as being primarily restrained by non-legal mechanisms.

3 Emergency Powers Theory and Its Application to the UNSC's Chapter VII Powers

In this article, emergency powers refer to special powers granted to governments and officials to respond to emergencies, grave dangers or existential threats.⁵⁹ Such powers usually form part of a larger regime that operate for a set period of time, include protections against abuse, are exceptional in nature and involve the granting of limited powers.⁶⁰ Such regimes are relatively common (now and historically), as states have 'developed constitutional arrangements to protect themselves from threats to their

⁵³ See Tzanakopoulos, *supra* note 51, at 155–158; Alvarez, *supra* note 34, at 136–139.

⁵⁴ Tzanakopoulos, *supra* note 1; Marko Milanovic, 'A Comment on Disobeying the Security Council' *EJIL:Talk!* (26 May 2011), available at <http://www.ejiltalk.org/a-comment-on-disobeying-the-security-council/> (last visited 10 August 2015); Erika de Wet, 'Debating Disobeying the Security Council: Is It a Matter of 'a rose by any other name would smell as sweet?'' *EJIL:Talk!* (25 May 2011), available at <http://www.ejiltalk.org/debating-disobeying-the-security-council-%E2%80%93-is-it-a-matter-of-%E2%80%93-a-rose-by-any-other-name-would-smell-as-sweet-%E2%80%99/> (last visited 10 August 2015).

⁵⁵ Hovell, *supra* note 43, at 585.

⁵⁶ See, e.g., Rosalyn Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council', 64(1) *AJIL* (1970) 1, at 3; Johnstone, 'Security Council Deliberations: The Power of the Better Argument', 14(3) *EJIL* (2003) 437.

⁵⁷ Hovell, *supra* note 43, at 589; *Namibia Advisory Opinion*, *supra* note 46, at 45. See also Hossain, 'Legality of the Security Council Action: Does the International Court of Justice Move to Take Up the Challenge of Judicial Review?', 3 *USAK Yearbook* (2010) 91, at 108–109.

⁵⁸ See, e.g., Blum, 'Proposals for UN Security Council Reform', 99(3) *AJIL* (2005) 632, at 644, 646; Farrall, *supra* note 14, at 215. See also Dimitris Bourantonis, *The History and Politics of UN Security Council Reform* (2005).

⁵⁹ Ackerman, 'The Emergency Constitution', 113 *YLJ* (2004) 1029, at 1037; For a discussion of what is an emergency, see Harold C. Relyea, 'National Emergency Powers', CRS Report for Congress no. 98–505 GOV, Congressional Research Service, 13 November 2006, at CRS-4; Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (2009), at 8; Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy', 21 *Cardozo Law Review* (2000) 1825, at 1855.

⁶⁰ Gross, *supra* note 59, at 1855.

continued existence'.⁶¹ Emergency powers often involve a 'state of exception', whereby normal laws are suspended (at least partially) and the executive's power is enlarged to deal with a threat.⁶² Once a threat has subsided, the exception ends and the normal law resumes its operation. As noted by Gross, 'the basic paradigm of the classical models of emergency regimes is that of the "normalcy-rule, emergency-exception," which is based on a clear separation of the normal and exceptional cases'.⁶³ Thus an 'exception' to the norm allows for derogation from some legal protections to enable the protection of the greater good, in particular, the very existence of the entire legal order.⁶⁴

At the same time, however, emergency powers themselves can also be a threat to core values and the normal legal order.⁶⁵ Where power is concentrated and oversight limited, opportunities for abuse are rife,⁶⁶ particularly when a sole institution determines both that an emergency exists and that the extent of powers are required to respond to it.⁶⁷ Further, there is always the danger that the exceptional law could contaminate the normal legal order or usurp it entirely into a constant state of 'emergency'.⁶⁸ This has been famously articulated by Carl Schmitt (the Nazi legal theorist) who argued that it was not possible for a state to both deal with an emergency and hold to the principle of legality due to the power that the executive wields through the exception.⁶⁹ This tension, according to Schmitt, lays bare the hypocrisy of liberal democracies and thus demonstrates the limits of the principle of legality.⁷⁰ For although liberal states espouse their adherence to the rule of law, their responses to emergencies demonstrate the inability of the law to be the protector it is held out to be (indeed, according to Schmitt, what we see is absolute power justified by a legal facade).⁷¹

In response to this challenge, a rich scholarship has arisen (particularly in the shadow of 11 September 2001),⁷² which has attempted to explain how liberal states can cope with, and respond to, emergencies without forsaking their core values. Drawing on traditions stretching to Roman times,⁷³ scholars have tried to reconcile the commitment to legality and the rule of law with the reality of emergencies and

⁶¹ de Wilde, 'Locke and the State of Exception: Towards a Modern Understanding of Emergency Government', 6(2) *European Constitutional Law Review* (2010) 249, at 249.

⁶² *Ibid.*, 249; Kim Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11', 6(5) *Journal of Constitutional Law* (2004) 1, at 4–21; Gross, *supra* note 59, at 1827.

⁶³ Gross, *supra* note 59, at 1854.

⁶⁴ *Ibid.*, 1835.

⁶⁵ Gross, *supra* note 6, at 1031.

⁶⁶ *Ibid.*, 1029–1030.

⁶⁷ Dyzenhaus, 'The Compulsion of Legality', in Victor Ramraj (ed.), *Emergencies and the Limits of Legality* (2008) 33, at 40.

⁶⁸ Gross, *supra* note 6, at 1022.

⁶⁹ Ramraj, 'No Doctrine More Pernicious? Emergencies and the Limits of Legality', in Victor Ramraj (ed.), *Emergencies and the Limits of Legality* (2008) 3, at 4.

⁷⁰ Dyzenhaus, *supra* note 67, at 33; Scheppele, *supra* note 62, at 9; Ramraj, *supra* note 69, at 5; Gross, *supra* note 59, at 1827.

⁷¹ Gross, *supra* note 59, at 1847–1848; Dyzenhaus, 'States of Emergency', in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 442, at 444.

⁷² de Wilde, *supra* note 61, at 249.

⁷³ See, e.g., Gross, *supra* note 59, at 1829; Ramraj, *supra* note 69, at 4.

official responses to existential threats.⁷⁴ These attempts have taken a variety of forms, from enhancing executive power under legislature oversight,⁷⁵ to a reliance on judicial authority to supervise the use of emergency powers,⁷⁶ and to attempts to take emergency powers outside of the realm of law and engage the polity in moral/political oversight of the use of exceptional powers.⁷⁷ These are all attempts to explain how states that adhere to the rule of law can respond to emergencies without sacrificing their core values.

What, then, is the relevance of these theories to the UNSC? This question has had some treatment in academic literature.⁷⁸ For example, Georges Abi-Saab has explicitly compared Chapter VII of the UN Charter to domestic emergency power regimes,⁷⁹ and Jared Schott has used 'emergency doctrine as a regulative ideal for the Council's invocation of Chapter VII'.⁸⁰ As noted by Abi-Saab, the Council's Chapter VII powers are 'triggered' by 'particular or specific situation[s]'.⁸¹ Such a trigger then empowers the UNSC to exercise 'exceptional powers' (measures determined to be necessary by the Council) to 'maintain or restore international peace and security'.⁸² These powers are 'exceptional' given that (i) they are binding upon UN member states;⁸³ (ii) they trump other treaty obligations,⁸⁴ (iii) the Council is authorized to even order the use of force, a measure otherwise illegal under international law (except in matters of self-defence)⁸⁵ and (iv) the Council is given a wide discretion in deciding what measures should be taken.⁸⁶ Some states have themselves also used language strikingly close to

⁷⁴ de Wilde, *supra* note 61, at 250; Gross, *supra* note 59, at 1835–1836; Ramraj, *supra* note 4.

⁷⁵ Ackerman, *supra* note 59.

⁷⁶ David Dyzenhaus, *The Constitution of Legality: Law in a Time of Emergency* (2006).

⁷⁷ Gross, *supra* note 59.

⁷⁸ See, in particular, Hood, 'The United Nations Security Council's Legislative Phase and the Rise of Emergency International Law-Making', in Kim Rubenstein and Hitoshi Nasu, *Legal Perspectives on Security Institutions* (2015).

