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A Legislative Power of the UN Security Council?

Abstract. The activities of the UN Security Council after the 11 September attacks provided subject for an extensive theoretic debate on the ongoing ‘transformation’ of international law. Whether and how much international terrorism constitutes a new (legal) threat and whether the current system of international law is appropriate to respond to these threats, has been analysed in many studies.

However, another aspect also deserves an in-depth examination; two resolutions of the UN Security Council [1373 (2001) and 1540(2004)] imposing general-abstract legal obligations, including the obligation to adopt certain domestic legal norms, for all the member States of the UN. That is to say, for the first time, the Security Council assumed legislative powers, practically, for the whole membership. Nevertheless, so far the adoption of legislative measures remained rather exceptional, the issue shall not be left ignored. The study focuses on the basic question, namely whether the Security Council has the power to adopt legislative measures - on the established basis of the notion of ‘legislation’.

Keywords: Security Council; international law-making; legislation; United Nations; UN Charter

Introduction

After the terrorist attacks of 11 September 2001, many scholars were of the view, that mankind has arrived at a historical landmark—the beginning of a new (political and security) era.¹

One may plausibly state that the real effects of the events can be measured through the (legal) responses given to the challenges they cause. Without aiming to provide an exhaustive overview of all the specific actions taken,² one shall

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¹ See, e.g.: Heisbourg, F.: The war against terrorism and the transformation of the world order: a European view. In: Emerson, M.–Becher, K. (eds.): *The war against terrorism and the transformation of the world order*. Brussels, 2002.

² For a broad overview see: Kovács, P.: The United Nations in the fight against international terrorism. *Sectio Juridica et Politica Miskolc*, Tomus XXI/2. 421–434;

take into account the individual responses of States—recognizing a (somewhat odd) case of the right of States to self-defence; the collective responses of regional and universal international organisations—including the invoking of Article V of the North-atlantic Treaty by NATO and the several resolutions adopted by the UN Security Council.

Examining Security Council Resolution 1373 (2001),³ one of the first, and perhaps most significant resolutions of the Security Council in response to the attacks, most of the authors accentuate the substantive measures to combat terrorist financing. Apart from those substantive measures, there is another, perhaps less conspicuous, aspect not strictly linked to the previous one, that undoubtedly constitutes a novelty in the practice of the Security Council, or—as Paul C. Szasz noted—where the Security Council obviously “broke new ground”.⁴

For the first time since its establishment, the Security Council imposed abstract legal obligations on all the member States. Therefore, from another point of view, the real novelty by the Security Council in Resolution 1373, is, that it acts unbound by a specific situation or conflict (though, the political backgrounds were and are obvious) and establishes general legal obligations on States for the future. This, according to most of the authors on the topic, constitutes an international legislative action, *i.e.* the Security Council, on its own initiative, makes new international legal norms binding on all States, irrespective their consent.

However, the enactment of ‘legislative measures’ by the Security Council did not remain an exceptional action desired by a particular moment, whereas in 2004, Resolution 1540 (2004)⁵ again imposed general legal obligations on States, at that time, concerning the fight against the proliferation of weapons of mass destruction. Moreover, the latter resolution goes further into the domain of State sovereignty, insofar as it imposes a detailed obligation for States to enact domestic laws and administrative measures, which may directly concern the rights of natural or legal persons in their own countries. Although their subjects are different, there is a clear relationship between the resolutions; Resolution 1540 (2004) can obviously be deemed as a continuation of a process

Jimeno-Bulnes, M.: After September 11th: the fight against terrorism in national and European law. Substantive and procedural rules: some examples. *European Law Journal*, 10 (2004) 235.

³ S/RES/1373 (2001), adopted by the Security Council at its 4385th meeting, on 28 September 2001.

⁴ Szasz, P. C.: The Security Council starts legislating. *American Journal of International Law*, 96 (2002) 901.

⁵ S/RES/1540 (2004), adopted by the Security Council at its 4956th meeting, on 28 April 2004.

begun with Resolution 1373 (2001), broadening the Security Council's instruments in the maintenance of international peace and security, however, there is only an indirect reference to the previous resolution. Instead, as a much broader, but more meaningful background, Resolution 1540 (2004) refers back to an earlier statement (and not resolution!) of the Security Council, adopted at the meeting on 31 January 1992 held "at the level of Heads of State and Government".⁶ The importance of this reference lies within that this statement is today commonly known as the promulgation of the Security Council's aim to enhance and broaden its own responsibility and powers in order to meet the new challenges of the post-cold war era. Beside that, as an equally important element, the referred statement is the first manifestation of the broad interpretation of international security.⁷

Consequently, the 'legislative measures' taken, albeit novels in the practice of the Security Council, are obviously not without any antecedents; therefore, further examples also cannot be excluded. However, it shall be added that the referred statement cannot be seen as a precedent in the legal but only in the political sense.

