

EBOLA: A THREAT TO THE PARAMETERS OF A THREAT TO THE PEACE?

ANNA HOOD*

In September 2014 the United Nations Security Council ('Council') passed Security Council Resolution 2177, which declared that the Ebola virus ('Ebola') was a threat to the peace under art 39 of the Charter of the United Nations. The Resolution was the first time that the Council had determined that a health issue constituted a threat to the peace. This article explores how the Council came to see Ebola as a threat to the peace, what reasons it provided to justify classifying the disease as a threat and what the significance of the Resolution is. The article argues that many of the rationales provided by states to justify the classification of Ebola as a threat to the peace represented a significant extension of the scope of a threat to the peace and that it is questionable whether under these rationales any substantive limits remain within the concept. It then turns to discuss the idea that the erosion of the limits within the term 'a threat to the peace' gives rise to the possibility that the Council's approach to determining a threat to the peace is beginning to resemble the Copenhagen School's theory on securitisation and it examines how viewing the Council's art 39 activity through the lens of securitisation may open up new ideas and questions about the Council's practice.

CONTENTS

I	Introduction.....	1
II	The Traditional Scope of the Term 'A Threat to the Peace' in Article 39 of the <i>UN Charter</i>	4
III	Conceptualising Ebola as a Threat to the Peace	9
	A Linking Ebola to the Prospect of Conflict.....	10
	B Suggesting Ebola Creates Instability within the Affected States	11
	C Viewing Ebola as a Threat to Human Security	12
	D Understanding Ebola as an Emergency or Crisis	14
	E Asserting that Ebola Required International Action and Cooperation	15
IV	Discussion.....	15
V	Conclusion	22

I INTRODUCTION

In December 2013, the Ebola virus ('Ebola') broke out in a small village in Guinea. Over the course of the following months it spread to other parts of the country. Then, in March 2014, it jumped the border into Liberia and two months later spread to Sierra Leone. By the beginning of June 2014, the disease was

* BA/LLB (Hons I) (Melbourne); LLM (NYU); PhD (Melbourne); Lecturer, University of Melbourne. The author would like to thank Professor Anne Orford for her encouragement to consider the applicability of the Copenhagen School's theory of securitisation to art 39 of the *Charter of the United Nations* as well as the anonymous referees who provided very helpful and thought-provoking comments on the article.

growing exponentially, with the number of cases doubling every 20 to 30 days.¹ The international community was initially slow to respond to the outbreak.² However, by September 2014, the gravity of the epidemic and the risk it posed to people and states seemed to penetrate the international community's consciousness and a number of entities on the international stage began to take action. One such entity was the United Nations Security Council ('Security Council' or 'Council').³ On 18 September 2014, the Council passed *Resolution 2177*,⁴ which declared that the Ebola outbreak in West Africa was a threat to international peace and security under art 39 of the *Charter of the United Nations* ('UN Charter')⁵ and encouraged states to take a number of steps to help bring the disease under control.⁶

The passage of *Resolution 2177* was the first time that the Security Council had determined that a health issue constituted a threat to international peace and security.⁷ Prima facie, the idea that a health crisis amounts to a threat to the peace appears to be at odds with the scope of the term 'a threat to the peace'.

¹ The Data Team, 'The Toll of a Tragedy', *The Economist* (online), 10 May 2015 <<http://www.economist.com/blogs/graphicdetail/2015/05/ebola-graphics>>; World Health Organization, *Ebola in West Africa: Heading for Catastrophe?* (2015) <<http://www.who.int/csr/disease/ebola/ebola-6-months/west-africa/en/>>; WHO Ebola Response Team, 'Ebola Virus Disease in West Africa — The First 9 Months of the Epidemic and Forward Projections' (2014) 371 *The New England Journal of Medicine* 1481.

² Lawrence O Gostin, 'Ebola: Towards an International Health Systems Fund' (2014) 384 *The Lancet* e49 <[http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(14\)61345-3.pdf](http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(14)61345-3.pdf)>.

³ Another international organisation that took action against the Ebola virus ('Ebola') at this time was the United Nations General Assembly. It adopted several resolutions in the second half of 2014 to address Ebola, including the following resolutions which supported the establishment of a United Nations Mission for Ebola Emergency Response. See *Measures to Contain and Combat the Recent Ebola Outbreak in West Africa*, GA Res 69/1, UN GAOR, 69th sess, Agenda Item 124, UN Doc A/RES/69/1 (23 September 2014); *United Nations Mission for Ebola Emergency Response*, GA Res 69/3, UN GAOR, 69th sess, Agenda Item 132, UN Doc A/RES/69/3 (14 October 2014).

⁴ SC Res 2177, UN SCOR, 69th sess, 7268th mtg, UN Doc S/RES/2177 (18 September 2014) ('*Resolution 2177*').

⁵ *Ibid* Preamble para 5. The declaration that Ebola constituted a threat to international peace and security was a determination under art 39 of the *Charter of the United Nations* ('UN Charter'). Article 39 states that the Security Council ('Council') can determine, *inter alia*, the existence of a threat to the peace. The term threat to the peace and threat to international peace and security are used synonymously by the Council. When the Council makes a determination under art 39 of the *UN Charter* that an issue amounts to a threat to the peace, it enables it to set down enforcement measures (such as the imposition of sanctions) that UN member states must follow.

⁶ It should be noted that although the declaration that Ebola was a threat to the peace entitled the Council to impose mandatory enforcement measures on states, it declined to impose such measures in *Resolution 2177* and instead just recommended steps for states to carry out. Some of the steps the Council encouraged states to take included lifting travel bans, providing assistance to countries suffering from the outbreak of Ebola and implementing recommendations established by the World Health Organization ('WHO'): *ibid* [3]–[9].

⁷ In *Resolution 1308*, the Council noted that HIV/AIDS could potentially give rise to a threat to international peace and security but it did not go so far as to determine that it in fact constituted a threat to international peace and security: SC Res 1308, UN SCOR, 55th sess, 4172nd mtg, UN Doc S/RES/1308 (17 July 2000) ('*Resolution 1308*'). The Council further discussed the challenge of HIV/AIDS in *Resolution 1983*: SC Res 1983, UN SCOR, 66th sess, 6547th mtg, UN Doc S/RES/1983 (7 June 2011). However, it did not discuss the idea that it was or might be a threat to the peace in this resolution.

While the precise parameters of the term ‘a threat to the peace’ are disputed,⁸ Security Council practice suggests that a threat to the peace will normally only be declared where there is an armed conflict or a situation that is likely to give rise to an armed conflict in the short to medium term.⁹ Although Ebola was inflicting pain and suffering on its victims and creating instability in Guinea, Liberia and Sierra Leone, there was little indication in September 2014 that the Ebola crisis was likely to give rise to armed conflict at any point in the foreseeable future.¹⁰ How then did the Security Council come to see it as a threat to the peace? What reasons did it provide to justify its classification of the disease as a threat to the peace? And does the characterisation of a health crisis as a threat to the peace alter the parameters of art 39 of the *UN Charter*?

This article attempts to answer these questions and analyse the significance of the Council classifying Ebola as a threat to the peace.¹¹ It begins in Part II by setting out the traditional scope of art 39 of the *UN Charter*. It then moves in Part III to explore how the Council understood Ebola as a threat to the peace in *Resolution 2177*. It argues that a range of reasons were put forward to justify classifying Ebola as a threat to the peace: some of them were fairly similar to traditional understandings of a threat to the peace but the majority represented more expansive understandings of the term. Part IV of the article turns to analyse the different rationales provided by states for classifying Ebola as a threat to the peace. It argues that many of the rationales provided by states represent such a significant extension of the scope of a threat to the peace that it is questionable what limits remain within the concept. It goes on to suggest that although *Resolution 2177* alone cannot alter the content of the term ‘a threat to the peace’ in art 39, if the Council continues to identify threats to the peace for the reasons it adopted in *Resolution 2177*, it is possible that the scope of the term will in time be permanently altered. The Part concludes by discussing the idea that the erosion of the limits within the term ‘a threat to the peace’ gives rise to the possibility that the Council’s approach to determining a threat to the peace is beginning to resemble the Copenhagen School’s theory on securitisation and it examines how viewing the Council’s art 39 activity through the lens of

⁸ For further discussion of this point, see below Part II.

