

IN THE NAME OF INTERNATIONAL  
PEACE AND SECURITY: REFLECTIONS  
ON THE UNITED NATIONS SECURITY  
COUNCIL'S LEGISLATIVE ACTION\*

EN NOMBRE DE LA PAZ Y LA  
SEGURIDAD INTERNACIONAL:  
REFLEXIONES SOBRE LA ACCIÓN  
LEGISLATIVA DEL CONSEJO DE  
SEGURIDAD DE NACIONES UNIDAS

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## ABSTRACT

This article seeks to illustrate how the United Nation's Security Council is entailing a sort of hegemonic capability to act as a legislator, having as a premise the absence of such figure under international law, provided the apparent structure and dynamics of the Law of Nations. Thus, basing its actions on the UN Charter's mandate to maintain international peace and security, the Council has adopted such kind of measures on the fight against terrorism -through Resolutions 1373 (2001) and 1540 (2004). The effects of the Council's action are analyzed through two yardsticks; legality *vis-à-vis* the UN Charter and other relevant international norms; and legitimacy, confronting it with issues of accountability under the perspective of what has been called the Rule of Law (international public policy). Assuming that the action of such UN organ has to be limited, some proposals and recommendations are set forth in order to establish the way by which the International Community is turning its sight to the protection of principles and/or values as self-determination, democracy and humanity.

**Key words author:** United Nations Security Council, International Peace and Security, Charter of the United Nations, legality, legitimacy, fight against terrorism, international legislative powers.

**Key words plus:** United Nations, Security Council, International law, Power politics.

*RESUMEN*

*El presente artículo busca ilustrar cómo el Consejo de Seguridad de Naciones Unidas ha asumido cierta capacidad hegemónica para actuar como legislador, teniendo como premisa la ausencia de tal figura en la estructura y dinámica del Derecho Internacional. Así, basando sus acciones en el mandato de mantenimiento de la paz y la seguridad internacional de la Carta de Naciones Unidas, el Consejo ha adoptado medidas de ese tipo bajo la lucha contra el terrorismo –por medio de las Resoluciones 1373 (2001) y 1540 (2004)–. Los efectos de tales acciones son analizados con dos raseros: legalidad vis-à-vis la Carta de Naciones Unidas y otras normas internacionales relevantes; y legitimidad, al confrontarlos con asuntos de accountability bajo la perspectiva de los que han sido denominados Rule of Law (Política Pública Internacional). Asumiendo que la acción del órgano de Naciones Unidas debe tener límites, se sugieren algunas propuestas y recomendaciones con el fin de mostrar la forma por la cual la Comunidad Internacional está enfocando su atención hacia la protección de principios y/o valores, como la autodeterminación, la democracia y la humanidad.*

**Palabras clave autor:** Consejo de Seguridad de Naciones Unidas, paz y seguridad internacional, Carta de las Naciones Unidas, legalidad, legitimidad, lucha contra el terrorismo, poder legislativo internacional.

**Palabras clave descriptor:** Naciones Unidas, Consejo de Seguridad, derecho internacional, poder (Política internacional).

## SUMMARY

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## INTRODUCTION

*“Those who are bound should be heard. This is an essential element of a transparent and democratic process, and is the best to proceed on a resolution that demands legislative actions and executive measures from the 191 members of the United Nations”*

*Mr. Baja, Representative of Philippines to the 4950<sup>th</sup> meeting of the Security Council on non-Proliferation of Weapons of Mass Destruction.*

One of the various concerns on the fact that the Security Council is progressively monopolizing different functions over the International System is that such principal Organ of the United Nations is entailing a sort of hegemonic capability to act as an executor, a judge, and even more critical, as a legislator, provided in addition, the fact that apparently there is no way and no one able to make it accountable for their actions.

The structure of the International System is unique and cannot be completely assimilated to internal orders, where there is a patent division of powers<sup>1</sup> and competences by virtue of a political decision which is laid down in a foundational legal instrument –a Constitution–, creating well identified organs empowered to play specific roles.

At the international level, the distribution of power and authority is not clear; even if in one hand the System shares the existence of a foundational Charter politically inspired with common values and legally structured in order to create a harmonized distribution of tasks, on the other hand the production of norms is not entitled to a single organ, but through a series of law-making processes on which the States take active part through their consent or continuous and conscious practice, as it is based on horizontal (bilateral or multilateral) relations between equally and sovereign entities.<sup>2</sup>

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1 According to the principle of separation of powers enunciated by Charles de Montesquieu [1689-1755], it must be in such grade, that any of the branches can operate without excessive limitations from the others; but interdependency between them must also be in such grade, that one single branch cannot rule out the other's decisions.