There may be as many arguments *pro*, as *contra* a legislative power of the Security Council. But, is the absence of an expressed prohibition on legislation a convincing argument in itself, or is it essential to provide at least an implied attribution of powers? Inasmuch as the UN Charter is constantly claimed to be a "living instrument",⁸ the answer cannot be given properly without examining the legal influence of the subsequent practice of the Security Council and the position of the member States. After all, if the questions on the details can somehow be answered, the general issue may, however, remain: is the legislative power of the Security Council compatible with its proper role, or, more

⁶ S/23500, 31 January 1992, Note by the President of the Security Council.

⁷ "[...] The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters. [...]" *Ibid.*, perational para. 10.

⁸ See also: Dissenting Opinion of Judge Schwebel, International Court of Justice, Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom), Preliminary Objections, Judgment of 27 February 1998, *ICJ Reports*, 1998, 80. [Hereinafter referred to as 'Lockerbie Case']. Professor Thomas M. Franck's opinion on the UN Charter as a "living tree", cited in: Malone, D. M.: The Security Council in the post-cold war era: A study in the creative interpretation of the UN Charter. *New York University Journal of International Law & Politics*, 35 (2003) 487.

broadly, with the constitutional order of the United Nations? Can it transfer itself from an essentially political organ to the position of a law-making body?

I. The Meaning of ‘Legislation’ for the Purpose of the Study

One shall see that eventually the essence of the problem concerning the contents of a legislative power does lie within the interpretation of the term ‘legislation’; however, admitting that this is not simply a semantic question.

On the one hand, the broad interpretation of the notion, proceeding from the specific nature of the international legal system, considers legislation as equal with general law-making processes. From that perspective, the two terms are deemed synonyms, both referring to the adoption and enactment of any new norm or rule of international law. Hence, legislation receives a new, independent meaning in the international plane, only applicable within that system.

On the other hand, the narrow interpretation, through an analogy with domestic legal theory, treats legislation as a unique form of the general law-making processes beside treaty-making and the creation of customary international law. While in the broad interpretation rules enacted through legislative processes become general sources of international law, as those in Article 38 of the Statute of the ICJ, in the narrow interpretation, legislative acts become *sui generis* sources of international law.

For the purposes of the present study, *legislation* shall mean *the adoption of binding resolutions by international organizations with general-abstract subject-matter and addressees (regarding member States; irrespective their consent), setting out legal obligations for a defined or undefined future period of time*. As the necessity or validity of two further elements may be disputed, I do not include the requirements of an expressed authorization in the constituting treaty and a clear-cut determination of procedural rules.

II. A Legislative Power of the Security Council? – Pros and Cons in a Critical Analysis

In the international literature concerning the legislative powers of the Security Council, there are several opinions and arguments both pro and contra the existence of such powers. Among them there are views e.g. that the Council lacks the expressed power for legislation and there are also opinions for the opposite; others argue that the Council may have at least an implied legislative power, while others bring up the unsuitability of the Council for acting as a

legislature. Moreover, there are also authors arguing that a legislative power of the Council would impair the basic principles of international law.

Most of these views can be originated in the general attitudes regarding the role and functions of the Security Council.

1. Absence of an Expressed Prohibition v. a Need for an Expressed Authorization

The core problem of this section might be tersely formulated in two questions. Firstly, is there a need for an expressed attribution of legislative powers in the Charter as a prerequisite of legitimacy? Secondly, can the terms concerning the Security Council's general or specific powers be interpreted plausibly in a way to include a legislative power? Authors are utterly divided on these questions. On the one hand, there are some, considering a legislative power for the Council almost as self-evident, however, one shall be cautious in this regard; the notion of 'legislation' often has a quite different meaning in their context.⁹

According to the first question, namely the requirement of an expressed attribution of power, one core aspect has been presented by Krzysztof Skubiszewski, by stating that:

the organization must have an explicit and unequivocal treaty authorisation in order to have the competence to enact law for States by virtue of its resolutions. The power to make law for States cannot be founded on any doctrine of implicit or implied powers.¹⁰

The main reason behind it must be that—following from the horizontal character of the international community and sovereignty—States may only be bound by general international legal norms if previously they consented to be bound. As pointed out by the PCIJ in the *SS. Lotus* case:

⁹ See e.g., P. Hulsroj, P.: The legal function of the Security Council. *Chinese Journal of International Law*, 1 (2002) 59.

¹⁰ Skubiszewski also notes in his study that the adoption of internal law of international organisations may be based on implied powers. Skubiszewski, K.: A new source of the law of nations: resolutions of international organisations. *Recueil d'études de droit international – En hommage à Paul Guggenheim*, Genève, 1968. 510.

The rules of law binding upon States emanate from their own free will ... Restrictions upon the independence of States cannot therefore be presumed.¹¹

Consequently, member States of an organization may only be bound by legislative acts of the organization if they have previously given their consent to be bound, *i.e.* the member States have expressly attributed legislative powers to the organization.

The specific requirement that legislative powers shall be explicitly granted has the primary role as a safeguard against uncontrolled and perhaps too far-fetched powers of an organization in matters seriously penetrating into the sovereignty of its member States.