⁷⁹ Abi-Saab, 'The Security Council Legibus Solutus? On the Legislative Forays of the Council', in Laurence Boisson de Chazournes and Marcelo Kohen (eds), *International Law and the Quest for its Implementation* (2010) 23, at 29. See also, e.g., Talmon, 'The Security Council As World Legislature', 99 *AJIL* (2005) 175, at 184; Chesterman, 'UNaccountable? The United Nations, Emergency Powers, and the Rule of Law', 42 *Vanderbilt Journal of Transnational Law* (2009) 1509; Cannizzaro, *supra* note 10, at 210; Aust, 'The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioner's View', in Erika de Wet and Andrew Nollkaemper (eds), *Review of the Security Council by Member States* (2003) 31, at 34–35. See also Bianchi, *supra* note 47, at 891, who, while rejecting thinking of UNSC legislation as being of the same order as domestic emergency legislation, accepts the exceptional nature of Chapter VII and that 'it is self-evident that the measures envisaged in Chapter VII are "emergency" measures that can be resorted to when international peace and security has been violated or is under threat'; Peters, *supra* note 8, at 809, who accepts that 'decisions under Chapter VII are always taken in emergency situations' but rejects the proposition that this takes them 'outside the law'.

⁸⁰ Schott, *supra* note 24, at 25.

⁸¹ Abi-Saab, *supra* note 78, at 29 (emphasis removed); Charter of the United Nations, Art. 39. See also Henderson, *supra* note 12, at 124–125.

⁸² Abi-Saab, *supra* note 78, at 30; Charter of the United Nations, Art. 39.

⁸³ Charter of the United Nations, Art. 25.

⁸⁴ *Ibid.*, Art. 103.

⁸⁵ *Ibid.*, Art. 42.

⁸⁶ Schott, *supra* note 24, at 26.

emergency powers language when commenting on Council action.⁸⁷ Thus, though sketched only briefly here, there are sound reasons to accept an analogy between domestic emergency powers and the Council's Chapter VII powers as meaningful and that emergency powers theory may be of relevance to understanding Council practice under Chapter VII.

Accepting that Chapter VII is a form of emergency powers regime, or at least allows for an 'exceptional' exercise of power, this article proceeds to analyse how we can best understand how the regime has worked in practice and, in particular, what restraints have been applied to the Council when using Chapter VII powers. The argument made is that to understand the regime established under Chapter VII we need to look beyond the law. In particular, the restraints on the Council are best understood when viewed in the context of the 'extra-legal measures model' approach to emergency powers.

4 The Extra-Legal Measures Model

To understand the extra-legal measures model, it is necessary to first briefly introduce the two other dominant categories of emergency power regimes, which Gross describes as the business-as-usual model and the accommodation model.⁸⁸ Business-as-usual models reject the need for an exception, assuming that a government restrained by 'normal' law will still be able to effectively deal with any emergency.⁸⁹ Thus, they engage in 'constitutionalism absolutism'.⁹⁰ Under these models, the 'normal' law is the only law, and it applies no matter what the circumstances.⁹¹ In starker terms, the constitutional order may very well be a suicide pact.⁹² Conversely, while accommodation models suggest that the normal law should apply to emergencies, they accept that a 'degree of accommodation' may also be necessary.⁹³ Such accommodation can take the form of constitutional provisions for exceptions,⁹⁴ legislative amendments or creating special laws⁹⁵ or of courts adopting different interpretative approaches to existing law.⁹⁶ The business-as-usual and accommodation models both adhere to the idea that the rule of law and the law itself can continue to apply during emergencies, either

⁸⁷ See, e.g., Algeria, the Philippines and Switzerland's comments on Resolution 1540. UN SCOR, 4950th mtg, UN Doc S/PV.4950, 22 April 2004, at 3, 5, 28.

⁸⁸ Gross, *supra* note 6, at 1021; Oren Gross and Fionnuala Ni Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006), at 9–10.

⁸⁹ Gross and Ni Aoláin, *supra* note 88, at 10.

⁹⁰ *Ibid.*, 88.

⁹¹ *Ibid.*

⁹² Bayer, 'Sacrifice and Sacred Honor: Why the Constitution Is a Suicide Pact', 20 *William and Mary Bill of Rights Journal* (2011) 287; Saikrishna Prakash, 'The Constitution as Suicide Pact', 79 *Notre Dame Law Review* (2003) 1299.

⁹³ Gross and Ni Aoláin, *supra* note 88, at 9.

⁹⁴ *Ibid.*, 35ff. The constitutional accommodation model can be seen in the French 'state of siege' (used also in Latin America), see *ibid.*, 26ff; and the idea of martial law in the United Kingdom and common law countries, see *ibid.*, 30ff.

⁹⁵ *Ibid.*, 66ff, e.g., the spate of new laws passed in the USA and elsewhere following the September 11 attacks.

⁹⁶ *Ibid.*, 72ff, e.g., the approach of the US Supreme Court during World War I, which recognized the ability of the government to exercise its powers in a way that would not be acceptable during normal times.

through legal regimes designed prior to the onset of an emergency⁹⁷ or by accommodating responses to emergencies being instituted through a process regulated by the law.⁹⁸ Both therefore take as their starting point that rulers are bound by law, which always regulates their action, and that legal institutions can act as a check on the use of emergency powers.⁹⁹

In contrast, the extra-legal measures model proposes that while the 'normal' law continues to apply during an emergency, violations of the law by the executive or its officers may be ratified after the fact through a political, moral and non-legal process and that such ratification (if given) voids the usual legal consequences of the unlawful action.¹⁰⁰ The ratification does not obviate the legal norm violated; indeed, it does not modify the legal order at all.¹⁰¹ Rather, it acts, in a sense, like a mitigation defence, absolving the actor from the legal outcomes of their action due to an overriding political or moral justification for the act.¹⁰² Without ratification, the officer or body must face the full consequences of the law as well as the political and moral sanctions that flow from their illegal and illegitimate act.¹⁰³

A Locke's Prerogative: Government Action beyond the Law

The extra-legal measures model finds its roots in John Locke's theory of prerogative powers.¹⁰⁴ Gross reads Locke as preserving certain prerogative powers to the government, which exist outside of the legal order and may only be used 'when strict and rigid observation of the laws may lead to grave social harm'.¹⁰⁵ According to Gross, Locke justifies this 'extra-legal' power as it avoids 'an expansion of the government's powers under the constitution and the vesting in the executive ... [of] a highly discretionary ... power within the constitutional framework'.¹⁰⁶ Locke accepted that the law could not fully predict and accommodate all emergencies, but he resisted legalizing action that was in reality unbound by law. Thus, his theory of prerogative power recognized that the government may act outside of the law, but he conditioned its use by requiring it be used only for the public good¹⁰⁷ and looked to a political reaction (an uprising by the people) as the ultimate check on its improper use.¹⁰⁸ The importance of Locke

⁹⁷ *Ibid.*, 17–85.

⁹⁸ *Ibid.*, 86–109.

⁹⁹ *Ibid.*, 86.

¹⁰⁰ *Ibid.*, 111–112.

¹⁰¹ Gross, 'Extra-Legality and the Ethics of Political Responsibility', in Victor Ramraj (ed.), *Emergencies and the Limits of Extra-Legality* (2008) 33, at 62.

¹⁰² See Simon Chesterman, 'Secrets and Lies: Intelligence Activities and the Rule of Law in Times of Crisis', 28 *MJIL* (2007) 553, at 570; Roberts, *supra* note 5, at 327.

¹⁰³ Gross, *supra* note 6, at 1108.

¹⁰⁴ *Ibid.*, at 1103, 1105. See John Locke, *Second Treatise of Civil Government* (1690), ch. XIV. See also Dyzenhaus, *supra* note 71, at 443; Clement Fatovic, *Outside the Law: Emergency and Executive Power* (2009), at 39.

¹⁰⁵ Gross and Ni Aoláin, *supra* note 88, at 120; de Wilde, *supra* note 61, at 253–254.

¹⁰⁶ Gross and Ni Aoláin, *supra* note 88, at 123.

¹⁰⁷ de Wilde, *supra* note 61, at 256.