2 *“International law could be created only by states, whether through the adoption and ratification of treaties, the creation of customary law by means of general practice supported by*

In other words, the factory of international rules is in charge of the States as direct operators, not into a specialized, supra-national body, provided that legislation and legislative powers are not directly transferable to International Law.<sup>3</sup>

Nevertheless, the activity of the Security Council after the cold war is certainly showing a variation to the yet described traditional conception of the international system, as the increase of actions starting from the invocation of Chapter VII of the Charter was accompanied by new controversial outcomes, among other things, the possibility of the Council to act as a legislator.

In that sense, after an initial approach through Resolutions having some elements identifiable with normative production, this body produced at least a couple of acts which apparently contain general and abstract obligations to the State members of the UN; Resolution 1373 (2001),<sup>4</sup> adopting wide-ranging measures in order to suppress the financing of terrorism and any other way to its support, and Resolution 1540 (2004),<sup>5</sup> on non-proliferation of nuclear, chemical and biological weapons to terrorists.

This paper describes the content and effects of the Security Council's apparently consolidated *legislative function*, which nowadays is in fact being used by this body to display its primary mandate (prevent or stop any threat to *international peace and security*), and analyze if it can be accountable for such actions.

Consequently, this study will be divided in two main parts; the first one (sections I and II) will focus on the practice of the

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opinio juris, or the recognition of general principles of law". Paul C. Szasz, *The Security Council Starts Legislating*, 96 *American Journal of International Law, AJIL*, 4, 901-905, 901 (2002).

3 Axel Marschik, *The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power*, 5 (Institute for International Law and Justice, IILJ Working Paper 2005/18). Available at: <http://ssrn.com/abstract=871758>.

4 SC Res. 1373 (2001). *Threats to International Peace and Security Caused by Terrorist Acts*. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

5 SC Res. 1540 (2004). *Non-Proliferation of Weapons of Mass Destruction*. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement>.

Council in order to establish if through the production of the abovementioned Resolutions it imposed general far-reaching norms binding all the UN member States, taking into account the nature and material elements of the so-called normative power and specifically, the legislative function. The second part (sections III and IV) will analyze such legislative role from two points of view; *legality* and *legitimacy*, to finally address the results to the possibility to impose limits to the activity of the Council from a constitutional interpretation of the Charter, and make some proposals to the update of the United Nations System. Finally, conclusions will be set forth (section V).

## I. THE PRACTICE OF THE SECURITY COUNCIL: RESOLUTIONS 1373 (2001) AND 1540 (2004)

### *A. Antecedents*

Since its creation as a principal organ of the United Nations System and until the end of Cold War,<sup>6</sup> the Security Council didn't display the mandate conferred by the Charter in a sustained way; thus, for instance, it declared the government of Rhodesia as a “*illegal racist minority regime*”, and some years later pronounced in the same terms with regard to the occupation of Namibia by South Africa, through Resolutions 216 (1965) and 276 (1970)<sup>7</sup> respectively.<sup>8</sup> Thus, such primary Resolutions were presumably structured as acts of the administration, by which it spread its

6 Paul C. Szasz, *The Security Council Starts Legislating*, 96 *American Journal of International Law*, *AJIL*, 4, 901-905, 901 (2002).

7 SC Res. 216 (1965). *Question concerning the situation in Southern Rhodesia* (12 Nov). Available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/222/87/IMG/NR022287.pdf?OpenElement>.

SC Res. 276 (1970). *The Situation in Namibia* (30 Jan). Available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/260/27/IMG/NR026027.pdf?OpenElement>.

8 José E. Álvarez, *International Organizations as Law-makers*, 190 (Oxford University Press, Oxford, 2005).

Axel Marschik, *The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power*, 8 (Institute for International Law and Justice, IILJ Working Paper 2005/18). Available at: <http://ssrn.com/abstract=871758>.

task as an executive body, according to a literal interpretation of the Charter.