On the other hand, there may be found voices, arguing that general, or, moreover, also implied powers of an international organization can serve the basis of legislative powers. In my view, basing an organization's legislative powers solely on the argument that it is necessary for the fulfilment of the purposes and functions of the organization would be too far-fetched and lack legal certainty. Therefore, it is inevitable to find expressed provisions in the constituting document of the organization as a legal basis for legislative powers.

At that point, we may turn to the second question, as to whether the expressed powers of the Security Council include the power to legislate. It must be noted in advance that the text of the Charter does not refer explicitly to the terms 'legislation', 'law-making' or 'legal norm' in relation to the powers of the Council. However, this *per se* does not necessarily exclude to existence of legislative powers.¹² It must also be added that, undoubtedly, the Council has the power to adopt binding measures for the member States. To begin with, there are several opinions—including that of the ICJ¹³—that the Security Council

¹¹ The Case concerning the SS. Lotus, (France v. Turkey), *Permanent Court of International Justice*, Judgement of 7 Sept. 1927, *PCIJ Ser. A. No. 10*. [Hereafter: Lotus case].

¹² As a contrast, it might be of interest that the Treaty Establishing the European Community in its Article 249 expressly empowers the institutions of the organisation to adopt specific acts which are commonly understood as legal acts. However, this analogy shall be used carefully, because the EC and the UN are of entirely different nature concerning their purpose and functions, and concerning the aim and effect of their acts. The different nature of the two legal systems is also noted in the Opinion 1/91 EEA-I of the ECJ, [1991] ECR I-6079. [„The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals.”]

¹³ Advisory Opinion on the Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), *ICJ Reports*, 1971. 52.

has the power to adopt binding decisions under its general powers set out in Articles 24 and 25 of the UN Charter. Accepting that the Council possesses general powers to enact binding decisions for the maintenance of international peace and security—without the restrictions in Chapter VII—there cannot be seen any objection to expand the Council's powers in order to cover legislation. However, this rather extensive interpretation would contradict the limitation in Article 2(7) and, more importantly, it might validly be seen too far-fetched and general to form the basis of legislative powers. Beside that, assuming a general power of the Security Council to adopt binding (also legislative) decisions would render the restrictions in Article 39 superfluous. In my opinion, Article 25 cannot be interpreted to include the power of the Council to adopt legislative acts. Nevertheless, the specific powers of the Council under Chapter VII leave open a much broader space for valid interpretation. Concerning the first part of that specific question, namely, whether Article 39 of the UN Charter can be interpreted in a way to include the power of general-abstract determinations, a core argument may be the fact that the powers of the Council at that point have been left open intentionally. Applying Article 39 one may choose between the interpretation stating that determinations shall always be applied concerning one particular situation¹⁴ and the interpretation allowing a wider discretion for the Council.¹⁵

Following from the proactive or preventive nature of the notion 'threat to the peace' and the lack of any reference suggesting the limitation of such determination (aside the general constraints on the powers of the Council), it cannot be stated validly that the Council would be bound to a particular situation. Consequently, there is a clear and plausible interpretation of Article 39 to include the power to make general determinations if required by the situation.

The second part of that particular question is whether measures to be adopted under Article 41 may also include general-abstract obligations applying equally for all member States. Here, one shall take a side whether those measures are essentially sanctions with one or more explicit target State or they can be generally enforcement measures not necessarily restricted to the form of sanctions but including all non-military measures the Council deems necessary for the maintenance of international peace and security. Neither the non-

¹⁴ For this aspect see Happold, M.: Security Council Resolution 1373 and the Constitution of the United Nations, *Leyden Journal of International Law*, 16 (2003) 599.

¹⁵ For this opinion see e.g., Sossai, M.: UNSC Res. 1373 (2001) and International Law-making: A Transformation in the Nature of the Legal Obligations for the Fight against Terrorism? Florence, 2004. 4–5, <www.esil-sedi.org/english/pdf/Sossai.PDF> (visited on 19 August 2005).

exhaustive list provided in Article 41 nor the context of the Article suggest this kind of limitation, however the terms in the Article 41 are generally interpreted as ‘enforcement measures’, that is to say, binding, moreover, ‘coercive’ acts, even against the will of the member States, eventually applying equally to them. In that regard, in my view, the concept of ‘coercive measures’ may be seen as measures binding upon member States even against their will. In a more strict interpretation, coercive measures shall directly indicate possible countermeasures in cases of non-compliance. It is true, that the two adopted legislative resolutions do not directly indicate such countermeasures. However, it does not necessarily exclude the possibility for the Council to adopt legislative measures which may indicate further sanctions if States fail to comply.

Consequently, it can plausibly be argued that there is not any expressed or implied limitation in the text of the Charter to strictly devoid the Council from the possibility and power to enact legislative measures. Beside that, the relevant provisions of the Charter do allow eventually a ‘wide’ interpretation of the Council’s powers to include the possibility to legislate.¹⁶ At this point, these determinations are nonetheless not conclusive in themselves pro a legislative power of the Council. On the other hand, they do indicate that the text of the Charter may be open for such interpretation and that legislative powers of the Council could eventually find their basis in specific expressed provisions of the Charter.