¹⁰⁸ Gross and Ni Aoláin, *supra* note 88, at 121, 123.

to the extra-legal measures model is his identification that though governments may need discretionary power during emergencies, ‘legalizing’ such power by incorporating it within a legal system dangerously expands the *legal* powers of government and threatens to transform the exception into the norm. However, Locke’s theory is also a product of its time and its benign view of government is reflected in its weak accountability mechanisms.¹⁰⁹ For Locke, when government turns to tyranny, the people may appeal to heaven or revolt.¹¹⁰ Gross sees these as insufficiently strong incentives for governments to not abuse their power.¹¹¹ Thus, he developed Locke’s model with the idea of *ex post* ratification/rejection of extra-legal action, by the public, to institute an ethic of political responsibility for such action.¹¹²

B Raising the Cost of Abuses of Power through Ex Post Review by the People

Under Gross’ extra-legal measures model, extra-legal action by officials can be justified by the polity where the action is done openly – that is, with full disclosure of illegality – and where the people are able to adjudicate on the action after the fact.¹¹³ Where the people ratify an extra-legal action, the official responsible is absolved from legal liability.¹¹⁴ Conversely, if the people reject the action and find it illegitimate, the official faces the full force of the law.¹¹⁵ Thus, officials face significant risk when deciding whether or not to embark upon an extra-legal course of action, given the lack of certainty of the *ex post* approval of their action and the possibility of legal sanction (and claims for compensation) if their conduct is found to be unjustified.¹¹⁶ Importantly, the review of the action is not a legal determination, inasmuch as the action is taken outside of the established legal order.¹¹⁷ Ratification or rejection is rather based on ‘ethical concepts of political and popular responsibility, political morality, and candor’.¹¹⁸ It can also take place in a range of ways including prosecutorial discretion, jury nullification, government indemnification, honorific awards, withholding of decorations, social ostracization and executive pardons.¹¹⁹ Further, the model seeks to ensure that the normal legal order itself stays uncontaminated by emergency powers. It does this by preserving the distinction between legality and legitimacy, inasmuch as *ex post* ratification of an action does not make it ‘legal’ under the normal legal order but merely excuses one actor from the legal consequences of performing the action on a non-precedential basis.¹²⁰

¹⁰⁹ *Ibid.*, at 123.

¹¹⁰ Locke, *supra* note 104, at 168.

¹¹¹ Gross and Ni Aoláin, *supra* note 88, at 123.

¹¹² *Ibid.*, at 137ff.

¹¹³ *Ibid.*, at 136; Gross, *supra* note 101, at 81–84.

¹¹⁴ Gross, *supra* note 101, at 69–71.

¹¹⁵ *Ibid.*, at 68.

¹¹⁶ *Ibid.*, at 70–71.

¹¹⁷ *Ibid.*, at 64–69.

¹¹⁸ Gross and Ni Aoláin, *supra* note 88, at 11.

¹¹⁹ Gross, *supra* note 101, at 65–66; Gross and Ni Aoláin, *supra* note 88, at 137, 139.

¹²⁰ Gross, *supra* note 88, at 1130–1133.

C Summarizing the Extra-Legal Measures Model

At its heart, the extra-legal measures model can be seen as a re-assertion of a form of natural law to fill gaps within positivist legal orders.¹²¹ Rather than rely on legal rules to regulate emergency power, as they will either be too restrictive (and, thus, unlikely to be followed in the face of existential threats) or too permissive (and, thus, result in tyranny), the extra-legal measures model appeals to the people to stand in judgment over the use of emergency powers.¹²² The people, exercising their judgment in light of the true purpose of government – Locke’s ‘public good’¹²³ – and in consideration of the values that the law attempts to embody and protect,¹²⁴ apply what can be seen as a form of natural law to determine the legitimacy of an action and, thus, what consequences it should entail. The positive law is insulated from this process and is therefore protected.¹²⁵ Though the extra-legal measures model relies on action outside of ‘the law’, it does so in the hope that the values the law is designed to protect may be upheld.¹²⁶ Thus, the positive law is seen as an instrument to protect more fundamental values.¹²⁷ Under the extra-legal measures model, it is up to the people to decide whether any extra-legal action truly protected those values and, thus, should be ratified.¹²⁸

Breaking down the extra-legal measures model into its component parts, then, the model can be summarized as follows:

- i. During emergencies, ‘emergency tactics ... will be employed’ as ‘governmental actors tend to do whatever is necessary to neutralize the threat’.¹²⁹
- ii. Explicit provision for the use of such emergency measures within a legal system is ‘extremely dangerous’, however, due to the ‘risks of contaminating and manipulating that system, and the deleterious message involved in legalizing such actions’.¹³⁰
- iii. Thus, instead, public officials may ‘act outside the legal order while openly acknowledging their actions’.¹³¹
- iv. In doing so, such officials ‘assume the risks involved in acting extralegally’.¹³² These risks include that it is ‘up to the people to decide, either directly or indirectly ... how to respond ... to such extralegal actions’.¹³³ The people can ratify the action

¹²¹ de Wilde, *supra* note 61, at 256, discussing Locke’s view of the natural law restraining the use of the prerogative power.

¹²² Fatovic, *supra* note 104, at 41.

¹²³ Gross, *supra* note 88, at 1102.

¹²⁴ Fatovic, *supra* note 104, at 40.

¹²⁵ *Ibid.*, at 41.

¹²⁶ Gross and Ni Aoláin, *supra* note 88, at 112.

¹²⁷ Lazar, *supra* note 59, at 5.

¹²⁸ Gross and Ni Aoláin, *supra* note 88, at 112.

¹²⁹ Gross, *supra* note 88, 1130–1133.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

and approve it retrospectively or ‘decide to hold the actor to the wrongfulness of her actions’ and thus require political and legal amends to be made.¹³⁴

These four elements will be used in the next part of this article to evaluate if and how they apply in the context of the UNSC.

5 Applying the Extra-Legal Measures Model to Security Council Chapter VII Action

A Preliminary Objections

Before looking at the application of the extra-legal measures model to the UNSC, it is first necessary to deal with some potential objections to the relevance of the model.¹³⁵ First, it must be acknowledged that analogizing from the domestic to the international is fraught with difficulties.¹³⁶ Certainly, a perfect similitude between domestic and international institutions or regimes can never be achieved, and, thus, any analogy will necessarily ‘fail’. In the case of the Council, for example, its position within the international legal order (or even the UN system) has no perfect analogue at the domestic level. For example, the Council has variously acted as legislator, judiciary and executive,¹³⁷ undermining any attempt at separation of powers. However, in light of the aim of this article, namely to show how the regulation of power suggested by the extra-legal measures model is relevant to the exercise of Chapter VII powers by the Council, the lack of a perfect realization of each aspect of the model as it is envisaged in a domestic setting will not sap it of all relevance to the Council but may indeed show areas for improvement within the Chapter VII regime.

Second, the extra-legal measures model is designed with the aim of protecting a ‘normal’ liberal democratic legal regime from potential compromise from the ‘exception’ of the emergency.¹³⁸ What then is the ‘normal’ order that is to be protected by the application of the extra-legal measures model to the UNSC? While it is certainly difficult to see how the general international legal order can be seen as a liberal democratic regime needing protection,¹³⁹ the premise that a rules-based system of international order is desirable itself,¹⁴⁰ given its benefits of certainty and predictability, could be sufficient to justify a need to restrain Council power from undermining an international

¹³⁴ *Ibid.*

¹³⁵ For a fuller critique of the application of the extra-legal measures model to the UN Security Council, see Anna Hood, *The Security Council’s Legislative Phase and the Rise of Emergency International Law-Making* (PhD thesis, University of Melbourne, 2015), Chapter VI.

¹³⁶ See, e.g., Hidemi Suganami, *The Domestic Analogy and World Order Proposals* (1989); Suganami, ‘Reflections on the Domestic Analogy: The Case of Bull, Beitz and Linklater’, 12(2) *Review of International Studies* (1986) 145.

¹³⁷ Harper, *supra* note 1, at 107–108, 126; Tzanakopoulos, *supra* note 1, at 7; Elberling, *supra* note 1, at 348.

¹³⁸ Gross and Ni Aoláin, *supra* note 88, at 112.

¹³⁹ See also Fidler’s discussion of the tensions within the liberal tradition and attempts to limit the role of international institutions such as the UNSC. Fidler, *supra* note 14, at 452.