But it was only after this period that the Council became, on one hand, persistent in the production of acts inspired on Chapter VII of the Charter, and on the other hand, actively involved into law-making processes, even if at this stage such contributions weren't really a legislative function, while interpreting and applying existent rules of international law or imposing obligations in particular cases. As Paul C. Szasz points out, "*the Security Council, suddenly freed from its cold war deadlock, has greatly expanded the repertory of devices available to it under Chapter VII (...) all actions not explicitly provided for in the Charter*".<sup>9</sup>

Hence, the activity of the Council showed a variation from a purely executive performance, due to the production of Resolutions from which they can be identified normative features, and which should be taken into account as antecedents to the broad exercise of legislative power.

One can find resolutions containing general and abstract, but non-binding provisions such as thematic Resolutions, with recommendations or declarations of intention open to the voluntary implementation by the States, such as Res. 984 (1995),<sup>10</sup> 1209 (1998),<sup>11</sup> 1308 (2000)<sup>12</sup> and 1366 (2001).<sup>13</sup> These ones

9 Paul C. Szasz, *The Security Council Starts Legislating*, 96 *American Journal of International Law*, *AJIL*, 4, 901-905, 904 (2002).

10 On the use of nuclear weapons, by offering supplementary guarantees to States without nuclear capacity and complementing the system created by a Treaty of non-proliferation, but not creating any obligation to States. SC Res. 984 (1995). *On security assurances against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/106/06/PDF/N9510606.pdf?OpenElement>.

11 Promoting the implementation of national legislation to limit the flow of arms between African States. SC Res. 1209 (1998). *On the situation in Africa, illicit arms flows to and in Africa*. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/363/25/PDF/N9836325.pdf?OpenElement>.

12 On HIV and its implications on the framework of peacekeeping operations. SC Res. 1308 (2000). *On the responsibility of the Security Council in the maintenance of international peace and security: HIV/AIDS and international peacekeeping operations*. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/536/02/PDF/N0053602.pdf?OpenElement>.

13 On the prevention of general conflicts, after previous declarations on the role of the Council in this issue. SC Res. 1366 (2001). *On the role of the Security Council in the*

contained references to general matters, and *called upon* all the member States of the UN to implement wide-ranging policies or concrete measures provided the importance of topic revised, but letting it to their interpretation and good will to comply with such suggestion.

Moreover, the Council enacted Resolutions containing indirect obligations to the member States of the UN, such as their abstention from providing goods to a country subject to an embargo sanction,<sup>14</sup> as well as the creation of *ad hoc* bodies which indirectly modified the rules of international law, like the International Criminal Tribunals for the former Yugoslavia and Rwanda through Resolutions 827 (1993) and 955 (1994) respectively.<sup>15</sup> Even if such provisions owned binding and general characters, they lacked the abstract and permanent elements, while directed to concrete situations and for a specific period of time, in order to comply with their main aim; to stop with the situation which gave birth to a menace to international peace and security.

Finally, The Council promulgated binding acts addressed to particular situations, such as the delimitation of the Irak-Kuwait border through Resolution 687 (1991),<sup>16</sup> reflecting its interest in legislating and adjudicating.

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*prevention of armed conflicts*. Available at: [http://www.responsibilitytoprotect.org/files/SC\\_Resolution1366\\_31Aug2001.pdf](http://www.responsibilitytoprotect.org/files/SC_Resolution1366_31Aug2001.pdf).

- 14 Regarding the case of Rhodesia. SC Res. 232 (1966). *Question concerning the situation in Southern Rhodesia* (16 Dec). Available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/227/55/IMG/NR022755.pdf?OpenElement>.

Similarly, the Council imposed measures of military embargo to Liberia through Resolution 788 (1992). SC Res. 788 (1992). *Liberia* (19 November). Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/010/46/IMG/N9301046.pdf?OpenElement>.

Catherine Denis, *Le pouvoir normatif du Conseil de Sécurité des Nations Unies: portée et limites*, 11 (Éditions Bruylant, Bruxelles, 2004).

- 15 SC Res. 827 (1993). *Tribunal Former Yugoslavia* (25 May). Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>.

SC Res. 955 (1994). *On extension of the mandate of the UN Operation in Mozambique until the new Government of Mozambique takes office and completion of the residual operations prior to the withdrawal of the UN Operation in Mozambique on or before 31 Jan. 1994*. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/449/98/PDF/N9444998.pdf?OpenElement>.

Catherine Denis, *Le pouvoir normatif du Conseil de Sécurité des Nations Unies: portée et limites*, 106 (Éditions Bruylant, Bruxelles, 2004).

- 16 SC Res. 687 (1991). *Iraq-Kuwait* (3 Apr). Available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/23/IMG/NR059623.pdf?OpenElement>.