2. *The Possible Intentions of the Founders—Power by Necessary Implication*

The possible intentions of the founders of an international organization expressed in the travaux préparatoires and the doctrine of implied powers are by now generally accepted and applied not only as subsidiary but also as supplementary means of interpretation of specific powers of the organization.

It has been argued by many authors that it was not in the mind of the founders to create a world government with extremely wide powers, and, more specifically, with the power to legislate.¹⁷ The text of the travaux préparatoires

¹⁶ This view may be discovered in the statements in Dekker, I. F.–Wessel, R.: Governance by international organizations: rethinking the normative force of international decisions. In: Dekker, I. F.–Werner, W. G. (eds.): *Governance and international legal theory*. Leiden, 2004. 227. For this opinion see also Fassbender, B.: The United Nations Charter as constitution of the international community. *Columbia Journal of Transnational Law*, 36 (1998) 574.

¹⁷ On the possible characterizations of the UN see Ross, A.: *Constitution of the United Nations—Analysis of structure and function*. Copenhagen, 1950. 189–200. Wright, Q.: *International law and the United Nations*. Bombay, 1960. 7.

concerning the powers of the Council, albeit comprehensive, cannot be deemed conclusive or supportive at all cases, for instance at the determination of the notions used in Article 39. There was an extensive debate on the specific powers and their extension at the San Francisco conference, however, one line of argument can be seen undoubtedly; the founders had in mind an essentially effective and capable organization with all the necessary powers for the maintenance of international peace and security.

Regarding the specific powers, especially a possible legislative power of the Council, one particularly interesting point shall be mentioned:

Numerous amendments were proposed All of them referred to the powers of the Security Council as compared with, and in relation to, the powers of the General Assembly. The need of determining with greater precision the functions and powers of the Security Council was stressed in many proposed amendments. Some other propositions may be briefly stated as follows:

...

(d) That the Security Council should not establish or modify principles or rules of law;¹⁸

This particular proposal—among many others—was defeated during the negotiations in Committee III/1. The refusal of this proposal may, however, still be interpreted at least in two different ways. On the one hand, it may mean that the founders did not find it important to add an explicit provision concerning such limitation, considering it as evidently inherent in the expressed provisions. On the other hand, especially in the context of the proposal, the founders did not want to establish that particular limitation on the powers of the Council. This interpretation may be underpinned by the fact that point (c) in the list of the proposals, stating “[t]hat the powers of the Security Council should be reduced” was also defeated. Consequently, following the principle of *‘negatio negationis est licitas’*, the defeat of a proposed limitation logically implies the acceptance of the positive power, i.e. in this case the power to legislate. Beside that, it cannot be argued plausibly that the text of the travaux préparatoires would in any way imply the restriction of the Council’s powers either concerning the determinations in Article 39 or the nature of measures in Article 41. It can rather be seen that all possible specific restrictions on the powers of the Council were removed for the sake of efficiency, leaving only one explicit limitation, namely the obligation to comply with the ‘purposes and principles

¹⁸ UNCIO Docs., Vol. XI., 556. [Emphasis added.]

of the United Nations'. Therefore, the text of the preparatory works tends to support the view in favorem a possible legislative power of the Security Council.

Other means of interpretation—with growing importance—may be the application of the doctrine of implied powers. However, some preliminary remarks shall be added concerning the scope and content of implied powers. To begin with, even the exact scope of this power is subject of constant debate. In the view of the supporters of a broader interpretation, as set out in the *Reparation for Injuries* opinion of the ICJ, the standard of review shall be the necessity of the power in relation to the duties of the organization. Nevertheless, this opinion was essentially aimed to describe the nature of the powers of the UN, but may also be applied for the organs of the UN. On the other hand, according to the restrictive interpretation, presented in Judge Hackworth's dissenting opinion to the *Reparation for Injuries* advisory opinion, "implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted".¹⁹ The primary difference between the two interpretations lies within the standard itself, *i.e.* what shall be the exercise of that specific power necessary for. In order to establish a legitimate basis, the possible power of the Council to legislate shall be subject to both tests.

Another important element is that implied powers shall be 'founded on powers attributed to the organization *at its creation*';²⁰ implied powers cannot be the result of practical development of the organization's competences. Analysing the possible legislative powers of the Council in the light of implied powers, the first question shall be, whether legislative powers are 'necessary' or 'essential' for the Council to fulfil its duties under the Charter. On the one hand, the Council has been vested with extremely wide discretion and powers in order to fulfil its primary responsibility, *i.e.* the maintenance of international peace and security. As seen above, it includes the adoption of binding resolutions, making determinations and applying non-military or military measures if it deems necessary. Therefore, it might be argued that the expressed powers of the Council cover all the necessary means the Council needs to fulfil its tasks. On the other hand, this opinion has been contradicted, for instance, by the emergence and general acceptance concerning the rather implied power of the Council to organize and execute peace-keeping operations.²¹ Practically, it

¹⁹ *Reparation for Injuries* case, dissenting opinion of Judge Hackworth, *ICJ Reports*, 1949. 174, at 198.