¹⁴⁰ See, e.g., Higgins, *supra* note 56, at 3 discussing international law as a ‘common language’.

relations regime based on law.¹⁴¹ Further, and more importantly, perhaps, there is a plurality of domestic legal orders that remain vulnerable to intervention and thus require protection from illegitimate Council action.¹⁴² Not to mention that as individuals become increasingly subject to sanctions directly,¹⁴³ and the Council takes it upon itself to modify municipal legal orders,¹⁴⁴ it will become increasingly necessary to ensure such persons and orders have some measure of protection against improper action. Finally, this article adopts the presumption that power unrestrained is itself undesirable, and, thus, the use of the extra-legal measures model may help to ameliorate concerns that the UNSC is *legibus solutus*.¹⁴⁵

B Emergencies Will Result in Action notwithstanding Legal Restraints

The extra-legal measures model is based on a belief that legal rules are insufficient protections against government overreach during emergencies.¹⁴⁶ That is, governments and officials will do whatever is necessary to 'neutralize the threat'.¹⁴⁷ This propensity for action by institutions is lessened to some degree at the UNSC due to the existence of the veto power of the permanent five members (P5) and the need to have the votes of at least nine of the Council's members for a resolution to be passed,¹⁴⁸ which requires agreement across ideological, geographical and political divides.¹⁴⁹ Indeed, in its first few decades, the Council was relatively inactive, and there remain situations that it is unwilling or unable to address due to disagreement among its members.¹⁵⁰ Often criticized as a flaw in the Council's process (particularly during the Cold War),¹⁵¹ this tendency for disagreement in the Council over the merits of action can also be seen as a feature, protecting it from rash decision making.¹⁵² Notwithstanding the political difficulties in obtaining agreement among Council members, however, the Council can also act, and will often act, swiftly, particularly when the interests of the P5 may be furthered or are not directly threatened. In such cases, decision making by the Council can be surprisingly swift.¹⁵³

¹⁴¹ Farrall, *supra* note 14, at 32.

¹⁴² See, e.g., Talmon, *supra* note 78; Rosand, 'The Security Council as "Global Legislator": *Ultra Vires* or *Ultra Innovative*?', 28 *Fordham International Law Journal* (2005) 542, at 569.

¹⁴³ Farrall, *supra* note 14, at 132; Michaelsen, *supra* note 21. See, e.g., SC Res. 1267, 15 October 1999.

¹⁴⁴ See, e.g., SC Res. 1373, 28 September 2001.

¹⁴⁵ See, e.g., Abi-Saab, *supra* note 78.

¹⁴⁶ Gross, *supra* note 6, at 1130–1133.

¹⁴⁷ *Ibid.*

¹⁴⁸ Charter of the United Nations, Art. 27(3). See also Reisman, *supra* note 16, at 95; Szasz, 'The Security Council Starts Legislating', 96(4) *AJIL* (2002) 901, at 905.

¹⁴⁹ Kohen, 'There Is No Need to Change the Composition of the Security Council: It Is Time for Stressing Accountability', in Marcelo Kohen and Laurence Boisson de Chazournes (eds), *International Law and the Quest for its Implementation* (2010) 84, at 86; David Caron, 'The Legitimacy of the Collective Authority of the Security Council', *AJIL* (1993) 552, at 562–563.

¹⁵⁰ Kirgis, 'The Security Council's First Fifty Years', 89 *AJIL* (1995) 506, at 512–513.

¹⁵¹ See, e.g., Glennon, 'Why the Security Council Failed', 82 *Foreign Affairs* (2003) 16, at 16.

¹⁵² Roberts, *supra* note 5, at 315.

¹⁵³ E.g., Resolution 1373 was passed mere weeks after the 11 September 2001 attacks on the USA and created a raft of legal obligations for member states. SC Res. 1373, 28 September 2001. Indeed, it was actually negotiated in just over 48 hours. See Talmon, *supra* note 78, at 187.

Often the rapid nature of these Council decisions results in decisions made and institutions established without sufficient consideration of their legal consequences.¹⁵⁴ Thus, practice shows that a propensity to action, regardless of legal limitations, is a potential issue for the Council.

C Explicit Legal Allowances for Emergency Measures Are Dangerous

When the UNSC acts under Chapter VII, it could be argued that it enters an ‘exceptional’ phase of action, governed by a limited form of law different to the normal legal order.¹⁵⁵ This position is dangerous as it risks providing a facade of legal legitimacy to actions that are actually unrestrained by law,¹⁵⁶ and ‘historical evidence belies ... [the belief] in our ability to isolate ordinary legal norms and institutions from emergency rules and powers’.¹⁵⁷ Further, if we accept that this mode of Council action is ‘exceptional’, we lose the ability to properly critique that action from the perspective of the law. The Charter’s authorisation of the Council to make the determination that a threat merits its use of Chapter VII powers exists also makes this position problematic.¹⁵⁸ This would mean that the body exercising exceptional powers is conflated with the body that determines when emergency powers can be used. This is a dangerous combination and risks undermining any pretence of abiding by the rule of law.¹⁵⁹ It is normatively inappropriate to view Chapter VII as providing a legal method whereby the Council can utterly evade the reach of the law,¹⁶⁰ the extra-legal measures model provides a more palatable alternative.

D Officials and Institutions Can Act Outside the Law without Denying the Operation of the Law

To avoid an exercise of unrestrained powers with a mere facade of legality, the extra-legal measures model suggests that although the UNSC may ‘act outside the legal order’, such an action should not be taken as occurring within a legally sanctioned but unrestrained space.¹⁶¹ Instead, the normal law continues to apply and should be complied with – that is, the legal restraints discussed in the second part of this article remain operative (and, in fact, are important measures against which Council action can be judged). However, any extra-legal action can also be ratified after the fact and, thus, remain binding, notwithstanding its extra-legality. Under the model, this entails two requirements: first, the extra-legality of the action must be ‘openly acknowledge[ed]’¹⁶² and, second, there must be some form of ratification or rejection of the action by ‘the people’.¹⁶³

¹⁵⁴ Szasz, *supra* note 148, at 905.

¹⁵⁵ See, e.g., Oosthuizen, *supra* note 2.

¹⁵⁶ Gross, *supra* note 6, at 1099.

¹⁵⁷ *Ibid.*, at 1096.

¹⁵⁸ de Wet, *supra* note 5, at 134–177, which discusses how this determination has been made previously.

¹⁵⁹ Dyzenhaus, *supra* note 67, at 40; Farrall, *supra* note 14, at 190–195.

¹⁶⁰ As noted by Dyzenhaus, ‘the claim that the executive has this power is puzzling since it suggests that there can be a valid use of law by the executive to do away with law’s control over the executive’. Dyzenhaus, *supra* note 71, at 447.

¹⁶¹ Gross, *supra* note 6, at 1099.

¹⁶² *Ibid.*, at 1130–1133.

¹⁶³ *Ibid.*

1 Publicly Acknowledging the Extra-Legal Nature of an Action

In relation to the first requirement, the extra-legal action must be ‘openly, candidly, and fully disclosed’ to allow for full consideration of the action by the public.¹⁶⁴ At the domestic level, there are concerns as to whether this is a realistic requirement to impose on executives – that is, whether they would ever admit to engaging in illegal acts.¹⁶⁵ However, in relation to the Council, there are two reasons why this requirement is not such an obstacle for the use of the extra-legal measures model, and past practice indicates how it can be satisfied. First, Council action, at least insofar as its resolutions are concerned, is necessarily public.¹⁶⁶ The resolutions passed by the Council are public documents, and it is not possible for it to authorize or engage in ‘covert’ action. This means that at least the fact of the action undertaken by the Council is known to the public and is able to be reviewed. Second, while the Council itself (as opposed to its constituent states¹⁶⁷) has never expressly accepted that any of its actions were done extra-legally, some of its members have at times raised concerns as to the legality of certain actions or noted outright that the action being contemplated did not comply with the law.¹⁶⁸ An example can be found in the debate surrounding Resolution 1540 (regarding the non-proliferation of nuclear, chemical and biological weapons and requiring certain action from states under Chapter VII¹⁶⁹). During that debate, some states strongly suggested that the Council lacked a legal basis for the adoption of the resolution. For example, the Indonesian representative noted that:

legal obligations can only be created and assumed on a voluntary basis. Any far-reaching assumption of authority by the Security Council to enact global legislation is not consistent with the provisions of the United Nations Charter.¹⁷⁰

And Pakistan’s representative commented that ‘there is no justification for the adoption of this resolution under Chapter VII of the Charter’.¹⁷¹ Going further, some states utilized language more akin to that used when discussing domestic emergency powers. For example, Switzerland’s position on Resolution 1540 was that:

[i]n principle, legislative obligations, such as those foreseen in the draft resolution under discussion, should be established through multilateral treaties, in whose elaboration all States can participate. It is acceptable for the Security Council to assume such a legislative role only in *exceptional circumstances and in response to an urgent need*.¹⁷²

The Philippines accepted that the:

¹⁶⁴ *Ibid.*, at 1111.