⁹ Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004) 139. As will be discussed below in Part II, states have at certain times tried to extend the concept further but to date such attempts have failed to amount to subsequent practice capable of transforming the definition of a ‘threat to the peace’.

¹⁰ Indeed, as will become apparent below, in the Security Council debate prior to the passage of *Resolution 2177*, very few states said that armed conflict was likely to arise at all from Ebola let alone in the short to medium term.

¹¹ NB: there are, of course, many other questions to which *Resolution 2177* gives rise that are worthy of examination. For example, what effect does the declaration that Ebola is a threat to the peace have for art 41 of the *UN Charter* and how well equipped is the Council to address health-related matters? These questions are, however, beyond the scope of this article.

securitisation may open up new ideas and questions about the Council's practice.¹²

II THE TRADITIONAL SCOPE OF THE TERM 'A THREAT TO THE PEACE' IN ARTICLE 39 OF THE *UN CHARTER*

Article 39 was designed to give the Council broad discretion to determine whether and when to take Chapter VII enforcement action.¹³ However, the Council's discretion was not unlimited.¹⁴ This is evidenced by the fact that the drafters of the *UN Charter* included three different tests — the existence of a threat to the peace, breach of the peace and act of aggression — within art 39. If the drafters had not wanted the Council to be limited in its determination of when to undertake Chapter VII action, they would not have needed to include these specific tests in art 39 at all; they could have simply empowered the Council to take enforcement action whenever it desired.¹⁵ The fact that art 39 contains limits has been confirmed throughout the Council's history by the fact that states frequently debate the parameters of the term a 'threat to the peace' and query what situations it encompasses.¹⁶

While it is clear that art 39 contains limits, the precise limits of the term a 'threat to the peace' have been the subject of considerable debate and controversy.¹⁷ Historically it was understood that a threat to the peace referred to the existence of an international armed conflict.¹⁸ Over the last few decades though, the Council has issued a range of resolutions that have attempted to extend the scope of the term considerably.¹⁹ Pursuant to art 31(3)(b) of the

¹² It should be noted that this comment is not arguing that health issues such as Ebola cannot be understood as security issues. There is a growing literature on the links between health crises and security issues. See, eg, Colin McInnes and Kelley Lee, *Global Health and International Relations* (Polity, 2012) 130–57. This article is focused on the much narrower matter of whether and how health crises such as Ebola can be understood as a threat to the peace under art 39 of the *UN Charter*.

¹³ Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012) vol 2, 1276.

¹⁴ *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 13 [28]. It is important to note that the idea that the Council's discretion under art 39 is not unlimited is disputed by some scholars. See, eg, Gabriël H Oosthuizen, 'Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law' (1999) 12 *Leiden Journal of International Law* 549. However, as set out in this section, this view is not supported by the ordinary meaning of the words in art 39 or their treatment by UN member states.

¹⁵ Simma et al, *A Commentary Volume II*, above n 13, 1275–6.

¹⁶ *Ibid* 1276. Examples of states disputing the ambit of art 39 can be found in the following Security Council debates: UN SCOR, 57th sess, 4568th mtg, UN Doc S/PV.4568 (10 July 2002); UN SCOR, 57th sess, 4568th mtg, UN Doc S/PV.4568 (Resumption 1) (10 July 2002); UN SCOR, 58th sess, 4772nd mtg, UN Doc S/PV.4772 (12 June 2003); UN SCOR, 59th sess, 4950th mtg, UN Doc S/PV.4950 (22 April 2004); UN SCOR, 59th sess, 4950th mtg, UN Doc S/PV.4950 (Resumption 1) (22 April 2004); UN SCOR, 59th sess, 4956th mtg, UN Doc S/PV.4956 (28 April 2004).

¹⁷ Simma et al, *A Commentary Volume II*, above n 13, 1279.

¹⁸ Karel Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future' (2003) 8 *Journal of Conflict and Security Law* 15, 28; Robert Cryer, 'The Security Council and Article 39: A Threat to Coherence?' (1996) 1 *Journal of Conflict and Security Law* 161, 187.

¹⁹ These resolutions are discussed in more detail below.

Vienna Convention on the Law of Treaties ('VCLT'),²⁰ it is possible for the meaning or scope of a treaty term to change over time through 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Before turning to consider whether the resolutions that have sought to broaden the parameters of art 39 of the *UN Charter* amount to subsequent practice it is first necessary to clarify some issues to which the application of art 31(3)(b) of the *VCLT* to art 39 of the *UN Charter* give rise. The first is whether the Council's Chapter VII resolutions alone can constitute subsequent practice or whether evidence of non-Security Council UN member states supporting such resolutions is required. Most international lawyers believe that the practice of the Council alone is insufficient to satisfy art 31(3)(b) and instead support the idea that the Council's activities will only amount to subsequent practice if they are 'generally accepted'²¹ and supported by 'a large majority'²² of the UN membership.

How the acceptance of UN member states is determined is a further matter requiring clarification. There appears to be broad agreement in the literature that in determining whether UN member states have accepted the Council's actions for the purposes of art 31(3)(b) of the *VCLT*, it is necessary to determine whether the states party believe that the Council was entitled to take the action it did.²³ That is, a form of *opinio juris* must be established.²⁴ What is important to note

²⁰ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('VCLT'). The *VCLT* had not been drafted, let alone come into force when the *UN Charter* was created. Article 31 of the *VCLT*, however, is widely acknowledged as representing the customary international law that was in existence at the time the *UN Charter* was drafted and the International Court of Justice ('ICJ') has relied on this provision when interpreting the *UN Charter*: Alberto Alvarez-Jimenez, 'The International Court of Justice's Use of the *Vienna Convention* in the Interpretation of Boundary Agreements: 2000–10' (2012) 3 *Journal of International Dispute Settlement* 409, 437.

²¹ At the San Francisco Conference in 1945 it was stated that:

In the course of the operations from day to day of the various organs of the [o]rganization, it is inevitable that each organ will interpret such parts of the *Charter* are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers.

...

It is to be understood, of course, that if an interpretation made by any organ of the [o]rganization or by a committee of jurists is not generally acceptable it will be without binding force

as quoted in Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Martinus Nijhoff, 1994) 150. In the *Namibia Case*, the ICJ held that art 27(3) of the *UN Charter* had been altered by subsequent practice to allow the votes of states that abstained from Security Council votes not to prevent the passage of the resolution because '[t]his procedure followed by the Security Council ... has been generally accepted by [m]embers of the United Nations': *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 22 [22] ('*Namibia Case*'). See also David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (Kluwer Law International, 2001) 17–8.

²² Schweigman, above n 21, 18.

²³ *Ibid* 20–1. Cf C F Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2nd ed, 2005) 55.

²⁴ Amerasinghe, above n 23.

about the *opinio juris* requirement is that the UN member states must believe that the Council's actions are permissible generally; it is not enough for the UN member states to acquiesce to a Security Council act they believe is ultra vires with the intention of remedying the ultra vires nature of the act in the particular circumstances.²⁵ Discerning states' acceptance of Council action is straightforward when states make unambiguous statements of support. Often, however, it is necessary to deduce states' opinions from their willingness to implement and abide by the Council's resolutions. Relying on state practice to identify states' views must be undertaken with care as compliance with Council resolutions may be driven by factors other than a belief in the intra vires nature of the resolution, such as geopolitical concerns and economic interests.²⁶

A further matter with the subsequent practice test in art 31(3)(b) of the *VCLT* is how many times the practice has to occur before it is accepted as evidence of a new interpretation of the treaty provision. In the *Namibia Case*, where the interpretation of the *UN Charter* turned on the practice of the UN's member states, the International Court of Justice looked for consistent and uniform practice over 'a long period' of time to establish subsequent practice.²⁷ It is this test that is today widely accepted as the appropriate one to apply.²⁸

From the above points it can be concluded that for subsequent practice to change the scope of art 39 of the *UN Charter*, it is necessary for the Council to pass resolutions with a new interpretation of art 39 consistently for a long period of time and for those resolutions to be accepted by a large majority of UN member states. With this in mind, it is possible to turn to the Security Council resolutions which have contained broadened understandings of a threat to the peace in recent years and consider whether they amount to subsequent practice that has changed the scope of art 39.