²⁰ Schermers, H. G.—Blokke, N.: *International Institutional Law*. Leiden, 2003. 176.

²¹ See e.g., *Certain Expenses* opinion, *ICJ Reports*, 1962. 151. Khan, R.: *Implied powers of the United Nations*. Delhi, 1970. 41.

always depends on the requirements of a problem the Security Council has to face, whether its expressed powers provide all the necessary and essential means. If a particular issue raises the question for the Council to use means not explicitly provided, it shall have the power to apply other, more efficient and necessary means. When the Council adopted Resolutions 1373 (2001) and 1540 (2004), it did not choose the abstract form incidentally; in the light of the challenges raised by the spread and danger of international terrorism and the proliferation of weapons of mass destruction to non-state actors, its expressed powers did not seem sufficient enough to meet those challenges. In that case, it may plausibly be argued, therefore, that the exercise of legislative powers by the Council were at that time necessary for the fulfilment of its duties. Nevertheless, it shall be added that it is upon the Council to determine its own means, namely what measures it deems 'necessary for the maintenance of international peace and security'; however, also taking into account the limits set by the Charter itself.

An additional question shall be raised at that point concerning the broad and narrow interpretation of the standard, namely the need for express provision as basis of implied powers. *Prima facie* it may be argued that Articles 39 and 41 contain these expressed powers, however, this assumption needs further clarification. The possible legislative powers of the Council shall be deemed necessary to exercise its powers to adopt non-military measures 'to give effect to its decisions' (it deems necessary) to 'maintain or restore international peace and security'. Here, it is uneasy to find further arguments *pro* or *contra*, the choice of aspects largely depends on one's attitude towards the extension of the powers of the Council. Nevertheless, as pointed out above, if the challenges raised by a particular security concern can only be met by adopting general-abstract decisions being the most proper means to 'maintain or restore international peace and security', the Council shall have the power to legislate in order to exercise its powers in Article 41. The reason behind the similarity between the arguments made concerning both the broad and narrow interpretation must lie within the fact that the general purposes and functions of the UN are practically identical with the primary powers of the Security Council. It cannot be deemed too far-fetched to argue for a possible implied power of the Council to legislate, based upon the classic qualifications of the implied powers doctrine. However, I still uphold the view that the general powers or the purposes and principles of the organization do not necessarily provide sufficient legitimacy for the Council's legislative actions. Therefore, in the application of both possible expressed and implied powers, specific provisions (containing specific, relevant powers) are to be shown in order to form a potential legal basis for legislative acts. In that regard, only the strict interpretation of

the doctrine of implied powers may be acceptable *prima facie* as the basis of further examinations.

As it can be seen, the doctrine of implied powers may also be applied in connection with the establishment of legislative powers for the Council; however, this argument shall be used extremely carefully in order to avoid unlikely conclusions and vague legitimacy. I fully agree with those views requiring specific expressed powers as a legal basis for legislative acts, however, space shall be left for the organ concerned to fulfil its duties under those provisions. In that regard, latent powers shall also be taken into account.

3. *The 'Subsequent Practice' of the Security Council and the Ex Post Facto Observance by Member States*

The use of subsequent practice as means of interpretation and at the same time as an argument *pro* or *contra* the existence of specific powers has further implications. Its independent application relates to the concept of 'assumed powers'. As the ICJ stated in its *Certain Expenses* opinion:

when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization.²²

On the other hand, subsequent practice may also supplement an argument *pro* implied or even inherent powers supporting the legitimisation of certain powers. However, in my opinion, in both cases the value of subsequent practice in that meaning largely depends on the attitude of the member States, namely the *ex post facto* observance or acceptance of the existence of such powers.²³

However, it shall also be added, that there are certain differences and ambiguities concerning the exact influence and weight of State acceptance. In our case, the subsequent practice of the UN Security Council shall be examined both pro- and retrospectively. On the one hand, it shall be analysed how determinant is the practice of the Council before its legislative acts on the scope of its powers; on the other hand, it shall also be treated, whether and how an emerging practice of the Council may contribute to the legitimization of its powers. The primary conclusion that may be drawn from the practice of

²² *Certain Expenses* opinion. *Ibid.* 168.