### B. Resolution 1373 (2001)

As it was mentioned, even if the Council produced a wide variety of Resolutions sharing some of the elements of what can be denominated *legislative acts*,<sup>17</sup> at the end they lacked some of such characteristics to become general far-reaching obligations. Regarding on terrorism, the Council created a complex system of sanctions to States which were considered as “*supporters*” of terrorism; to Libia after the Lockerbie incident through Resolution 748 (1992)<sup>18</sup> and to the Taliban regime in Afganistan after the terrorist actions in Kenya and Tanzania in the course of Resolutions 1267 (1999) and 1333 (2000).<sup>19</sup> In the same direction, after the terrorist action of September 11<sup>th</sup> 2001, the Council tried to respond to the situation occurred in soil of one of the permanent members (and possibly more than just one of them, the United States) with the production of Resolution 1368.<sup>20</sup>

But certainly it wasn't neither the first, nor the last measure taken by the UN body concerning terrorism, because 16 days later it introduced to the international community Resolution 1373 (2001), which can be considered as the first act through which a legislative function was clearly exercised by the Security Council, as it relied on a general issue more than responding to a specific act.

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Even if for some authors such action was more a judicial decision, because the Council decided on the conflicting claims regarding the validity of the 1963 Agreement after a judicial analysis. Axel Marschik, relying on Keith Harper, *Does the United Nations Security Council have the competence to act as Court and Legislature?*, 27 *New York University Journal of International Law and Politics*, 103, 115-118 (1994-1995).

- 17 This concept will be analyzed, expanded and confronted with the commented Resolutions in section III.
- 18 SC Res. 748 (1992). *Libyan Arab Jamahiriya* (31 Mar). Available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/011/07/IMG/NR001107.pdf?OpenElement>.
- 19 SC Res. 1267 (1999). *Establishes Security Council Committee; imposes limited air embargo and funds and financial assets embargo on the Taliban*. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement>.
- SC Res. 1333 (2000). *On the situation in Afghanistan*. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf?OpenElement>.
- 20 SC Res. 1368 (2001). *Threats to International Peace and Security Caused by Terrorist Acts*. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>.

Hence, this act represents a step forward from the Council's previous activity, as well as the starting point of the so-called legislative powers, while originally configured and having performed as an efficient executor. It contained a "*Holistic and comprehensive approach to terrorism, applicable to all States*,"<sup>21</sup> but without defining which acts can be assumed as it, letting to the States or even the Council a broad possibility to appreciate a situation as a terrorist action.

After condemning the terrorist acts which took place in the United States, the Council reaffirmed through the declarative part of the Resolution that such actions are contrary to the principles and purposes of the Charter, and "*like any act of international terrorism, constitute a threat to international peace and security*."<sup>22</sup> Such political declaration established a direct link between the inspirational support of the Charter and the competence of the Council to impose collective measures under Chapter VII, in order to stop the effects of the consummated attacks as well as prevent future likely situations.

Through paragraphs 1 and 2 of the Resolution the Council imposed concrete obligations to States<sup>23</sup> on preventing those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purpose against other countries and their citizens, as well as ensuring that anyone who has participated in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice.<sup>24</sup> They should also ensure that terrorist acts

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21 Alan Boyle & Christine Chinkin, *The Making of International Law*, xx (Malcolm Evans & Phoebe Okowa, eds., Foundations of Public International Law, Oxford, 2007).

22 Regarding on this position, the Preamble of the 1994 General Assembly Declaration on Measures to Eliminate International Terrorism noted that "*suppression of terrorist acts is an essential element in the maintenance of international peace and security*". Alan Boyle & Christine Chinkin, *The Making of International Law*, 7 (Malcolm Evans & Phoebe Okowa, eds., Foundations of Public International Law, Oxford, 2007).

23 Using the term "*Decides that all States shall*", it granted to the normative provisions a general, abstract and binding character. The temporal element is provided by the Resolution as a whole.