Some of the ways that the Council has attempted to extend the scope of art 39 have been included in resolutions consistently for more than two decades and have been accepted by a large majority of UN member states. For example, the Council has passed a wide array of resolutions that indicate that the term 'a threat

²⁵ Axel Marschik, 'Legislative Powers of the Security Council' in Ronald St John Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, 2005) 457, 464–5; Amerasinghe, above n 23, 51. Amerasinghe makes the point that while states must believe the practice is permissible, they do not need to believe it is obligatory as they must with the creation of customary international law.

²⁶ This point is highlighted by Georges Abi-Saab who claims that states only complied with *Resolution 1373* because 'they found that it corresponded to their felt needs or interests': Georges 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* (Koninklijke Brill, 2010) 23, 34.

²⁷ *Namibia Case* [1971] ICJ Rep 16, 22 [22].

²⁸ It should be noted that the precise formulation varies slightly between international lawyers. For example, Amerasinghe articulates the test as 'repeated and consistent' practice and Simma et al state that the test is 'consistent and permanent' practice: Amerasinghe, above n 23, 51; Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2nd ed, 2002) vol 1, 28. On a different note, admittedly 'a long period' of time is still a somewhat ambiguous test: Amerasinghe, above n 23, 51. It does at least, however, indicate that a very short period of time would be insufficient for establishing subsequent practice.

to the peace' encompasses internal armed conflicts²⁹ as well as situations that may give rise to armed conflicts in the short to medium term.³⁰ Examples of such situations include where there are severe human rights abuses, serious humanitarian crises, large flows of refugees or post-conflict states where there is a high level of instability.³¹ When the Council first started passing resolutions with these sorts of threats to the peace, there was some debate about the practice.³² However, over time, the international community has come to accept these interpretations of the doctrine and it is now uncontroversial that the term 'a threat to the peace' can include internal armed conflict as well as situations that may spark armed conflict in the short to medium term.

There have, however, been other attempts to expand the scope of the term 'a threat to the peace' that have failed to garner the support of the majority of UN member states and/or have arisen only occasionally, meaning that consistent practice over a long period of time has not yet developed. For example, the Council has at times declared that general risks — such as the possibility of weapons of mass destruction falling into the hands of non-state actors³³ — constitute threats to the peace.³⁴ The declarations of general risks amounting to threats to the peace have, for the most part, been controversial³⁵ and there has not been a consistent practice of the Council passing such resolutions over a long period of time.³⁶ As such, it is not possible to conclude that the scope of art 39 has been altered to encompass the inclusion of general risks.

Some further attempts to alter the scope of the term 'a threat to the peace' have centred on getting the Council to give up the idea that threats to the peace require any form of connection to armed conflict and recognise that threats to

²⁹ Note that it is uncontroversial that internal conflicts that may create regional or international instability come within the scope of threats to the peace. However, it is more controversial whether purely internal conflicts are encompassed by art 39 of the *UN Charter*: Simma et al, *A Commentary Volume II*, above n 13, 1279.

³⁰ Simma et al, *A Commentary Volume II*, above n 13, 1279; Cryer, above n 18, 178–81.

³¹ Simma et al, *A Commentary Volume II*, above n 13, 1279; Wellens, above n 18, 42–7; Cryer, above n 18, 178–81.

³² See generally Cryer, above n 18, 178–88.

³³ SC Res 1540, UN SCOR 59th sess, 4956th mtg, UN Doc S/RES/1540 (28 April 2004) Preamble paras 8–9 ('*Resolution 1540*').

³⁴ Such declarations represent a significant departure from traditional understanding of threats to the peace as general risks entail no specific, concrete threat and no clear prospect of conflict occurring in the short to medium future.

³⁵ For example, when the Council passed *Resolution 1540*, a number of states expressed concerns about the idea that the possibility of weapons of mass destruction falling into the hands of non-state actors would amount to a threat to the peace: see UN SCOR, 59th sess, 4950th mtg, UN Doc S/PV.4950 (Resumption 1) (22 April 2004); UN SCOR, 59th sess, 4956th mtg, UN Doc S/PV.4956 (28 April 2004). One resolution that identified a general risk as a threat to peace which did not seem to attract significant dissent was *Resolution 1373*. *Resolution 1373* was adopted in the aftermath of September 11 and was designed to address the very general risk of international terrorism. The high compliance rates with *Resolution 1373* and lack of criticism about its passage suggests that most states acquiesced to the expansive use of the term 'a threat to the peace' in this circumstance. This acquiescence was sufficient to remedy the illegality of the Council's expansive approach to art 39. However, alone, it was not able to alter the scope of art 39, as (as noted above) for art 39 to be permanently altered, it would be necessary for the Council to pass resolutions with general risks consistently for a long period of time.

³⁶ The Council has only passed a handful of resolutions in response to general risks.

human security can fall within the scope of the term.³⁷ The term ‘human security’ first emerged in the early 1990s.³⁸ It encompasses a far broader notion of security than traditional notions of security do. While national and international security are concerned with protecting the nation state from armed conflicts, human security is concerned with protecting individuals.³⁹ It is founded on the idea that people do not just feel insecure in times of crisis but also on a daily basis because of a host of threats including ‘disease, hunger, unemployment, crime, social conflict, political repression and environmental hazards’.⁴⁰

Despite periodic calls for the Council to embrace the notion of ‘human security’, there has been a general reluctance on the part of Council members to identify a threat to the peace where purely human security issues are at stake. Some of the Council’s determinations of the existence of a threat to the peace in recent decades have focused more on the security of individuals. For example, the Council has declared that threats to the peace exist where civilians have been at risk,⁴¹ and it has also determined that some grave violations of human rights are threats to the peace.⁴² However, in each case, the threats to civilians or the human rights violations have arisen in the context of an armed conflict.⁴³ The Council has not been prepared to recognise a threat to the peace where individuals have faced insecurity from factors such as hunger, disease or the environment where there is no armed conflict or at least a prospect of one in the short to medium term.⁴⁴

Other attempts to expand the concept of a threat to the peace have similarly failed to acquire widespread support. It is thus apparent that at this point in history, a threat to the peace under art 39 of the *UN Charter* requires the existence of an armed conflict or the prospect of one arising in the short to medium term. This raises the question of how Ebola could have been classified as a threat to the peace by the Security Council in September 2014. It is theoretically possible that a health crisis could create a situation where conflict is likely to break out by, for example, damaging the health and wellbeing of military troops or peacekeepers⁴⁵ or generating such instability that conflict

³⁷ See, eg, Commission on Human Security, ‘Human Security Now’ (Report, 2003) 131.

³⁸ The scope of the term ‘human security’ was first fully set out in: United Nations Development Programme, ‘Human Development Report 1994’ (Report, 1994) (‘Human Development Report’).

³⁹ *Ibid* 3; Barbara von Tigerstrom, *Human Security and International Law: Prospects and Problems* (Hart Publishing, 2007) 16.

⁴⁰ Human Development Report, above n 38, 22. Human security is often described as broadly encompassing two ideas — freedom from fear and freedom from want: von Tigerstrom, above n 39, 28.

⁴¹ See, eg, SC Res 1296, UN SCOR, 55th sess, 4230th mtg, UN Doc S/RES/1296 (19 April 2000).

⁴² See, eg, Cryer, above n 18, 178–81.

⁴³ Simma et al, *A Commentary Volume II*, above n 13, 1286–7.

⁴⁴ For example, the Council has debated the idea of finding climate change a threat to the peace and HIV/AIDS a threat to the peace but has failed to do so in either case. Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012) 222–4.