²³ For this opinion see also Amerasinghe, C. F.: *Principles of the institutional law of international organizations*. 2nd ed., Cambridge, 2005. 49.

the Council, especially in the post-Cold War period is the clear effort to expand its own capabilities and powers. Starting from the often-cited political statement in 1992 by the Heads of State in the Council, the Security Council never disguised its goals to adapt itself to the new challenges, eventually through the re-interpretation of fundamental concepts. This expansion of powers, obviously, may be best seen in the development of the Council's Chapter VII powers.²⁴

It shall be noted at this point, that in these cases the Security Council generally attempted to base its motion on expressed provisions and specific powers granted by the UN Charter. Consequently, the Council's practice was and is by and large understood as the interpretation of its specific powers, and, at the same time, the filling in the lacunae in the text of the Charter. In my opinion, it is only the minority of the cases when it may be argued that, through its practice, the Council rather expanded and supplemented its expressed or implied powers. Beside that, it may also be subject of debate, whether and how much the Council's post-Cold War practice was and is an expansion of its powers and not the exploitation of them, originally attributed to it but prevented by the political environment to be used for a long period of time. Therefore, concerning our case, the practice of the Council prior its legislative acts can only be interpreted properly as an evidence for further possibilities and capabilities and cannot be seen as determinative regarding the scope of the Security Council's existing powers. In my view, taking the Council's previous practice as a standard is only plausible in the permissive and not the restrictive meaning. Taking a specific example, the fact that the Security Council referred so far to specific cases concerning the determination of a 'threat to the peace' does not in any way prevent it to refer to general threats in the future, if it is compatible with the text of the Charter and is necessary for the restoration or maintenance of international peace and security.

The second part of the question refers to the legal value and legitimacy of the subsequent legislative practice by the Security Council; the examination of the *ex post facto* observance by the member States bears an essential importance in this regard. However, it shall be determined in advance, which factors generally characterize the legal value of subsequent practice. A description and test may be found in the ICJ's *Namibia* opinion:

the proceedings of the Security Council *extending over a long period* supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have *consistently and uniformly interpreted the practice* [...]. This procedure

²⁴ For a proper and comprehensive overview see Malone: *op. cit.*

followed by the Security Council, which has *continued unchanged* [...], *has been generally accepted by Members of the United Nations and evidences a general practice of that Organization*.²⁵

However, this test and its standards shall be applied carefully, because there is a significant difference between the practices the Court referred to and a possible legislative practice. In the latter case, the terms ‘long period’ and ‘continued unchanged’ practice shall be interpreted differently, considering that the adoption of legislative acts is not a procedural question but rather a substantive one. In my view, therefore, it shall not be required of all or the majority of the Security Council resolutions to be legislative, especially considering the extensive discretionary power of the Council in choosing its own measures. Consequently, in that specific case, already a few examples may contribute to the existence of a practice by the Council; however, a general acceptance in this case would be much more difficult to prove. To see whether a supposed practice by the Council should be considered in itself as the basis of interpreting the Charter in order to include a (legislative) power, or there may be found other arguments underpinning this interpretation, we shall refer to C.F. Amerasinghe, according to whom in the former case a longer period of time, (*i.e.* several cases of legislative activity) and extensive coherency is required for a stable legitimacy.²⁶

As pointed out above, the legitimacy of the Security Council’s practice and especially of a legislative practice essentially depends on the acceptance and observance by the member States. The attitude of the member States may be best shown from their statements and practical reactions or protests before, during and after the adoption of the resolutions in question. Regarding the first act, namely Security Council Resolution 1373 (2001), neither the procedure prior the adoption of the resolution, nor the adoption procedure itself implies much debate. The resolution was adopted after a quite short discussion, with unanimity within the Council.²⁷ Another additional element may be the compliance with the provisions of the resolution. As pointed out above, Resolution 1373 (2001) established a so-called Counter-Terrorism Committee in order to coordinate and organize the efforts of the member States under the resolution. The attitude of the member States may be seen from the fact that:

²⁵ Advisory Opinion on the Legal Consequences... *op. cit.* ICJ Reports, 1971. 22.

²⁶ Amerasinghe: *op. cit.* 51.

²⁷ However, some may argue that there have been essentially political and not legal considerations behind this unanimity, triggered by the general sympathy after the 11 September attacks.

191 states submitted first round reports called for by the resolution, self-assessments on implementation of Resolution 1373.²⁸

On the other hand, the case of Resolution 1540 (2004) shows a somewhat different approach. To begin with, prior the actual adoption there was about a half a year of informal and formal consultations, involving some fifty member States of the UN. As it may be seen from the records of two open meetings, the opinions of the member States concerning a possible legislative function of the Security Council were in many aspects entirely different.²⁹ There were opinions expressly or at least implicitly recognizing a possible legislative power and function of the Security Council, and views expressly opposing it. However, not all the contributing member States have expressly addressed this question.³⁰ On one hand, for example, expressly accepting and supporting a legislative function of the Council, the representative of Switzerland stated:

It is acceptable for the Security Council to assume such a legislative role only in exceptional circumstances and in response to an urgent need.³¹

Others presented a much more neutral point of view, however, still, at least implicitly accepting such a function, for example, the representative of South Africa, by stating that:

The current draft resolution imposes obligations on United Nations Member States and attempts to legislate on behalf of States by prescribing the nature and type of measures that will have to be implemented by States. ... South Africa believes that the draft resolution could have far-reaching legal and practical implications for Member States,³²

²⁸ For an overview on the work of the CTC see Rosand, E.: Security Council resolution 1373, the Counter-Terrorism Committee, and the fight against terrorism, *American Journal of International Law*, 97 (2003) 337.