¹⁶⁵ Chesterman, *supra* note 102, at 554.

¹⁶⁶ Cf. Schweigman, *supra* note 31, at 296, discussing proposals to increase the transparency of Council decision making (as opposed to the transparency of the actual content of decisions made).

¹⁶⁷ See Higgins, *supra* note 56, at 1.

¹⁶⁸ See, e.g., Johnstone, *supra* note 56, at 466–473.

¹⁶⁹ SC Res. 1540, 28 April 2004. With thanks to Dr Anna Hood for sharing an early version of her doctoral thesis with me wherein she discusses this debate in detail, see Hood, *supra* note 135.

¹⁷⁰ UN SCOR, 4950th mtg, UN Doc. S/PV.4950, 22 April 2004, at 31.

¹⁷¹ *Ibid.*, at 15.

¹⁷² *Ibid.*, at 28 (emphasis added).

resolution deviates from time-tested modes of creating multilateral obligations but my delegation essentially regards it as an *exceptional measure* to address a new and urgent potential threat not covered by existing treaty regimes.¹⁷³

And Algeria noted that:

[i]t is understood that, in shouldering this responsibility, the Security Council is acting in an *exceptional manner*, since, clearly, the Charter does not give it a mandate to legislate on behalf of the international community, but simply gives it the principle responsibility for the maintenance of international peace and security.¹⁷⁴

These types of clear rejections of the UNSC having a legal basis for action (particularly in combination with references to the action being ‘exceptional’) are indicative of the use that member states can make of Council deliberations to flag action as extra-legal and thus perform the ‘public acknowledgement’ function envisaged by the extra-legal measures model.¹⁷⁵ While not an explicit or direct acknowledgement by the Council qua Council, they are sufficient for the purpose of highlighting problematic action, particularly where a large number of states are similarly minded.

2 Raising the Cost of Extra-Legal Action through Ex Post Public Review

The final step, then, of the extra-legal model is that extra-legal action by officials is subjected to review by the public, which can either ratify the action or reject it.¹⁷⁶ This may be the most problematic part of the extra-legal measures model’s application to the UNSC. Domestically, Gross envisages a broad range of potential ways that this ratification or rejection could take place, as described above.¹⁷⁷ At the domestic level, the rejection of an extra-legal action would entail the application of the normal law to the official undertaking the action. For example, an official who tortured a suspect would then be subject to the usual rules regarding torture including a criminal case and punishment.¹⁷⁸ Conversely, ratification would mitigate such an outcome so that, though the action is acknowledged as contravening the law, it is not subject to the usual punishment due to the people accepting it as being necessary to protect higher order values and being in line with their moral and political views.¹⁷⁹ The uncertainty as to whether an extra-legal action will be ratified or rejected ‘raises the cost’ of taking such action and acts as a restraint on the use of such powers so that it will only be used when the action taker believes it is truly justified.¹⁸⁰

For the UNSC, there are three potential issues for applying this final step of the model. First, while the public at the domestic level is relatively easy to define, it is not as clear who is able to ratify or reject Council action (that is, who is the Council’s ‘polity’).

¹⁷³ *Ibid.*, at 3 (emphasis added).

¹⁷⁴ *Ibid.*, at 5 (emphasis added).

¹⁷⁵ See also the debate surrounding SC Resolution 1487, 12 June 2003, at 5, 7–8, 13.

¹⁷⁶ Gross, *supra* note 6, at 1130–1133.

¹⁷⁷ See earlier discussion in the article; Gross, *supra* note 101, at 65–66; Gross and Ni Aoláin, *supra* note 88, at 139.

¹⁷⁸ Gross, *supra* note 6, at 1112–1113.

¹⁷⁹ *Ibid.*, at 1114–1115.

¹⁸⁰ *Ibid.*, at 1024.

Second, the unstructured nature of the international legal order means that this oversight will be diffuse and potentially lack the authority that ratification or rejection would have at the domestic level.¹⁸¹ Third, while there are clear ramifications domestically of breaking the law, no such processes exist for the Council.¹⁸² Thus, the extent to which the uncertainty regarding ratification will raise the cost of engaging in extra-legal action may be questionable. Each of these issues is examined in turn in the following sections.

These hurdles for application of the extra-legal measures model to the use of UNSC Chapter VII powers are significant. Indeed, it may be argued that they are insurmountable given the current arrangement of the international legal system. However, the following examination demonstrates two things: (1) that the system as it is now ordered contains the potential for restraints as imagined under the extra-legal measures model, notwithstanding that they may be in a nascent and weak form, and (2) that the potential presented by these restraints needs to be developed and improved upon if Council action is to be properly restrained and the promise of the extra-legal measures model is to be realized (in the absence of wide-ranging reform of the UN system¹⁸³).

(a) *The UNSC's Polity*

Moving then to the first issue, the UNSC has at least two categories of constituents who would *prima facie* be able to ratify or reject extra-legal action. Most obviously, states make up the members of the Council and the UN itself. UNSC action is traditionally directed at states, and, indeed, under the UN Charter its action is technically binding only upon states.¹⁸⁴ Thus, just as at a domestic level it is the subjects of executive action that may reject or ratify extra-legal action by their executive, so too can states ratify or reject extra-legal action by the Council.¹⁸⁵ At the international level, given that international law is traditionally created by states¹⁸⁶ and that it is for states to determine in the final instance the international legality or otherwise of international acts,¹⁸⁷ this connection becomes even clearer. In addition to states, though, since the

¹⁸¹ de Wet, 'The Constitutionalization of Public International Law', in Michel Rosenfeld and András Sajó (eds), *Comparative Constitutional Law* (2012) 1209, at 1227.

¹⁸² See, e.g., Gowlland-Debbas, 'Implementing Sanctions Resolutions in Domestic Law', in Vera Gowlland-Debbas (ed.), *National Implementation of United Nations Sanctions: A Comparative Survey* (2004) 33, at 64, discussing the inability of victims to obtain compensation for illegal Council action.

¹⁸³ Which is unlikely. See Farrall, *supra* note 14, at 38–39.

¹⁸⁴ Charter of the United Nations, Art. 25.

¹⁸⁵ As noted by Lauterpacht, 'the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law'. Quoted in Malcom Shaw, *International Law* (2008), at 197; Gideon Boas, *Public International Law* (2012), at 156.

¹⁸⁶ *SS 'Lotus' (France v. Turkey) – Judgment*, 1927 PCIJ Series A, No. 10, at 18; Boas, *supra* note 185, at 11. Cf. Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?', 4 *EJIL* (1993) 447. See also Hollis, 'Why State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law', 23(1) *Berkeley Journal of International Law* (2005) 137.

¹⁸⁷ *Case Concerning the Air Service Agreement of 27 March 1946 between the USA and France*, Decision of 1980, reprinted in UNRIIAA, vol. 18, 417, at para. 81; Tzanakopoulos, *supra* note 1, at 150; Schweigman, *supra* note 31, at 207.

Council increasingly adopts resolutions that impact upon the rights and obligations of individuals,¹⁸⁸ individuals arguably have also been empowered to decide upon the acceptability of Council extra-legal action. This also mirrors the rise in public international law of a focus on individual rights as opposed to the rights of states.¹⁸⁹ Thus, the Council has at least two sources by which its extra-legal actions could be ratified or rejected – states and individuals. Of course, though these are dealt with here as two distinct categories, states are also made up of individuals, and, thus, domestic processes may involve domestic publics, to varying degrees, in the decision of a state to ratify or reject extra-legal action.¹⁹⁰

(b) *Methods of Review of UNSC Action by Its Polity*

How then can states and individuals exercise the ratification or rejection function? Without the domestic machinery of elections, parliaments or other political institutions,¹⁹¹ they must rely on a more diffuse form of public review for the Council. There are a number of potential forms this review could take.