⁴⁵ This possibility was acknowledged in *Resolution 1308*. See above n 7. See also McInnes and Lee, above n 12, 130.

becomes highly likely.⁴⁶ However, it is difficult to conclude that, at the time the Council passed *Resolution 2177*, Ebola was likely to generate armed conflict in the short to medium term. Analyses of the crisis focused on the idea that Ebola was threatening the health and life of thousands of individuals, it was hindering the ability of the affected states to function properly and it was seriously damaging states' economies; they did not suggest that it was likely to ignite armed conflict.⁴⁷ Admittedly the spread of Ebola did give rise to some violent clashes in parts of West Africa. For example, attempts to control Ebola and quarantine persons inflicted with the disease in West Point in Liberia in August 2014 resulted in some violent unrest and the death of one person.⁴⁸ However, the scale and intensity of these clashes were not sufficient to constitute an armed conflict as it has been traditionally understood.

Despite the lack of indication that Ebola amounted to the traditional conception of a threat to the peace, 130 states co-sponsored *Resolution 2177* — the greatest number of states in the history of the UN to sponsor a Security Council resolution — suggesting that many states perceived Ebola as a threat to the peace. The following section turns to analyse the Security Council debate that took place prior to the passage of *Resolution 2177* in an attempt to determine how these states understood Ebola as a threat to the peace.

III CONCEPTUALISING EBOLA AS A THREAT TO THE PEACE

At the outset of exploring how states conceptualised Ebola as a threat to the peace, it is important to acknowledge that two states — Brazil and Colombia — did not believe Ebola constituted a threat to international peace and security. In the Security Council debate prior to the adoption of *Resolution 2177*, Brazil stated:

We recognize the disease's potential to destabilize fragile situations in Liberia, Guinea and Sierra Leone and spread far beyond the affected countries. However, we underline the need to treat the outbreak first and foremost as a health emergency and a social and development challenge rather than a threat to peace and security.⁴⁹

These ideas were echoed by Colombia, which identified the Ebola outbreak as a crisis but insisted that 'the situation cannot be characterized as a threat to international peace and security in general'.⁵⁰ Instead, it urged the international community to address the crisis in the General Assembly.

Outside of Brazil and Colombia, however, all states that spoke prior to the passage of *Resolution 2177* believed that Ebola amounted to a threat to the peace. There were a range of explanations offered by states as to why Ebola

⁴⁶ McInnes and Lee, above n 12, 130.

⁴⁷ See below Part III and accompanying text.

⁴⁸ Norimitsu Onishi, 'Clashes Erupt as Liberia Sets an Ebola Quarantine', *The New York Times* (online), 20 August 2014 <http://www.nytimes.com/2014/08/21/world/africa/ebola-outbreak-liberia-quarantine.html?_r=0>; Norimitsu Onishi, 'Liberian Boy Dies After Being Shot During Clash Over Ebola Quarantine', *The New York Times* (online), 21 August 2014 <<http://www.nytimes.com/2014/08/22/world/africa/liberian-boy-dies-after-being-shot-during-clash-over-ebola-quarantine.html>>.

⁴⁹ UN SCOR, 69th sess, 7268th mtg, UN Doc S/PV.7268 (18 September 2014) 28 ('*Peace and Security in Africa*').

⁵⁰ *Ibid* 45.

came within art 39 of the *UN Charter* with many states offering multiple explanations. The reasoning provided by the states can be divided into five broad categories ranging from those that resemble relatively settled understandings of a threat to the peace to those that represent a significant departure from such settled understandings. This section sets out and explores each category.⁵¹

A *Linking Ebola to the Prospect of Conflict*

The first way that some states understood Ebola as a threat to the peace largely reflected traditional understandings of the term ‘a threat to the peace’ as it drew a link between Ebola and the prospect of conflict arising. The three states where the Ebola outbreak was most significant — Guinea, Liberia and Sierra Leone — were post-conflict states. All had experienced significant conflict a decade prior to the outbreak and were engaged in ongoing peace-building efforts at the time Ebola took hold in the region. In the Security Council debate, some states viewed the presence of Ebola in Guinea, Liberia and Sierra Leone as a threat to the peace because they believed it would weaken economic and social systems within these states, undo the gains made by peace-building projects and thus open up the possibility of conflict igniting again.⁵² For example, France stated that ‘[t]he Ebola virus is threatening to erase the peace dividends and to reignite chaos in those countries’;⁵³ Lithuania said:

Ebola has struck countries, which only a short decade or so ago emerged out of devastating conflicts, threatening now to cripple their economies, instilling fear and tearing apart the fragile social fabric, reversing the gains of a peaceful development⁵⁴

and Chile said:

[W]hen there is a genuine threat of any type or origin to the stability, security and peace in an area or region that is in the process of building peace ... the Council ... must adopt the necessary decisions that will ensure conditions ... to tackle the emergency.⁵⁵

As noted in Part II above, it is common practice for the Council to find a threat to the peace exists in post-conflict situations where states are unstable and there is a reasonable prospect that conflict may reignite. Consequently, this understanding of Ebola as a threat to the peace is fairly uncontroversial. The only questionable element of these statements is the extent to which there was in fact a prospect of Ebola affecting the three states to the point that a reversion to conflict was a real possibility.

⁵¹ NB: it is sometimes difficult to cleanly dissect the statements of states into the different threat categories and some of the statements made in the debate can be read in more than one way. The work below represents one possible way of reading the debate. It is very possible that other people would classify the ideas within the Security Council debate slightly differently.

⁵² See, for example, the comments of the African Union, Canada, France, Guyana, Japan and Lithuania: *Peace and Security in Africa*, UN Doc S/PV.7268.

⁵³ Ibid 10.

⁵⁴ Ibid 14.

⁵⁵ Ibid 22.

B *Suggesting Ebola Creates Instability within the Affected States*

A second way that some states rationalised treating Ebola as a threat to the peace did not align so closely with traditional understandings of the term. A large number of states argued that Ebola constituted a threat to the peace because it was destabilising Guinea, Liberia, Sierra Leone and West Africa generally. Specifically, states argued that the disease was generating social and economic instability within the affected states and region.⁵⁶ For example, Chad stated, 'Ebola is not simply a public-health crisis; it has lasting humanitarian, social and economic consequences and could even threaten the economic stability of the countries affected'⁵⁷ and Luxembourg said, '[i]t is no longer a simple humanitarian emergency, but, rather, a multidimensional crisis that threatens institutions, societies and the economies of the countries affected by the epidemic and of West Africa as a whole'.⁵⁸

Although in the past destabilising situations such as humanitarian crises, large refugee flows and political instability have at times been deemed threats to the peace, this has only been the case where the destabilisation was so significant that it gave rise to a prospect of conflict occurring in the short to medium term.⁵⁹ In the debate about Ebola, the vast majority of states that noted that Ebola was generating negative economic and social consequences for the affected states did not suggest that such consequences might give rise to conflict. One possible exception to this was Argentina's classification of Ebola as a threat to the peace. Argentina stated:

We recognize that this epidemic has the potential to kill the present and wound the future, eroding the possibilities of human social and economic development, which is at the root of most of the conflicts we deal with in the Council, and which may have consequences for security.⁶⁰

This statement indicates that Argentina appreciated that the economic and social instability that Ebola could create is the sort of instability that could ignite conflict. However, even here the link that Argentina drew between the consequences of Ebola and future conflict was a theoretical one; it stopped short of stating that Ebola posed a real prospect of conflict arising in the short to medium term.⁶¹

⁵⁶ See, for example, the comments of the African Union, Canada, Chad, China, France, Guinea, Israel, Jordan, Korea, Liberia, Lithuania, Luxembourg, the Netherlands, Nicaragua, Norway, Sierra Leone, Spain, Turkey and Uruguay: *ibid.*

⁵⁷ *Ibid* 19.

⁵⁸ *Ibid* 18.

⁵⁹ Or, at the very least, it was *argued* that the situation gave rise to the prospect of conflict in the short to medium term.

⁶⁰ *Peace and Security in Africa*, UN Doc S/PV.7268, 20.