²⁹ For the records of the meetings see UN Doc. S/PV. 4950. Record of the Security Council's 4950th meeting, Thursday, 22 April 2004, 9.50 a.m., New York, and UN Doc. S/PV. 4965. Record of the Security Council's 4956th meeting, Wednesday, 28 April 2004, 12.45 p.m., New York.

³⁰ For an overview see Lavalley, R.: A novel, if awkward exercise in international law-making: Security Council Resolution 1540 (2004). *Netherlands International Law Review*, 51 (2004) 425.

³¹ UN Doc. S/PV.4950, Record of the Security Council's 4950th meeting, Thursday, 22 April 2004, 9.50 a.m., *op. cit.* 28.

³² *Ibid.* 22.

On the other side, there were also several opinions to be found, which could not accept a legislative power for the Security Council. As, for example, the representative of the Islamic Republic of Iran stated:

The United Nations Charter entrusts the Security Council with the huge responsibility to maintain international peace and security, but it does not confer authority on the Council to act as a global legislature imposing obligations on States without their participation in the process. The draft resolution, in its present form, is a clear manifestation of the Council's departure from its Charter-based mandate.³³

As it can be seen, the adoption of legislative acts by the Security Council was not at all accompanied by unanimous support and acceptance; however, the proportions of the different opinions may have further implications. From the fifty-one States making a statement during the open meetings, some ten made an expressly opposing view against the legislative function of the Council, while other States either did not mention that aspect of the resolution, or accepted generally the urgent need and necessity to adopt the measure in question, or even, supported expressly a limited power of the Council to eventually adopt legislative acts.³⁴ In my view, this proportion reflects a qualified majority of the views supporting or at least accepting (in the meaning of 'not opposing') such a function by the Council. It must be added that the supporting opinions also contained references that the Council should only apply its powers in exceptional cases when there is an existing and serious threat and there are gaps in the relevant international legal regulations and it is necessary for the maintenance of international peace and security to act immediately. In some arguments, it was also added that preferably the widest majority of the membership is to be involved in the adoption of such measures, in order to ensure its general legitimacy. In the end, this resolution was also adopted by unanimity.

After the debate, one may still argue the value of member State acceptance, which is probably substantial. Therefore, further examples and debates are needed to formulate a general conclusion on the attitude of the member States; so far it may only be observed that the first reactions of the States may be seen as supportive, as long as the legislative practice of the Council remains exceptional.

³³ *Ibid.* 32.

³⁴ The determination whether an opinion is supporting or opposing, reflects the interpretation of the author of this study.

4. *The Unsuitability of the Security Council—as a Political Organ—to Legislate*

According to Judge Schwebel's dissenting opinion in the *Nicaragua* case:

The Security Council is a political organ which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to apply them.³⁵

In the view of some authors, and even member States of the UN, the essentially political character of the Security Council as an organ makes it legally and constitutionally unsuitable to adopt legislative measures.³⁶ There are arguments that the Council is generally unbound by law, consequently, it cannot guarantee the rule of law in its legislative function. Beside that, its lack of representativity and the democratic deficit of its decision-making procedure are also brought up against its possible legislative function. However, in my opinion, there are several deficiencies of these arguments. To begin with, the qualification of the Security Council as a political organ is generally understood and mentioned in relation to the International Court of Justice as a judicial organ. Referring back to Judge Schwebel's dissenting opinion, even his determination is based on the comparison of the Council and the Court. Therefore, when arguing that the Council is essentially a political organ, it shall be interpreted in the meaning that the Council is not suited to act as a court, but it does not necessarily excludes its possible capability to act as a legislature. Beside that, as Judge Schwebel pointed out, the Council has the power and the capability to 'take legal considerations into account' which may also mean that in specific cases the Council is capable to comply with the principle of rule of law, which may be interpreted as an evidence *pro* its very wide discretionary powers regarding the elements of its decision-making.

The other part of its argument, namely that the Council is unbound by legal considerations in its decision-making, in my opinion, is rather connected with the problem of the lack of judicial review and the wide margin of the Council in making its determinations, but it does not necessarily eliminate its possible legislative power *per se*. Perhaps a more important aspect of the problem is

³⁵ Case concerning military and paramilitary activities in and against Nicaragua (*Nicaragua v. USA*), Merits, dissenting opinion of Judge Schwebel, *ICJ Reports*, 1986. 90. [Hereinafter referred to as *Nicaragua case*.]

³⁶ See e.g., Happold: *op. cit.*; E.g., Pakistan's view prior the adoption of SC/RES/1540 (2004), *op. cit.*

that, despite its alleged lack of representativity, the Security Council is the primary organ within the UN empowered to adopt binding decisions for the member States. The primary role of the Council is to lead the organization in the field of international peace and security, and to make all the necessary measures for its restoration or maintenance.

Summing up, in my opinion, based on its political nature *per se*, it cannot be stated that the Security Council may not adopt legislative acts; nevertheless, its practice may have constitutional and democratic deficiencies.