Beginning with states, the most prominent avenues for expression of ratification or rejection are: (i) through collective action in the UN General Assembly (UNGA)¹⁹² and (ii) through non-compliance with Council decisions.¹⁹³ The UNGA has in the past played some role in providing a venue for comment on Council action. For example, in response to the Council's raft of counter-terrorism resolutions,¹⁹⁴ the UNGA passed resolutions that also dealt with terrorism, and its response to the Council's regime has been described as 'tepid'.¹⁹⁵ Further, subsequent UNGA resolutions reiterated the need for states to comply with their human rights obligations when countering terrorism, again in distinction to the regime established by the Council that has significant human rights issues.¹⁹⁶ While envisaged by some commentators as a potential legal oversight mechanism,¹⁹⁷ the importance of these kinds of UNGA resolutions for the extra-legal measures model is their ability to evaluate the legitimacy (not legality) of the Council's action and to ratify or reject such action. Thus, though the UNGA has no legal right within the UN Charter to overturn Council resolutions, it can call into

¹⁸⁸ Tehindrazanarivelo, 'Targeted Sanctions and Obligations of States on Listing and De-listing Procedures', in Marcelo Kohen and Laurence Boisson de Chazournes (eds), *International Law and the Quest for Its Implementation* (2010) 127, at 133; Michaelsen, *supra* note 21.

¹⁸⁹ See, e.g., Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', 32 *American University Law Review* (1982) 1, at 9; Janis, 'Individuals as Subjects of International Law', 17 *Cornell International Law Journal* (1984) 61.

¹⁹⁰ Posner, 'Do States Have a Moral Obligation to Obey International Law?', *Stanford Law Review* (2002) 1901, at 1902–1903.

¹⁹¹ See Gross, *supra* note 6, at 65–66; Gross and Ni Aoláin, *supra* note 88, at 137, 139.

¹⁹² Abi-Saab, *supra* note 79, at 35.

¹⁹³ Tzanakopoulos, *supra* note 1.

¹⁹⁴ See, e.g., SC Res. 1267, 15 October 1999; SC Res. 1373, 28 September 2001.

¹⁹⁵ Szasz, *supra* note 148, at 903.

¹⁹⁶ See, e.g., *Human Rights and Terrorism*, GA Res. 56/160, 19 December 2001; *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, GA Res. 57/219, 27 February 2003.

¹⁹⁷ See, e.g., de Wet, *supra* note 5, at 309, 383.

question the legitimacy or morality of Council action undertaken extra-legally via its resolutions.

Individual states (or states in regional groupings) can also play a role in rejecting or ratifying Council extra-legal action.¹⁹⁸ Complying with extra-legal resolutions, particularly where Council debates have identified the resolutions as such, can be taken to be an act of ratification, establishing that notwithstanding the lack of compliance with the law the action was justified. Conversely, failing to comply with an extra-legal resolution can be seen as rejecting its legitimacy, where such a rejection and its reasons are made publicly known. For example, in 1998, the Organization of African Unity (OAU) passed a resolution noting that it would not comply with the Council resolutions regarding Libya following the Lockerbie bombing:

[O]wing to the fact that the said resolutions violate Article 27 paragraph 3, Article 33 and Article 36 paragraph 3 of the United Nations Charter, and the considerable human and economic losses suffered by Libya and a number of other African peoples as a result of the sanctions;

DECIDE[D] ... on moral and religious grounds and with immediate effect that the OAU and its members will not comply from now on with the sanctions imposed against Libya;¹⁹⁹

In doing so the OAU identified that the action was extra-legal and also that OAU members would not 'ratify' the extra-legal action due to moral and religious concerns. This example shows how regional bodies and domestic governments can publicly reject illegitimate extra-legal action by setting out their reasons for doing, in particular that the relevant measures conflicts with core values over and beyond the legal rules that were violated.²⁰⁰ Further, widespread non-compliance by states with a Council resolution could also be seen as a rejection under the extra-legal measures model, one reminiscent of Locke's original check on power – revolt.²⁰¹

In addition to comments and action by domestic governments and regional bodies, municipal courts may provide judicial review of the implementation of UNSC resolutions.²⁰² While courts are clearly legal institutions, in relation to the Council they are unable to make binding determinations as to the legality of resolutions under international law.²⁰³ For the purposes of the extra-legal measures model, then, they can perform two roles. First, domestic courts can point out when the Council has taken

¹⁹⁸ Alvarez, *supra* note 34, at 141; de Wet, 'The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View', in Erika de Wet and André Nollkaemper (eds), *Review of the Security Council by Member States* (2003) 7, at 29–29.

¹⁹⁹ Organisation of African Unity (OAU), *The Crisis between the Great Socialist People's Libyan Arab Jamahiriya and the United States of America and the United Kingdom*, OAU Doc. AHG/Dec.127 (XXXIV), 8–10 June 1998, paras 2–3.

²⁰⁰ See also Libya's attempts to delegitimize the Council's sanctions regime more generally. Ian Hurd, 'Legitimacy, Power, and the Symbolic Life of the UN Security Council', 8 *Global Governance* (2002) 35, at 46.

²⁰¹ Locke, *supra* note 104, para. 168.

²⁰² Peters, *supra* note 8, at 837–838; Tzanakopoulos, *supra* note 51.

²⁰³ Peters, *supra* note 8, at 837. See, e.g., Cases 402/05 and C-415/05, *Kadi v. Council and Commission*, [2008] ECR I-06351, paras 287–288.

extra-legal action (either in relation to the resolution itself²⁰⁴ or via its effect upon implementation²⁰⁵). Second, domestic courts can engage in a thorough analysis of a resolution – its legality and its impact on individuals – to ground a rejection or to ratify it by other parts of the polity. While a traditional legal analysis tends to focus on the extent to which municipal courts evaluate Council action in light of international law,²⁰⁶ under the extra-legal measures model, the courts' application of domestic law is also relevant. This is because the review phase of the model is not primarily concerned with the legality of the action. Indeed, a lack of legality is a given. Rather, the review is a chance for the polity to take on responsibility for the extra-legal acts (or not) on the basis of the polity's core values, morals and political ideals and whether the action's extra-legality can be justified on a higher basis.²⁰⁷ Thus, when municipal courts make pronouncements as to conflicts between Council measures and fundamental domestic legal norms and values, these can be crucial components in ascertaining whether an action should be ratified or rejected and whether the polity does indeed ratify or reject the action.

The power of municipal courts is thus found in their ability to publicize the relevant UNSC action, identify community values that may have been violated and issue authoritative views on the violations. A good example of this being done is the Canadian case of *Abdelrazik*, where Justice Zinn added 'his name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights' and noted that the Council's counter-terrorism sanctions regime violated a 'fundamental principle of Canadian and international justice'.²⁰⁸ Thus, *Abdelrazik* can be seen to be evaluating not only the legal status of the Council's 1267 Committee but also as expressing a view on the compliance of the regime with core moral values, including ideas of justice. These types of statements, in combination with the legal opinions of courts, can thus play a role in ratifying or rejecting extra-legal Council action.

Individuals and civil society organizations can also play a role in the review of extra-legal action by the UNSC. While certainly not a commonplace occurrence, where an entire civil society expresses a view that extra-legal action by the Council is immoral or contrary to their core values, this could be a form of rejecting extra-legal action. The history of the Council's sanctions regime points to one instance of this type of behaviour happening, which is the case of three Swedish citizens who were listed on

²⁰⁴ See, e.g., *Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs* (2007) ILDC 461 (CH 2007) paras 5, 7.4. Cf. Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions', in August Reinisch (ed.), *Challenging Acts of International Organizations before National Courts* (2010) 54, at 61.

²⁰⁵ See *ibid.*, at 57. See, e.g., *Abdelrazik v. Minister of Foreign Affairs* [2009] FC 580.

²⁰⁶ Peters, *supra* note 8, at 837–838.

²⁰⁷ Gross, *supra* note 101, at 64–69.

²⁰⁸ *Abdelrazik*, *supra* note 205, paras 51, 53 (emphasis added); Laurence Boisson de Chazournes and Pieter Jan Kuijper, 'Mr Kadi and Mrs Prost: Is the UN Ombudsperson Going to Find Herself between a Rock and a Hard Place?', in Eva Rieter and Henri de Waele (eds), *Evolving Principles of International Law* (2011) 71, at 80.

the Council's list of individuals associated with Al-Qaida.²⁰⁹ The three individuals were listed by the USA on allegations that their foreign-exchange company was being used by terrorist groups to transfer funds.²¹⁰ As a result of their listing, Sweden was required to freeze the men's bank accounts and subject them to travel and employment bans.²¹¹ However, despite this legal requirement, and due implementation by Sweden of the relevant sanctions, Swedish civil society rejected the listing of the individuals and, in contravention of the sanctions, collected money to pay for their legal fees and found employment for one of the men at a newspaper.²¹² The three men were ultimately delisted following pressure from Sweden and others on the Council and the USA.²¹³ Thus, domestic non-compliance with both domestic laws implementing Council action, and the regime established by the Council itself, has a potential role to play in judging Council action. While admittedly at this time the role is a negligible one, if the Council were to severely overstep its authority and engage in extra-legal action that was beyond the limits of acceptability, such action does point the way to an additional form of public oversight.²¹⁴ Of course, such action would need to be broad-based and public. Mere individual non-compliance with UNSC regimes is just illegality and would not be sufficient to perform the oversight function envisioned by the extra-legal measures model.