⁶¹ An approach that was somewhat similar to Argentina's was Australia's. Australia noted that Ebola would give rise to economic and social instability in the affected region and then mentioned that the affected region was suffering from other conflict risks. Specifically, Australia said, '[e]conomic growth forecasts are already being slashed, and it is already having an impact on stability in a region emerging from conflict and grappling with chronic conflict risks, such as high youth unemployment': *ibid* 16. It could perhaps be implied from this statement that Australia thought the destabilising effects of Ebola could give rise to conflict. However, comparably to the statement by Argentina, Australia stopped short of explicitly stating the economic and social consequences the affected region was experiencing gave rise to a real prospect of conflict in the short to medium term.

C Viewing Ebola as a Threat to Human Security

A third way that states portrayed Ebola as a threat to the peace was by drawing on notions that reflect conceptions of human security. As set out above, human security places the security and wellbeing of individuals, not states, at the centre of enquiries about security. Further, it asks not just whether individuals are secure from military threats but also whether they are free from sources of instability in everyday life such as hunger, disease, poverty and environmental damage. As discussed in Part II, to date ideas of human security have not been accepted within the parameters of a threat to the peace except where they arise in connection with an armed conflict.

In the debate prior to *Resolution 2177*, no state directly said that Ebola was a threat to human security and that human security comes within the ambit of a threat to international peace and security. However, numerous states identified the effects of Ebola on individuals and suggested that these effects warranted action from the Council.⁶² Some states highlighted the fact that Ebola was killing a large number of people and had the potential to kill many more. For example, Guyana stated:

[G]iven the exponential increase in the number of cases and deaths, it has become necessary, indeed, imperative, for the international community to mobilize a coordinated response that is commensurate in scale and pace with the enormity of the challenge.⁶³

Similarly, Nicaragua said:

[T]he Ebola virus ... threatens to decimate communities and whole villages, and ... the international community must act immediately with the aim of saving as many human lives as possible and prevent the current situation from becoming a humanitarian catastrophe.⁶⁴

Other states suggested that it was not just the deaths of people from Ebola that warranted Security Council action but also the fact that it was affecting the health of individuals. For example, China stated that Ebola 'is rapidly spreading throughout countries in western Africa ... seriously threatening the health and life of their populations'.⁶⁵ When thinking about the effect of Ebola on people's health, Liberia noted that it was not just affecting people's health directly when they became infected with the disease but it was also affecting the health of individuals more broadly because health systems were overburdened by the disease and the fight against Ebola was undermining states' abilities to 'respond to routine illnesses such as malaria, typhoid fever, measles, and diarrhoea'.⁶⁶

Others went further and discussed how Ebola might affect the wellbeing and personal security of people because it might hinder development efforts and give rise to food crises, poverty, unemployment, and deterioration in living standards.

⁶² See, for example, the comments of the African Union, Argentina, Botswana, Burundi, China, Equatorial Guinea, Guinea, Israel, Liberia, Luxembourg, Morocco, the Netherlands, Nicaragua and Russia: *ibid*.

⁶³ *Ibid* 47.

⁶⁴ *Ibid* 46.

⁶⁵ *Ibid* 15. For the comments of Morocco on this point, see also at 29–30.

⁶⁶ *Ibid* 23. For the comments of Israel and the African Union on this point, see also at 35–6, 37–8.

For example, Argentina expressed concern that if the international community did not ‘respond with urgency and from the heart ... the living conditions of peoples around the world may be dramatically affected’ and further noted that ‘while hunger, poverty and sickness do not directly cause conflicts, it is also true that situations of insecurity may arise in the wake of so many injustices’.⁶⁷ In a similar vein, Guinea said that ‘the economic and social consequences of the disease have negatively affected the development of our countries and the wellbeing of our peoples’⁶⁸ and the Netherlands stated that ‘if we do not act now, people not dying of Ebola may die of starvation’.⁶⁹

A few states suggested that Council action was warranted, in part, because of the psychological effect Ebola was having on people and the fear it was generating. Botswana said, ‘[t]he extent of the catastrophe can be measured not only in human terms, but also in the fear it instils in those it affects’;⁷⁰ Burundi stated, ‘[t]he widespread panic created by the Ebola crisis in affected countries does not allow people to go about their normal daily productive activities’;⁷¹ and Lithuania noted that Ebola was ‘instilling fear and tearing apart the fragile social fabric’ of states.⁷²

A final element of the Security Council debate on *Resolution 2177* that did not directly address the issue of how Ebola constituted a threat to the peace but nonetheless touched on notions of human security was the fact that numerous states stressed the need to look at the root causes of the Ebola crisis. One of the central ideas in human security discourse is that matters of human security should be addressed holistically and structural causes of insecurity should be remedied.⁷³ This is in stark contrast to traditional understandings of how the Council is able to operate which suggest that the Council is designed to focus on quelling security issues when they reach crisis point, not addressing the underlying structural causes of the issues.⁷⁴ Examples of states suggesting the Council needed to take a holistic approach to Ebola included China, which stated that ‘[t]he international community should address both the root causes and symptoms of the problem by assisting African countries in accelerating their economic and social development’,⁷⁵ and Luxembourg which said that, ‘[w]e must face up to the structural challenges that condemn the greater part of the citizens of West Africa to live in poverty and precarity and that increase their vulnerability to shocks such as the Ebola epidemic’.⁷⁶

⁶⁷ Ibid 20.

⁶⁸ Ibid 24.

⁶⁹ Ibid 34. Concerns about starvation and a food crisis were also raised by Burundi, Equatorial Guinea, Nicaragua and Russia.

⁷⁰ Ibid 42.

⁷¹ Ibid 41.

⁷² Ibid 14. For the statement by the African Union, see also at 37–8.

⁷³ Human Security Unit, ‘Human Security in Theory and Practice: Application of the Human Security Concept and the United Nations Trust Fund for Human Security’ (Handbook, United Nations Office for the Coordination of Humanitarian Affairs, 2009) 8, 9, 11; Yaniv Roznai, ‘The Insecurity of Human Security’ (2014) 32 *Wisconsin International Law Journal* 95, 101.

⁷⁴ de Wet, above n 9, 139.

⁷⁵ *Peace and Security in Africa*, UN Doc S/PV.7268, 15.

⁷⁶ Ibid 18.

In analysing and evaluating the strands of human security rhetoric that appeared in the debate prior to the Council adopting *Resolution 2177*, it is important to appreciate that most states that mentioned issues of human security also referred to other security concerns in justifying their call for Security Council action. For example, many also mentioned how Ebola was generating instability within the affected states generally.⁷⁷ This fact may lead some to downplay the significance of the human security rhetoric in the Council debates. However, just because human security concerns were not the only basis upon which most states identified Ebola as a threat to international peace and security does not mean that the references to human security ideas are insignificant. In the past, many states have shied away from acknowledging that human security ideas are relevant in any way to discussions about enlivening the Council's Chapter VII powers via art 39.⁷⁸ Thus the fact that states are now beginning to build these ideas into their narratives about what amounts to a threat to the peace represents a significant development and an openness to considering a connection between human security and international peace and security.

D *Understanding Ebola as an Emergency or Crisis*

The transcript of the Security Council debate prior to the passage of *Resolution 2177* was filled with references to emergencies and crises. Some states used the words 'emergency' or 'crisis' to describe the situation created by Ebola,⁷⁹ while others described Ebola in ways that reflected notions of emergencies or crises by emphasising the gravity and magnitude of the situation.⁸⁰ It is unclear from the transcripts whether all states that invoked the language of crisis did so to justify Ebola being declared a threat to the peace and a Chapter VII resolution being passed. However, it is apparent that at least some states used the rhetoric of crisis and emergency for this reason. For example, Australia described Ebola as a crisis and said that '[i]t is self-evident that the crisis is a threat to international peace and security.'⁸¹ Further, Luxembourg stated:

It is ... a multidimensional crisis that threatens institutions, societies and the economies of the countries affected by the epidemic and of West Africa as a

⁷⁷ See, for example, the comments of the African Union, China, Guinea, Liberia, Luxembourg, the Netherlands and Nicaragua: *ibid*.