5. *Incompatibility with the Basic Principles of International Law*

During the open meetings before the adoption of Security Council Resolution 1540 (2004), the representative of Japan, nevertheless generally accepting a possible legislative function of the Council, made an observation, which actually can be used as a counter-argument or an element of it:

In adopting a binding Security Council resolution under Chapter VII of the United Nations Charter, the Security Council assumes a lawmaking function. The Security Council should, therefore, be cautious *not to undermine the stability of the international legal framework*.³⁷

At the same meeting, the representative of Cuba, generally opposing a legislative power of the Council, stated that:

Several elements of this initiative *do not correspond to the basic principles* contained in the United Nations Charter and *recognized in international law* that prohibit interference in the internal affairs of States and the use or the threat of the use of force against the territorial integrity or political independence of any State.³⁸

Another aspect of the same counter-argument may be found in Matthew Happold's study:

Once the Security Council starts imposing general and temporally undefined obligations on states, it is *usurping a role that states have reserved for*

³⁷ UN Doc. S/PV. 4950, 28. *op. cit.*

³⁸ UN Doc. S/PV. 4950, 30. *op. cit.*

themselves. Moreover, given its composition and procedures, it is doing so in a way that *erodes the principle of sovereign equality*.³⁹

Regarding one of the main arguments, namely the prohibition of the interference with the domestic jurisdiction of the states, it can be stated that Article 2(7) of the UN Charter expressly allows the organization and its organs to interfere with the *domain réservé* of its member States, by adopting binding resolutions for them.

The other argument, concerning the violation of the principle of sovereign equality of States, needs further examination. An important element of this principle may be formulated that the source of obligations and rights of States in the international plane shall be based upon their will and consent. Here again, this rule may have general application, however, there are certain exceptions on the level of individual States. To begin with, a State may be bound by *ius cogens* norms of international law by the fact that it became a member of the international community. In general, a State is also bound by customary international law, even against its will, except the very narrow case of 'persistent objection'.

In the specific case of decisions of international organization, this consent is implied within the accession to the constituent treaty of the organization. On the other hand, the fact that the Security Council as an organ with 15 members may adopt binding decisions for the whole organization is generally accepted among the member States as well as among international lawyers as a legitimate restriction of sovereign equality. Consequently, the question is not whether or not the Council may interfere with the domestic jurisdiction of its member States or whether it may adopt binding decisions for the whole membership under the general international law but whether or not the Council may adopt general legislative measures. The answer to this question may be affirmative if the UN Charter (expressly or implicitly) attributes to it legislative powers.

It is true that:

International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.⁴⁰

³⁹ Happold: *op. cit.* 1373. 610.

⁴⁰ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, *ICJ Reports*, 73 (1980) 89.

Nevertheless, there must be a governing principle among these obligations; based upon to the *lex specialis derogat legis generalis* principle. If the constituent treaty, namely the UN Charter attributes certain powers to the Organization which are not granted (or regulated) by general international law, the Organization shall have the power as long as it does not violate peremptory norms of international law.⁴¹ However, as proven by the case of other international organizations (especially by the example of the European Community), attributing legislative powers to an international organization *per se* does not in any way violate *ius cogens*.

Conclusions

In the end, the essential question still remains: is the Security Council empowered to adopt legislative measures? The question is not in any way as simple as it seems at a first glance. It is also far more than a semantic question concerning the contents of the notion of ‘legislation’; however, a different interpretation of the term may shorten many parts of the discussion. The underlying problem, namely the uncertainty concerning the parameters of a legitimate and generally accepted power, leaves an extremely wide margin of appreciation for the interpreters. The text of the UN Charter may be interpreted in many ways: from the aspect of State sovereignty and also from the aspect of the efficiency of the Organization. In my interpretation, it cannot be concluded that the provisions of the Charter exclude a possible legislative power of the Council. The Security Council has the power to adopt binding resolutions for the member States of the UN. Whether those shall refer to a specific situation or general “threats to the peace” may also form the basis of such acts, may also be disputed.

On the other hand, the Charter and the *travaux préparatoires* do not underpin a restrictive interpretation—this has been proven in the study. It is also of vital importance for a legitimate legislative function of the Council that member States accept and observe it, at least implicitly. Eventually it is the States that shall determine rules of international law—their consent is a prerequisite. This view does not necessarily impair with the existence of a legislative power of the Security Council because the consent of the member States may be found in their acceptance of the UN Charter and their views expressed during the adoption of the legislative acts in question. It is also up to the States to set up the limitations on the legislative powers of the Council. The sign of this

⁴¹ This principle also follows from the law of treaties, as regulated by Article 53 of the 1969 Vienna Convention on the Law of Treaties.

tendency may be seen in their statements referring to existing gaps in international law.

Whether or not a legislative power would be beneficial for the international community, is, however, not a legal question and may only be proved by a longer term of exercised practice. Nevertheless, it cannot be denied that the elaboration or exploitation of a legislative power by the Security Council will definitely change the quality of measures within the maintenance of international peace and security.