24 Moreover, the Council went further and practically enacted a model of penal behavior to be adopted by States, as section 1 (b) establishes the obligation of "*criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that*

are established as serious criminal offences in domestic laws and regulations and that the seriousness of such acts is duly reflected in sentences revised.<sup>25</sup>

Complementary to such obligations, it is important to highlight several dispositions addressed to confront terrorism in an effective way; particular reference was made to the need of cooperation between States by exchanging information in order to prevent and suppress terrorist acts,<sup>26</sup> strict control over the borders in order to avoid the movement of terrorists,<sup>27</sup> as well as rigid policies on the granting of refugee status as to prevent from giving it to individuals who might be terrorists.<sup>28</sup>

Moreover, even if the Resolution had provisions similar to those found on conventional instruments previously released, but at that moment not ratified by an important number of States,<sup>29</sup> paragraph 3 (d) requested States to become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999,<sup>30</sup> even if it has not the same binding character as paragraphs 1 and 2.<sup>31</sup> Nevertheless, in practice it was effective as a binding

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*they are to be used, in order to carry out terrorist acts”.*

- 25 Security Council, 4385 Meeting, press release SC/7158. Security Council unanimously adopts Wide-Ranging Anti-Terrorism Resolution; calls for Suppressing Financing, Improving International Cooperation. Available at: <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>.
- 26 Security Council, 4385 Meeting, press release SC/7158. Security Council unanimously adopts Wide-Ranging Anti-Terrorism Resolution; calls for Suppressing Financing, Improving International Cooperation, paragraphs 2 (f) and 3 (a), (b), (c). Available at: <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>.
- 27 Security Council, 4385 Meeting, press release SC/7158. Security Council unanimously adopts Wide-Ranging Anti-Terrorism Resolution; calls for Suppressing Financing, Improving International Cooperation, paragraph 2 (g). Available at: <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>.
- 28 Security Council, 4385 Meeting, press release SC/7158. Security Council unanimously adopts Wide-Ranging Anti-Terrorism Resolution; calls for Suppressing Financing, Improving International Cooperation, paragraph 3 (f). Available at: <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>.
- 29 José E. Álvarez, *International Organizations as Law-makers*, 197 (Oxford University Press, Oxford, 2005).
- 30 International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999. Available at: <http://www.un.org/law/cod/finterr.htm>.
- 31 The expression “*calls upon all the States*” contributes to the general and abstract characters of the provision, but it doesn’t provide the binding element.

normative disposition, while generated a massive ratification of such treaty activating its entry into force in 2002, otherwise impossible as by the moment the Resolution was enacted, only four States had ratified it (Botswana, Sri Lanka, the UK and Uzbekistan).

Finally, the Council established the creation of a Committee (so-called Counter-Terrorism Committee) in order to monitor the implementation of the measures enacted by such normative instrument on the State's internal systems, calling them to report on actions they take to that end.<sup>32</sup>

Regarding on the reaction from the subjects affected by the legislative measures, even if they were not previously consulted, States gave strong support to the Resolution as by 2003 every member of the UN had submitted the first implementation report to the Committee.<sup>33</sup> Whether this constitutes an evidence of their conviction on its binding character or just a reaction of fear to the almighty powers of the Council, such act was clearly encouraged and followed.

As Axel Marschik points out, it can be concluded that Resolution 1373 (2001) is not an act of peace-enforcement but a measure to create legal obligations for the States in an area of international law,<sup>34</sup> falling into the definition of legislative function previously enunciated.

### C. Resolution 1540 (2004)

Following a similar reasoning as its predecessor, Resolution 1540's principal aim was to link terrorism (perpetrated by non-state actors) with non-proliferation of nuclear, biological or

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32 SC Res. 1373 (2001). *Threats to International Peace and Security Caused by Terrorist Acts*, paragraph 6. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement..>

33 Axel Marschik, *The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power*, 16 (Institute for International Law and Justice, IILJ Working Paper 2005/18). Available at: <http://ssrn.com/abstract=871758>.

34 Axel Marschik, *The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power*, 8 (Institute for International Law and Justice, IILJ Working Paper 2005/18). Available at: <http://ssrn.com/abstract=871758>.

chemical weapons of mass destruction; thereafter, departing from such association, it pretended to fill some self-perceived gaps in certain branches of International Law,<sup>35</sup> or even complement or supplement existing treaty regimes.<sup>36</sup> As Resolution 1373, it also created a monitoring Committee to check the implementation of the new rules enacted into municipal systems.

Concerning the content of the Resolution, José E. Álvarez points out:

*In this act, and deploying its Chapter VII enforcement authority and affirming that all States must refrain from providing any support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, or transfer the weapons listed. It also ordered all States to adopt appropriate laws to bar such activity. That Resolution also required all States to take and enforce effective measures to establish domestic controls over such, and identifies in considerable detail the scope of measures required.*<sup>37</sup>

The structure, language and legal scope of these legal documents is similar to Resolution 1373,<sup>38</sup> combining the Council's declaratory, promotional,<sup>39</sup> interpretative and enforcement functions into a tidy tool of global law,<sup>40</sup> as well as establishing a similar link between a factual situation and the need of a prompt and efficient action through a political statement: "*Affirming that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security*".