⁷⁸ For example, there has been great reluctance to acknowledge that the issue of climate change, which has very clear human security elements, can be classified as a threat to the peace. See, eg, UN SCOR, 62nd sess, 5663rd mtg, UN Doc S/PV.5663 (17 April 2007); Security Council, 'Security Council Holds First-Ever Debate on Impact of Climate Change on Peace, Security, Hearing Over 50 Speakers' (Press Release, SC/9000, 17 April 2007) <<http://www.un.org/press/en/2007/sc9000.doc.htm>>; McAdam, above n 44, 222–4.

⁷⁹ For instance, Senegal characterised the disease outbreak as an 'extraordinary crisis': *Peace and Security in Africa*, UN Doc S/PV.7268, 47; Nigeria said that it was 'no ordinary crisis': at 9; and France stated that it was an 'emergency': at 10.

⁸⁰ For example, Argentina said '[t]he gravity of the current Ebola epidemic unquestionably justifies our meeting today': *ibid* 20; Morocco noted that '[t]he epidemic is of unprecedented magnitude due to its geographical reach, the number of cases and the number of victims, which is increasing daily': at 29; and Uruguay said that it 'recognizes the importance and gravity represented by the swift development of this terrible disease': at 36.

⁸¹ *Ibid* 16.

whole ... *Resolution 2177 (2014)* ... reflects the commitment of the Security Council to address this threat to peace and security.⁸²

The idea that the term ‘a threat to the peace’ encompasses any form of emergency, crisis or very grave situation represents a departure from prior understandings of the term. Numerous scholars have at times characterised the Council’s powers as emergency powers and suggested that art 39 is very similar to provisions in domestic constitutions and pieces of legislation that enable executives to declare the existence of an emergency.⁸³ However, art 39 has traditionally only empowered the Council to declare a particular form of emergency, namely, an emergency where there is an armed conflict or the prospect of armed conflict arising. Thus, by suggesting that a threat to the peace will exist whenever some form of emergency is present, states are broadening the parameters of the term significantly.

E *Asserting that Ebola Required International Action and Cooperation*

A final way that states justified the characterisation of Ebola as a threat to the peace was by claiming that the outbreak of the disease required global, coordinated action and the Security Council was the body best placed to facilitate this. Examples of such justifications came from Russia, which said that the ‘huge challenge’ facing states in West Africa ‘cannot continue without the coordinated response of the international community. In that respect, we believe that the Council’s discussion of this topic is justified and welcome the adoption of [*R*]esolution 2177 (2014)’;⁸⁴ and Korea, which said that the spread of the disease would not normally be deemed an international peace and security issue but needed to be here because, inter alia, ‘a substantial and coordinated international response is required to tackle the Ebola epidemic’ and ‘[b]efore the situation gets out of control, with devastating results, we must heed the risks and respond at the international level. The United Nations ... is the best platform to coordinate efforts’.⁸⁵ This reasoning is similar in some ways to the idea above that the Council can respond to emergencies and crises, but it limits the emergencies and crises that the Council can address to those that require international attention and assistance.

IV DISCUSSION

Most of the explanations offered by states as to why Ebola is a threat to the peace represent a significant broadening of the concept. The idea that something that causes economic and social instability, threatens human security, constitutes an emergency or requires an international response amounts to a threat to the

⁸² Ibid 18.

⁸³ See, eg, Anna Hood, ‘The Security Council’s Legislative Phase and the Rise of Emergency International Law-Making’ in Hitoshi Nasu and Kim Rubenstein (eds), *Legal Perspectives on Security Institutions* (Cambridge University Press, 2015) (forthcoming); Jared Schott, ‘Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency’ (2007) 6 *Northwestern Journal of International Human Rights* 24; Simon Chesterman, ‘UNaccountable? The United Nations, Emergency Powers, and the Rule of Law’ (2009) 42 *Vanderbilt Journal of Transnational Law* 1509.

⁸⁴ *Peace and Security in Africa*, UN Doc S/PV.7268, 12.

⁸⁵ Ibid 13.

peace departs from traditional, accepted conceptions of a threat to the peace which require some link to the prospect of conflict. As discussed above in Part II, it is possible for new interpretations of a treaty term such as art 39 to evolve through subsequent practice where the new interpretations are widely accepted and applied consistently over a long period of time. However, although *Resolution 2177* received widespread support from the international community, the broader understandings of a threat to the peace in *Resolution 2177* have not yet been applied consistently over a long period of time. Consequently, at this stage in the Council's history, it is not possible to conclude that the term 'a threat to the peace' has expanded to encompass the ideas about a threat to the peace that were set out in the debate prior to *Resolution 2177*.

While *Resolution 2177* may not have altered the legal meaning of a threat to the peace on its own, the debate surrounding it shows that states are thinking about, and are open to, broadening the concept in an array of ways. The specific ways that states are contemplating expanding the term are concerning. All of them are very broad, malleable concepts and it is difficult to discern their limits and parameters. This Part explores just how broad and malleable the ideas about threats to the peace embedded within the *Resolution 2177* debate are.

To start with, the idea that instability within a state could amount to a threat to the peace without requiring the prospect of conflict significantly stretches the traditional concept of a threat to the peace. It opens up the possibility that a very wide range of situations could come within the parameters of the concept as there are many, many causes of state instability ranging from economic causes to social and political ones. In the debate prior to *Resolution 2177*, states suggested that a significant increase in unemployment and a damaged economy could signal instability.⁸⁶ Sharp rises in unemployment figures and a damaged economy are matters that frequently afflict states around the world. Indeed, on this test, the Council could have taken action in response to the Global Financial Crisis in 2008–09. States also suggested in the *Resolution 2177* debate that instability sufficient to invoke the Council's Chapter VII powers will be generated where development gains are threatened.⁸⁷ There are innumerable factors that affect the development of a large number of states including the climate, migration and government policies. Allowing such situations to amount to a threat to the peace dramatically broadens the Council's mandate.

In addition to broadening the Council's remit, enabling instability within a state or region to constitute a threat to the peace without necessarily requiring any link to the prospect of conflict raises a number of uncertainties and questions about the scope of the term 'a threat to the peace'. How much instability is required before a situation can be classified as a threat to the peace? What can/should the Council have regard to when exploring whether there is instability in a state or region? How can/should the Council measure levels of instability within states or regions?

Introducing concepts of human security into the ambit of a threat to the peace further broadens the concept of a threat to the peace. Human security is a

⁸⁶ See, for example, the comments by Chad and Luxembourg: *ibid* 18, 19.

⁸⁷ See, for example, the comments of Guinea: *ibid* 24–5.

notoriously vague concept.⁸⁸ Its limits are at best unclear and at worst non-existent.⁸⁹ When security is assessed from the perspective of the individual and regard is had not only to their need to be protected from military violence but also all forms of insecurity in daily life, the list of situations that amount to 'security' situations is seemingly boundless.⁹⁰ Indeed, it has been said that human security can be used to justify anything and everything as a security issue.⁹¹

Enabling the Council to respond to human security concerns would give it a licence to respond to poverty, famine, climate change, environmental degradation and crime, as well as an array of diseases such as diarrhoea, typhoid, malaria and cancer. The Council would no doubt require human security to be threatened to a certain level of severity before it determined that it amounted to a threat to the peace. However, any such limit would go only a small way to containing the concept as judgements about severity are unlikely to be made on a purely objective basis, and regardless, on any measure, it is reasonable to conclude that there are a large number of situations around the globe where human security is severely threatened.

Allowing the Council to understand a threat to the peace as encompassing emergencies or crises generally would also significantly broaden the ambit of art 39. The term 'emergency' is highly malleable and in domestic jurisdictions it has been employed to cover a vast array of situations.⁹² Emergency law literature reveals that, theoretically, the term 'emergency' is intended to encompass only existential threats, that is, extraordinary events that threaten the existence of a state or government.⁹³ This understanding of the term limits it to phenomena of great gravity and imminence such as wars and military attacks.⁹⁴ However, over time, states have expanded the ambit of the term in domestic jurisdictions to include numerous other matters such as terrorism, civil unrest, economic distress and natural disasters and it has become increasingly difficult to discern the limits of the term.⁹⁵

The idea that threats to the peace should encompass emergencies, crises or very grave situations that require international cooperation for their resolution does little to place significant limits on the concept. In an age of globalisation there are a vast number of issues that could easily be framed as 'emergencies',

⁸⁸ von Tigerstrom, above n 39, 27; Roland Paris, 'Human Security: Paradigm Shift or Hot Air?' (2001) 26(2) *International Security* 87, 88.