Finally, when evaluating whether an extra-legal act of the UNSC has been ratified or rejected, it cannot be presumed that acts are ratified until rejected. While the presumption of legality clearly applies to Council action,²¹⁵ mere acquiescence does not necessarily need to be taken as ratification if there are indications of rejection within the polity.²¹⁶ Thus, though many of the avenues suggested above as being able to demonstrate ratification or rejection of Council action may be weak in and of themselves, conceptualizing the requirement of ratification to validate extra-legal action as something more than mere acquiescence may serve to strengthen the ability of states and individuals to advocate for, and rely on, the rejection of such action.

²⁰⁹ SC Res. 1267, 15 October 1999; SC Res. 1390, 28 January 2002.

²¹⁰ 'U.S. Drops Names of 2 Swedes from Al Qaeda List at U.N.', *New York Times* (23 August 2002), available at www.nytimes.com/2002/08/23/world/us-drops-names-of-2-swedes-from-al-qaeda-list-at-un.html (last visited 10 August 2015).

²¹¹ SC Res. 1390, 28 January 2002, para. 2.

²¹² Serge Schemann, 'A Nation Challenge: Sanctions and Fallout; Swedes Take Up the Cause of 3 on U.S. Terror List', *New York Times* (26 January 2002), available at www.nytimes.com/2002/01/26/world/nation-challenged-sanctions-fallout-swedes-take-up-cause-3-us-terror-list.html (last visited 10 August 2015).

²¹³ UNSC, '1267 Committee Approves Deletion of Three Individuals and Three Entities from Its List', Press Release, SC/7490, 27 August 2002, available at www.un.org/News/Press/docs/2002/sc7490.doc.htm (last visited 10 August 2015).

²¹⁴ Perhaps also reminiscent of Locke's original check on power – that the people could appeal to the heavens or revolt. Locke, *supra* note 104, para. 168.

²¹⁵ Elberling, *supra* note 1, at 352; *Certain Expenses Advisory Opinion*, *supra* note 46, at 168.

²¹⁶ See, e.g., Abi-Saab, *supra* note 79, at 33 on suggestions that acquiescence by states to the UNSC's counter-terrorism regime legally ratified the regimes. Cf. Conforti and Focarelli, *supra* note 12, at 54 on curing international illegality through state acquiescence.

(c) *The Effect of Ratification or Rejection of UNSC Action*

Having identified the ways in which extra-legal action by the Council may be ratified or rejected, the question then becomes what is the effect? Under the extra-legal measures model, the potential for non-ratification of extra-legal action is a key restraint against abuse of power. As Gross notes, ‘the model adds an element of uncertainty hanging over the head of the public official who needs to decide how to act ... [which] raises the cost of taking an extralegal course of action.’²¹⁷ However, to be a real constraint, there must be a potential for true penalty or negative consequence to be imposed if an extra-legal action is not ratified. As noted earlier, for the Council, there is no legal oversight system able to impose binding consequences for breaches of the law.²¹⁸ How then can the extra-legal measures model be said to apply any sort of meaningful restraint on Council action? As foreshadowed earlier, this is one of the most serious issues facing any attempt to see the extra-legal measures model as restraining Council action.²¹⁹ At present, state practice evidences only one meaningful way that non-ratification of extra-legal action could ‘raise the cost’ of the Council ignoring the law – non-compliance.²²⁰ This section also briefly proposes two further potential methods of non-ratification through non-state actors.

Where states decide to reject the legitimacy of extra-legal Council action, they may also not implement the decision domestically.²²¹ A potential example of this can be seen in the EU’s experience in *Kadi*, which confirmed that the EU courts could strike down the implementation of Council resolutions that do not comply with EU law, notwithstanding the international obligations of EU member states.²²² In this case, it was a court that determined that the measures could not legally be followed under EU law, but the effect of the non-compliance will be telling for the ability of non-compliance generally to ‘raise the cost’ of extra-legal action. If it results in substantive changes at the Council, it may suggest that non-compliance is a more powerful restraint on the potential use of extra-legal action. In fact, in response to earlier regional developments suggesting dissatisfaction with the Council’s counter-terrorism regime, the Council acted to modify its sanction programme to include minimal methods of review and oversight of listings.²²³

This attempt to mollify EU concerns indicates that non-compliance by states with UNSC decisions – in particular, large or powerful groups of states – can influence Council decision making. As the Council increasingly deals more with threats that

²¹⁷ Gross, *supra* note 6, at 1024.

²¹⁸ See discussion earlier in this article.

²¹⁹ See also Hood, *supra* note 78, at 16.

²²⁰ For the legal justification for such non-compliance, see Tzanakopoulos, *supra* note 1, however note there are serious concerns with the strength of these legal arguments. See Milanovic, *supra* note 54; de Wet, *supra* note 54. See also Alvarez, *supra* note 34, at 141.

²²¹ Gowlland-Debbas, *supra* note 182, at 651. See Karl Doehring, ‘Unlawful Resolutions of the Security Council and their Legal Consequences’, 1 *Max Planck Yearbook of United Nations Law* (1997) 91, at 107, for a discussion of how such non-compliance might work through notifying the Council of its *ultra vires* action prior to engaging in non-compliance.

²²² *Kadi*, *supra* note 203.

²²³ Genser and Barth, *supra* note 52, at 4–6.

require internationally concerted action to address, the importance of seamless global compliance with its resolutions is only likely to rise. The experience with terrorism is demonstrative of this tendency. A sanctions list is an 'all-or-nothing' program. If holes exist whereby listed individuals are able to access funds or employment via certain jurisdictions, then the effectiveness of the entire global regime is threatened.²²⁴ Thus, Council responses to these types of issues will be increasingly reliant on full compliance by all states and more vulnerable to higher 'costs' of non-ratification of extra-legality in the form of non-compliance.

It is also possible that individuals could make meaningful the non-ratification of UNSC action, for example, by:

- i. domestic political sanctions of governments that encourage or comply with non-ratified extra-legal action²²⁵ – for example, the citizens of Council members (particularly P5 members) could lobby their government to not support illegitimate extra-legal action and agitate for domestic political change if this is not heeded²²⁶ or
- ii. individual non-compliance with extra-legal actions of the Security Council – for example, the experience in Sweden in the case described above.²²⁷ Such a measure would need to go beyond mere individual non-compliance and be based on a widespread, co-ordinated campaign that clearly rejects the relevant resolutions as being illegitimate and contrary to core values.²²⁸

While both of these proposals appear to necessitate some change in the relationship between the UNSC, states and individuals, the potential does currently exist within the present system to allow for the development of these types of oversight mechanisms. For example, as knowledge and media coverage of the extent of the Council counter-terrorism sanctions lists grows, civil society and the media have increasingly begun to report on, and become aware of, the potential legal and moral issues created by these regimes.²²⁹ As will be discussed in the recommendations section below, by

²²⁴ Devika Hovell, 'A House of Kadis? Recent Challenges to the UN Sanctions Regime and the Continuing Response to the ECJ Decision in Kadi', *EJIL:Talk!* (7 July 2009), available at www.ejiltalk.org/a-house-of-kadis-recent-challenges-to-the-un-sanctions-regime-and-the-continuing-response-to-the-ecj-decision-in-kadi/ (last visited 10 August 2015), at 41, noting that 'domestic and regional court decisions have begun turning the due process issue into a security concern'.

²²⁵ See, e.g., Caron, *supra* note 149, at 558.

²²⁶ See also Mohamed, 'Shame in the Security Council', 90 *Washington University Law Review* (2013) 1191, regarding the use of shame in influencing the UNSC.