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35 Ian Johnstone, *The Security Council as Legislature*, in *The UN Security Council and the Politics of International Authority*, 81-104 (Bruce Cronin & Ian Hurd, eds. Routledge Security and Government Series, New York: 2008).

36 See José E. Álvarez, *International Organizations as Law-makers*, 197-198 (Oxford University Press, Oxford, 2005), regarding on the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention, as Resolution 1540 indicates that it should be interpreted so as not to conflict with the obligations contained on such legal instruments.

37 José E. Álvarez, *International Organizations as Law-makers*, 197-198, 197 (Oxford University Press, Oxford, 2005),

38 Axel Marschik, *The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power*, 16 (Institute for International Law and Justice, IILJ Working Paper 2005/18). Available at: <http://ssrn.com/abstract=871758>.

39 In the paragraphs were the Council merely *call upon*.

40 José E. Álvarez, *International Organizations as Law-makers*, 197 (Oxford University Press, Oxford, 2005).

Finally, another interesting characteristic of this Resolution was the inclusion of definitions –just for the purpose of the legal document– which clarifies critical elements of the obligations, such as the subject to be watched (non-state actors), the dynamic of the forbidden activity (means of delivery), and the object prohibited (restricted materials). Such inclusion is a clear sign of the legal support that the Council wanted to give to Resolution 1540 in order to legitimize its action.<sup>41</sup>

Nevertheless, the manufacture line of Resolution 1540 was conducted in a different way than Resolution 1373, throughout a more comprehensive consultation process, not as a multilateral negotiation, but involving different groups of countries, non-members of the Council,<sup>42</sup> which led to a feedback exercise in order to influence in some way the final draft of the Decree.

In the course of a period of 4 months (between December 2003 and April 2004) a primary draft was distributed to all the members of the UN, followed by a stage of consultations which converged in a series of public debates, especially the one conducted on 22 April 2004 within the framework of the 4950 meeting of the Council. Such instance reflected the diversity of positions on the issue, including various concerns on the legality and legitimacy of the Council acting as a legislator, coming from different States individually considered or blocks of States. After reading the meeting's report, such opinions can be condensed in the following attitudes and opinions:

- In general terms, well reception of the project by the western States, pointing the Council's "*leadership in addressing a new challenge*".<sup>43</sup>

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41 Marschik goes further, and proposes that Resolution 1540, as a development of the prior practice of the Council, could constitute subsequent practice and establish general legislative powers if accepted by the wide UN-membership. Axel Marschik, *The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power*, 17 (Institute for International Law and Justice, IILJ Working Paper 2005/18). Available at: <http://ssrn.com/abstract=871758>.

42 Stefan Talmon, *The Security Council as World Legislature*, 99 *American Journal of International Law*, *AJIL*, 1, 175-193, 188 (2005).

43 Axel Marschik, *The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power*, 16 (Institute for International Law and Justice, IILJ Working Paper 2005/18). Available at: <http://ssrn.com/abstract=871758>.

- Concern about the fact that the Resolution could become a precedent for a normal and active legislative production by the Council, and not as an exceptional situation. For instance, Pakistan stated that he could accept the Resolution only as an exceptional measure with precise conditions: the existence of a situation of urgency due to a threat to international peace and security, the need to fill a lacuna in international law regarding on such situation, and the participation of the wider UN-membership in the elaboration of such norms.<sup>44</sup>
- Critics to the concentration of power on the hands of the Council, while acting as a “*world legislature, a world administration and a world court rolled into one*”.<sup>45</sup>
- From a structural point of view, the Council’s apparatus results inappropriate to develop an international legislative function, provided that such power should be based on the consensual participation of the majority of the members of the UN in order to create norms for themselves, but this body is not a representative organ.
- With reference to the content of the Resolution, some States manifested that it should have implied additional discussions on disarmament, a topic linked to the nuclear capacity of most of the permanent members of the Council, and which has to be linked to the case of non-proliferation of weapons of mass destruction as a logical comprehension of the issue.
- According to the representative of Brazil, “*the draft Resolution should not need to invoke chapter VII of the Charter, since article 25 of the Charter provides that all decisions by the Security Council shall be accepted and carried out by the member states of the organization*”.
- The strongest position was adopted by India, who yet threatened to disregard the Resolution, stating as main reasons for his position that the function of producing norms on behalf of the international community is not envisaged by the Charter of the UN, as well as that he could not accept neither obligations arising from treaties which has not signed or ratified, nor externally prescribed norms or standards which are not consistent with his national interests or infringe on his sovereignty.