⁸⁹ Paris, above n 88, 90–2.

⁹⁰ Yuen Foong Khong, 'Human Security: A Shotgun Approach to Alleviating Human Misery?' (2001) 7 *Global Governance* 231, 233.

⁹¹ McInnes and Lee, above n 12, 146; Paris, above n 88, 92.

⁹² Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006) 40–6.

⁹³ Schott, above n 83, 31–2; Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1031; Commission on Human Rights, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, UN ESCOR, 35th sess, Agenda Item 10, UN Doc E/CN.4/Sub.2/1982/15 (27 July 1982) 8 [23] ('*States of Siege of Emergency*').

⁹⁴ Schott, above n 83, 31–2; Ackerman, above n 93, 1031; *States of Siege or Emergency*, UN Doc E/CN.4/Sub.2/1982/15, 8 [23].

⁹⁵ Giorgio Agamben, *State of Exception* (Kevin Attell trans, University of Chicago Press, 2005) 2; Gross and Aoláin, above n 92, 171–2; William E Scheuerman, 'The Economic State of Emergency' (1999) 21 *Cardozo Law Review* 1869, 1869.

'crises', or 'very grave situations' that require some form of international action or cooperation for their resolution. Climate change, refugee crises, transnational crime, food shortages and economic instability are but a few of the issues that can be cast as requiring the attention of the international community.

What comes through from the above discussion is that the four conceptualisations of a threat to the peace that fall outside of the traditional understandings of the term are very vague and broad, and it is difficult to discern objective criteria within them as to what constitutes a threat to the peace. This state of affairs gives rise to a risk that the term will become devoid of meaning and that a threat to the peace will become whatever the Council says is a threat to the peace. Simply concluding, however, that art 39 is on the road to becoming an empty shell that allows the Council to determine that anything amounts to a threat to the peace is rather simplistic and unsatisfactory. It may be the case that the substantive limits within a threat to the peace are eroding and will in time become non-existent. However, this raises the question, why does the Council come to see certain issues as threats to the peace and not others? Why, for example, did it see Ebola as a threat to the peace but it has never considered malaria, which kills far more people every year than Ebola had in September 2014,⁹⁶ as an art 39 threat? The Copenhagen School's theory of securitisation is a theoretical approach that may be helpful to employ in trying to understand how issues become threats to the peace in an age when the substantive limits of the doctrine are fading.

The theory of securitisation emerged in the 1990s at a time when the number of issues that were being considered 'security issues' in domestic jurisdictions was expanding rapidly and it was becoming difficult to identify what was a security issue by reference to any objective criteria.⁹⁷ In light of this a number of scholars put forward a theory that suggested an issue becomes securitised not when it meets any substantive definition of 'security' but rather when it has been through a two-stage process.⁹⁸ Stage one involves a securitising actor (usually a political leader but at times civil society actors or the media)⁹⁹ declaring that an issue poses an existential threat to a referent object.¹⁰⁰ Referent objects can include a range of entities such as the state, the government or the economy.¹⁰¹ The declaration that an issue is an existential threat is known as a speech act.¹⁰²

⁹⁶ WHO statistics suggest that in 2013 around 198 million people contracted malaria and around 584 000 people died from it: World Health Organization, *10 Facts on Malaria* (April 2015) <<http://www.who.int/features/factfiles/malaria/en/>>. In contrast, in September 2014 there had been 4366 cases of Ebola and 2218 deaths: World Health Organization, 'WHO: Ebola Response Roadmap Situation Report 3' (Report, 12 September 2014) <http://apps.who.int/iris/bitstream/10665/133073/1/roadmapsitrep3_eng.pdf>.

⁹⁷ Some of the early, seminal works on securitisation include: Ole Wæver, 'Securitization and Desecuritization' in Ronnie D Lipschutz (ed), *On Security* (Columbia University Press, 1995) 46; Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner, 1998).

⁹⁸ Ralf Emmers, 'Securitization' in Alan Collins (ed), *Contemporary Security Studies* (Oxford University Press, 3rd ed, 2013) 131, 132–4; Colin McInnes and Simon Rushton, 'HIV/AIDS and Securitization Theory' (2013) 19 *European Journal of International Relations* 115, 119–20.

⁹⁹ Emmers, above n 98, 132; Buzan, Wæver and de Wilde, above n 97, 40.

¹⁰⁰ Buzan, Wæver and de Wilde, above n 97, 36.

¹⁰¹ Emmers, above n 98, 132–4.

¹⁰² *Ibid.*

Simply declaring that an issue constitutes an existential threat is insufficient alone to amount to the securitisation of the issue. It is also necessary, in stage two of the process, for an audience to accept the securitising actor's speech act.¹⁰³ What is significant about this stage is that the audience can accept the securitising actor's assertion that a referent object is subject to an existential threat regardless of whether this is in fact the case. It is thus possible that the audience may be persuaded of the existence of an existential threat regardless of the real level of threat posed.¹⁰⁴ The Copenhagen School also posits that one of the key motivations for securitising actors securitising matters is to gain control over them, remove them from the realm of 'normal', discursive, deliberative politics and enact emergency measures in relation to them.

The Copenhagen School developed its theory in the context of domestic states. However, it may be possible to apply the framework to the Council's current approach to determining the existence of a threat to the peace.¹⁰⁵ In the context of the Council, the securitising actors are the states seeking to have an issue declared a threat to the peace. In accordance with stage one of the securitisation theory, they engage in speech acts — speeches to the Council — which portray an issue (for example, Ebola, a conflict, a large flow of refugee or a humanitarian crisis) as an existential threat to a referent object. Precisely what the referent object is in the context of the Council varies. At times it is the international community, at other times it is a particular state, states or region, and at other times it may be non-state actors such as civilians or peacekeepers. A state or states declaring that an existential threat is posed to a referent object is not by itself sufficient to determine the existence of a threat to the peace. Rather, such declarations must be accepted by at least nine of the 15 states on the Security Council.¹⁰⁶ This requirement reflects the second stage of the securitisation process which requires that the speech act be accepted by the relevant audience.

The Council's process of declaring a threat to the peace appears to fit reasonably well within the securitisation framework not only because it is possible to determine within the Council's process a securitising actor, a speech act and then an audience which must accept the speech act but also because, as discussed above, the Council appears to be adopting a practice whereby it is questionable whether its declarations of threats to the peace accord with any settled substantive criteria. Instead it may be more appropriate to say that a situation becomes a threat to the peace when it has been through the two stage securitisation process.

There is perhaps one key element of the Copenhagen School's theory which is not directly reflected in the Council's approach in *Resolution 2177*. It is the idea that securitising actors securitise matters to gain control over them and move them to a space beyond politics where decisive, emergency measures can be

¹⁰³ Ibid 134.

¹⁰⁴ Ibid. Although, as Colin McInnes and Simon Rushton have observed, an audience may be more likely to accept a speech act where there is in fact evidence of an existential threat: see McInnes and Rushton, above n 98, 119–20.

¹⁰⁵ McInnes and Rushton have applied the securitisation theory to the Council's discussions of HIV/AIDS as a possible threat to the peace. See generally McInnes and Rushton, above n 98.