²²⁷ See discussion earlier in this article. See also Gowlland-Debbas, *supra* note 182, at 651, regarding initiatives to supply pencils to Iraq (banned under a UNSC sanctions regime) by citizens in Jordan, the USA and United Kingdom.

²²⁸ Cf. UNSC, 'Special Research Report: UN Sanctions', Special Research Report no. 3, 25 November 2013, at 12, available at www.securitycouncilreport.org/special-research-report/un-sanctions.php (last visited 10 August 2015).

²²⁹ See, e.g., Security Council Report, available at www.securitycouncilreport.org/ (last visited 10 August 2015); Colum Lunch's *Turtle Bay*, available at <http://turtlebay.foreignpolicy.com/> (last visited 10 August 2015); Human Rights Watch, *In the Name of Security* (29 June 2012), available at www.hrw.org/reports/2012/06/29/name-security (last visited 10 August 2015).

encouraging this kind of reporting and connection between Council action and the general public, the ability of oversight as envisaged by the extra-legal measures model to exercise meaningful control on the Council will increase.

Finally, non-ratification of extra-legal action also opens up the possibility of utilizing the ICJ to judicially review the act.²³⁰ As noted earlier, though the avenues of obtaining ICJ oversight of the Council are weak, the potential for an adverse determination by the Court of Council action is likely to be a strong incentive against taking extra-legal action.²³¹ Thus, the extra-legal measures model supports the continued development and strengthening of the ICJ as a forum for judicial review of non-ratified Council action. Not only does seeking such review act as a form of non-ratification, but it also can result in the negative assessment of Council action and, thus, be a way of increasing the costs of extra-legal action.²³²

Given the above, there are at least some risks faced by the UNSC when engaging in extra-legal action. At present, these risks are admittedly weak restraints and certainly lack the directness envisioned in Gross' formulation of the extra-legal measures model.²³³ However, the prospect of widespread non-compliance by either states or individuals may be sufficient to reign in too outrageous Council proposals,²³⁴ particularly if these methods are strengthened and recognized as forms of oversight.

6 Lessons from the Extra-Legal Measures Model

The earlier analysis has begun the process of rethinking the governance of the UNSC in terms beyond just legal analysis. It also shows that the application of the extra-legal measures model is incomplete and that there is thus the dangerous potential of the Council transforming into a Schmittian executive, operating in the exception.²³⁵ At the same time, however, this article has also shown potential avenues that could be strengthened and developed to better protect against abuses of power by the Council.²³⁶

First, there is a need to increase domestic knowledge and oversight of UNSC action.²³⁷ That is, while the current work of the Council is entirely public, it is yet to capture the attention of domestic audiences, and, thus, individuals remain largely unaware of the acts being done by the Council. Accountability of the Council can only

²³⁰ See Martenczuk, *supra* note 36; Akande, *supra* note 2.

²³¹ See Akande, *supra* note 2, at 333ff. for a discussion of the effect of an adverse determination by the ICJ of Council action.

²³² *Ibid.*, at 336.

²³³ Gross and Ni Aoláin, *supra* note 88, at 137–142.

²³⁴ Tzanakopoulos, *supra* note 1.

²³⁵ Gross, *supra* note 59, at 1831–1832.

²³⁶ Cf Hood, *supra* note 78, Part IV, who suggests that 'limitations inherent in adapting the normative ideas within emergency law literature to the Council's legislative activity' means that rather than having direct application these ideas can be used instead to question the underlying assumptions of emergency law-making by the Council, in particular, the assumed 'necessity and utility of the Council engaging in emergency international law-making'.

²³⁷ What Nasu refers to as 'accessibility'. Nasu, *supra* note 45, at 130.

occur with a properly informed polity,²³⁸ thus the existence of non-government and media groups focused on promoting access to, and knowledge of, Council action could be crucial to realizing the potential of the extra-legal measures model.²³⁹ These should be encouraged, as should wider reporting of Council action.

Second, domestic political and lobbying efforts in relation to Council action should be encouraged. By situating Council action as a domestic political issue,²⁴⁰ the polity of the Council is broadened and the potential for ratification/rejection of Council extra-legal action is increased. Thus, civil society groups and non-governmental organizations advocating for or against certain action, particularly in Council member states, should also be encouraged and supported. Both of these suggestions are also likely to be a natural result of the Council becoming more invasive in the domestic sphere generally. As individuals see their lives being directly affected by Council action, it is likely that they will become more concerned with the Council as an institution.²⁴¹ At the same time, encouraging such developments will help to realize the polity's oversight of Council extra-legal action.

Importantly, supporting and strengthening these restraint mechanisms does not require legal action or reform on the behalf of states but, rather, political and social action on behalf of individuals, civil society and media organizations. This emphasizes the political nature of the problem of an unrestrained international executive and the need to look beyond the positive law to remedy its flaws.²⁴² This also stems from a foundational idea of the extra-legal measures model, which is that the law is only a limited tool for restraining power,²⁴³ and courts are but 'one of many possible (de)legitimizing agencies.'²⁴⁴ A narrow approach to restraining Chapter VII power, focused only on the law, misses the larger potential political and moral avenues for restraining the Council. While, *prima facie*, antithetical to typical liberal democratic/positivist visions of protecting the rule of law by law,²⁴⁵ by recognizing that law is only one possible instrument to protect higher order values, the extra-legal measures model helps us to be more imaginative and innovative in approaching the problem of an unrestrained UNSC.²⁴⁶

²³⁸ Gross, *supra* note 101, at 81.

²³⁹ E.g., Security Council Report, available at www.securitycouncilreport.org/ (last visited 10 August 2015), and reporting such as Colum Lunch's *Turtle Bay*, available at <http://turtlebay.foreignpolicy.com/> (last visited 10 August 2015).

²⁴⁰ As, e.g., attaining a seat on the Council can be a source of domestic pride. See Hurd, *supra* note 200, at 43.

²⁴¹ See Gowlland-Debbas, *supra* note 182, at 18.

²⁴² Fatovic, *supra* note 104, at 40–41.

²⁴³ See also Lazar, 'A Topography of Emergency Power', in Victor Ramraj (ed.), *Emergencies and the Limits of Extra-Legality* (2008) 156, at 170.

²⁴⁴ Alvarez, *supra* note 5, at 39f. See also Gross, *supra* note 101, at 85. See also Tushnet, 'The Political Constitution of Emergency Powers: Some Conceptual Issues', in Victor Ramraj (ed.), *Emergencies and the Limits of Extra-Legality* (2008) 145.

²⁴⁵ For a positivist take on Gross, see, e.g., Campbell, 'Emergency Strategies for Prescriptive Legal Positivist: Anti-terrorist Law and Legal Theory', in Victor Ramraj (ed.), *Emergencies and the Limits of Extra-Legality* (2008) 201, at 223ff.

²⁴⁶ Lazar, *supra* note 243, at 160–161. See also Mónica García-Salmones, 'The Ethos of the Rule of Law in the International Legal Discourse: Portrait of an Outsider', 10(29) *International Community Law Review* (2008) 49.

7 Conclusion

The extra-legal measures model shows a possible alternative way of conceiving of restraints on the UNSC's use of Chapter VII powers. Though much work remains on the details of the application of the model to the Council – for example, on the substance of the international legal order's 'core values' – this article has shown that the core aspects of the model have relevance to the Council and how oversight of Council action could be improved. The extra-legal measures model highlights potential avenues for restraint that may be missed in traditional legal analysis. It emphasizes the law's instrumental nature,²⁴⁷ highlights the protection of the values underpinning the law²⁴⁸ and focuses attention on improving the political mechanisms governing the Council.²⁴⁹ By engaging a polity in review of Council action, the model also encourages individuals and states to take on an ethic of political responsibility in relation to Council action²⁵⁰ and emphasizes ideas of legitimacy and morality filling gaps left by a positive legalism.²⁵¹ It is hoped that this will then lead to greater consideration by the Council of the need to comply with the law and, perhaps more importantly, to also abide by the fundamental values that the law is intended to protect.²⁵²

²⁴⁷ Lazar, *supra* note 59, at 5.

²⁴⁸ Fatovic, *supra* note 104, at 40. See also de Wet, *supra* note 198, at 29.

²⁴⁹ Gross, *supra* note 59.

²⁵⁰ Gross, *supra* note 6.

²⁵¹ Gross and Ni Aoláin, *supra* note 88, at 112–113.

²⁵² Fatovic, *supra* note 104, at 40–41.