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44 Axel Marschik, *The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power*, 19 (Institute for International Law and Justice, IILJ Working Paper 2005/18). Available at: <http://ssrn.com/abstract=871758>.

45 Statement of Mr. Murari Raj Sharma (Nepal), talking on behalf of the Non-Aligned-Movement. S/PV.4950, April 22 2004. Available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap%20VII%20SPV%204950.pdf>.



Section II shows then, how the activity of the Council increased in recent times, going from the production of general thematic resolutions in order to impulse State's voluntary action, to face emerging issues to the stability of the international community, such as terrorism, through the production of Resolutions which apparently are –at least in part– the expression of a legislative function, attached to the maintenance of international peace and security.

The question which is now arising is if such practice –Resolutions 1373 (2001) and 1540 (2004) can be addressed as truly legislative actions. In order to assess the activity of the Security Council on this respect, two concepts have to be considered and developed, looking to confront the facts with the theory *in abstracto*: normative power, and legislative function.

## II. NORMATIVE POWER AND LEGISLATIVE FUNCTION UNDER THE COUNCIL'S ACTIVITY, PRELIMINARY CONCLUSIONS

### *A. Normative power and legislative function*

As the International Court of Justice, ICJ, pointed in its Advisory Opinion on Namibia,<sup>46</sup> the decisions of the Security Council have legal effects. Yet, such effects have a hierarchical referent while the Council may extend or develop the law through the interpretation and application of the UN Charter,<sup>47</sup> especially by relying on Chapter VII, which authorizes the council to make recommendations or take measures for to the maintenance of international peace and Security,<sup>48</sup> as it was previously described when confronting the practice of this organ.

Nevertheless, what is apparently unclear is the nature of such legal effects; that is, whether such decisions constitute the imple-

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46 International Court of Justice, ICJ, Advisory Opinion on Namibia case. ICJ Reports 1971. Available at: <http://www.icj-cij.org/docket/files/53/5595.pdf>.

47 Alan Boyle & Christine Chinkin, *The Making of International Law*, 112 (Malcolm Evans & Phoebe Okowa, eds., Foundations of Public International Law, Oxford, 2007).

48 Charter of the United Nations, San Francisco, United States of America, 1945, article 39. Available at: <http://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf#page=134>.



mentation of a legislative function, more if the Charter neither confers expressly the authority to the Council to produce norms, nor refers to the nature or effects of its actions in a concrete way, while just establishing that they should be performed taking into account the Purposes and Principles of the United Nations, contained in articles 1 and 2 of the Charter respectively.<sup>49</sup>

Therefore, in order to establish if the Security Council is acting as a legislator provided its practice, that is to say, if it is producing general norms to the group of States members of the UN,<sup>50</sup> one has to rely on the content of such activity, which can be defined from a wider concept so-called *normative power*.

Following Catherine Denis, the normative power is a general aptitude to elaborate legal norms;<sup>51</sup> such prerogative can be understood then in a wide sense, either as the production of legal norms or as the development of law through to the interpretation and application of a rule in a concrete situation.<sup>52</sup>

Thus, the practice of the Council is a clear example of the exercise of such general prerogative; it produced thematic resolutions which influenced the way international law is conceived, created judicial organs such as the *ad hoc* Criminal Tribunals for the former Yugoslavia and Rwanda which interpreted and applied international rules, and imposed obligations directly and indirectly in concrete cases, as part of as a consequence of a sanction system.<sup>53</sup>

Following this reasoning, the Council's normative power can be observed in two facets; as its capacity to take part into a global process of law-making when interpreting or applying an

49 Article 24 (2) establishes that “*In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations*”. Charter of the United Nations, San Francisco, United States of America, 1945. Available at: <http://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf#page=134>.

50 Paul C. Szasz, *The Security Council Starts Legislating*, 96 *American Journal of International Law*, *AJIL*, 4, 901-905, 902 (2002).

51 “*La norme juridique se définit comme tout modèle de conduit, doté d’une force obligatoire, qui a pour objet de créer des droits, des habilitations et/ou des obligations en faveur ou à charge de sujets de droit*”. Catherine Denis, *Le pouvoir normatif du Conseil de Sécurité des Nations Unies: portée et limites*, 3 (Éditions Bruylant, Bruxelles, 2004).