¹⁰⁶ *UN Charter* art 27(3).

taken. As discussed above in footnote 7, *Resolution 2177* only set down recommended actions for states; it did not require states to take any particular actions under arts 41 or 42 of the *UN Charter*. This discrepancy suggests that in this instance the Copenhagen School's theory may be inadequate to explain what motivated the Council to securitise Ebola and regard may need to be had to other theories and ideas to explore this matter. It should not, however, lead to the conclusion that the theory of securitisation should be completely disregarded when seeking to understand the Council's approach to art 39. To start with, the fact that some states believed that the Council should declare Ebola a threat to the peace because they wanted the Council to take emergency action in response to the disease,¹⁰⁷ goes some way to undermining the idea that states were not interested in removing the issue of Ebola from the realm of 'normal' politics. Further, the Council's decision not to take action under arts 41 or 42 of the *UN Charter* after declaring a threat to the peace in *Resolution 2177* was very unusual and it may well be that the Copenhagen School's theory has more purchase when a broader array of Chapter VII resolutions are considered. Finally, the fact that the theory appears to go some way to explaining how and why some issues become threats to the peace is significant and opens up new lines of inquiry about the Council's practices that are worthy of exploration.

Indeed, the Copenhagen School's theory of securitisation provides a number of avenues for exploring aspects of the Council's work that have historically been under-examined by international lawyers. Traditionally, art 39 scholarship has centred on whether particular situations, issues or matters come within the parameters of a threat to the peace. Indeed the vast majority of academic pieces on art 39 proceed by going through various issues — such as internal conflicts, human rights abuses, humanitarian crises, terrorism and piracy — and discussing whether they come within the definition of a threat to the peace.¹⁰⁸ The lens of securitisation, however, shifts attention from whether a matter is or is not a threat to the peace and asks about the process that occurs when a matter is transformed into a threat to the peace. It encourages questions to be asked about who the securitising actors are, how they construct situations as threats to the peace and how they persuade other states to accept their characterisations as threats to the peace.

Securitisation theory posits that securitising actors are elites within a society who wield a lot of power and have the ability to persuade their audience to accept their categorisation of an issue as a security matter. The extent to which this idea helps to advance understandings of the Council's work is at first questionable as there has been a lot of literature about how the most powerful states — and in particular the United States as the global hegemon — have influenced the Council's work in recent decades.¹⁰⁹ However, much of this literature has simply identified the fact that powerful states exercise control and influence over the Council's agenda without going further. Securitisation theory invites us to consider a broader range of matters and questions. How do powerful states frame issues they wish to see identified as a threat to the peace? What

¹⁰⁷ See above Part III(E) and accompanying text.

¹⁰⁸ See, eg, Simma et al, *A Commentary Volume II*, above n 13; Cryer, above n 18.

¹⁰⁹ For a discussion of the US' influence over the Council, see José E Alvarez, 'Hegemonic International Law Revisited' (2003) 97 *American Journal of International Law* 873.

language and rhetoric do they employ to portray situations as threats? What methods do they use to persuade others that purported threats should be recognised? Which narratives are successful and why? It is of course possible that powerful states may at times seek to persuade other states that a situation should be securitised by appealing to objective criteria such as those found in traditional conceptions of art 39. However, securitisation provides a means for considering whether there are times when other approaches come into play.

In addition to encouraging attention to be paid to how states identify, construct and attain acceptance for threats to the peace, securitisation theory may also facilitate discussions about the problems and limits of expanding the scope of art 39, and foster consideration of desecuritisation methods. A central tenet of the Copenhagen School's theory is that securitisation is a concerning process that should be avoided in many circumstances and reversed as far as possible when it occurs. Of particular concern to proponents of the theory is that securitisation removes matters from deliberative political arenas to places where elites wield too much unfettered power. In the words of Barry Buzan, Ole Waever and Jaap de Wilde:

[S]ecurity should be seen as negative, as a failure to deal with issues as normal politics. Ideally, politics should be able to unfold according to routine procedures without this extraordinary elevation of specific "threats" to a prepolitical immediacy ... desecuritization is the optimal long-range option, since it means not to have issues phrased as "threats against which we have countermeasures" but to move them out of this threat-defense sequence and into the ordinary public sphere.¹¹⁰

Methods of desecuritisation that are raised by the Copenhagen School include not identifying issues as threats, managing issues that are securitised so that they are contained and moving securitised issues back into the 'normal' political sphere.

There has been extensive analysis in the international law literature of mechanisms that can be employed to limit the expansion of the Council's powers. Most of these efforts, however, have focused on methods of holding the Council to account after it has acted through mechanisms such as judicial review,¹¹¹ countermeasures,¹¹² extra-legal measures and other forms of checks and balances.¹¹³ In contrast, the Copenhagen School's ideas about desecuritisation offer possible pathways for limiting the scope of the Council's actions in a different way. Rather than looking at how the actions the Council takes in response to certain situations can be contained, the theory provides a way to think about whether the Council should be seized of situations in the first place. Admittedly the Copenhagen School's ideas about desecuritisation are not as well developed as other aspects of their securitisation theory. Nonetheless, they may provide a starting point for future discussions about the scope of art 39.

In closing this section on the Copenhagen School's theory of securitisation, it is clear that much more work needs to be done to explore how the theory might

¹¹⁰ Buzan, Waever and de Wilde, above n 97, 29.

¹¹¹ See, eg, Jose E Alvarez, 'Judging the Security Council' (1996) 90 *American Journal of International Law* 1.

¹¹² See generally, Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press, 2011).

¹¹³ See generally, Hood, above n 83.

apply to the Council's approach to art 39. In the space available it has only been possible to begin setting out possible links and ideas. In discussing the possibility of applying the theory, I am by no means suggesting that it captures all aspects of the Council's practice. To the contrary, I am very aware that the theory does not fit perfectly with every facet of the Council's practice and that it fails to explain important aspects of the Council's work. For example, the theory provides little help for understanding the sorts of emergency measures securitising actors implement after they securitise matters or for understanding how well placed securitising actors are to craft emergency measures in the first place. This is a significant shortcoming as the Council's tendency to determine that more and more issues are threats to the peace gives rise to questions about how well equipped the Council is to address such a broad array of issues. The Council was designed to provide temporally limited emergency responses to threats to the peace involving conflict, or at least the prospect of conflict. It is a small, executive-type body that appears ill-suited to addressing the broad array of issues that could come before it if the limits of art 39 are relaxed.¹¹⁴ Indeed it is doubtful whether it has the expertise, knowledge and resources to address issues such as health crises, poverty, climate change, migration, development issues and unemployment.¹¹⁵ Even if it did, it is questionable whether the Council should take on these sorts of issues given a host of other international organisations and bodies exist to address these challenges. It is not apparent that the securitisation theory provides clear tools for thinking through problems such as these. Despite such shortcomings, however, the avenues it opens up around how matters may become threats to the peace and the role that language and securitising actors play in this process are worthy of further consideration.

V CONCLUSION

In concluding this article, it is apparent that the Council's declaration in *Resolution 2177* that the Ebola crisis amounts to a threat to the peace represented a significant moment in the Council's history. It was the first time that the Council determined that a health crisis amounted to a threat to the peace under art 39 of the *UN Charter* and many of the reasons that UN member states gave for understanding Ebola as a threat to the peace departed markedly from traditional, accepted conceptions of the term 'a threat to the peace'. Indeed the debate that took place prior to the passage of *Resolution 2177* suggested that states are willing to relax the traditional limits embedded in art 39 to a significant degree.

This article has argued that the willingness of states to expand the parameters of art 39 raises a number of concerns, including that it may lead to a situation where it is difficult, if not impossible, to discern any objective criteria for determining what constitutes a threat to the peace. It has also suggested that a

¹¹⁴ de Wet, above n 9, 139.

¹¹⁵ Gian Luca Burci and Jakob Quirin have noted that the enforcement measures the Council can impose may be of little 'practical value' when addressing issues such as Ebola. See Gian Luca Burci and Jakob Quirin, 'Ebola, WHO and the United Nations: Convergence of Global Public Health and International Peace and Security' (2014) 18(25) *ASIL Insights* <<http://www.asil.org/insights/volume/18/issue/25/ebola-who-and-united-nations-convergence-global-public-health-and>>.

helpful way of explaining what amounts to a threat to the peace may possibly be found within the Copenhagen School's theory of securitisation. This article is, by its nature, very brief and it has thus only been possible to sketch some preliminary ideas about the applicability and utility of employing securitisation to understand the Council's current approach to art 39. There is a need for much more work to be done on this as well as on the Council's current approaches to health issues such as Ebola and threats to the peace more generally.