52 Catherine Denis, *Le pouvoir normatif du Conseil de Sécurité des Nations Unies: portée et limites*, 5 (Éditions Bruylant, Bruxelles, 2004).

53 See section II (a) on the antecedents of the Council's legislative function.

existing norm of International Law on a concrete situation (*sens large*),<sup>54</sup> or as a concrete aptitude to produce norms in a direct and unilateral way, be them containers of rights and obligations and addressed to particular or general situations (*sens strict*).<sup>55</sup>

Regarding on the former facet, the exercise of the normative power by the Council is associated to its action as an executive body, for instance through the imposition of collective measures provided the existence of a breach or threat to international peace and security or an act of aggression, on behalf of the community of States, according to articles 39 to 42 of the Charter.

However, the strict legislative function of an organ such as the Council has to be conceived by reference to the latter view, when it assumes the capacity to produce general norms under its context and functions, that is to say, through the direct enactment of regulatory structures able to be applied to an undetermined number of legal relations and individuals, each time conditions and situations which constitutes the object of such regulation are met.<sup>56</sup>

Consequently, it is possible to draw several elements which identifies an act as a manifestation of the legislative function; Thus, a norm is *abstract* as it doesn't need a determined cause to be applied and uses a neutral language;<sup>57</sup> it is *impersonal* whether it can be opposable to an undetermined number of individuals and relations; is *permanent* provided that its application can occur indefinitely in time and without regarding on a geo-politic limit; and is *binding* if it creates a subjective conviction and an

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54 Some authors argue that such activity has a "creative" character, taking into account that the concrete effects of the interpretation and application are original and gives rise to specific consequences to the subjects and legal relations involved. Catherine Denis, *Le pouvoir normatif du Conseil de Sécurité des Nations Unies: portée et limites*, 9 (Éditions Bruylant, Bruxelles, 2004).

55 Catherine Denis, *Le pouvoir normatif du Conseil de Sécurité des Nations Unies: portée et limites*, 9 (Éditions Bruylant, Bruxelles, 2004).

56 Catherine Denis, *Le pouvoir normatif du Conseil de Sécurité des Nations Unies: portée et limites*, 3 (Éditions Bruylant, Bruxelles, 2004).

57 Talmon emphasizes the need of a neutral language, as the expression of the abstract character of a norm. Stefan Talmon, *The Security Council as World Legislature*, 99 *American Journal of International Law*, *AJIL*, 1, 175-193, 176 (2005).

objective response from the addressees in respect of the mandatory character of the rule.

### *B. Preliminary Conclusions*

This first part of the study displayed relevant practice of the Security Council in order to identify if this body has exercised legislative powers through the production of acts which presumably contains general far-reaching obligations to all the members of the United Nations: Resolutions 1373 (2001) and 1540 (2004), concerning different aspects of terrorism as a threat to international peace and security

An opening answer is that in fact the Council did it so in the case of such Resolutions. Moreover, the confrontation of such practice with the nature and elements of the so-called *legislative function* shows that even if the content is not purely attached to the commented prerogative, there can be found several dispositions by which it created legal propositions with a general, permanent, abstract and binding character.

Thus, the activity of the Council has shown its tendency not just to be involved into a process of interpretation or application of international law, but a conscious intent to create original rules provided the existence of a situation qualified as politically relevant, which activates its competence to act, or at least legitimize its action to the eyes of the international community. Therefore, the existence of a legislative function on the hands of this body is not clear as there is a mixture of performances, consequence of a system in evolution; institutions, sources and procedures playing onto a dynamic play of power distribution and identity-definition.

Concerning the reaction of the rule's addressees, it can be said that in general terms the legislative action of the Council was accepted by the States, taking into account the context which surrounded both resolutions, and even if some countries expressed concerns and displayed divergent attitudes related with

the legality given by the Charter of the UN and the legitimacy of the Security Council to act in such a way.

Precisely, and provided that as first conclusion it can be held that the Security Council imposed obligations upon all States more quickly than slower processes of law-making, as an institutional response to a particular crisis<sup>58</sup> (even if not in a pure way), those two issues—legality and legitimacy—should be considered as the center of section IV, regarding on the advantages, disadvantages and limits of such activity, and looking forward to deal with the question of accountability on section V.

### III. THE SECURITY COUNCIL AS LEGISLATOR: LEGALITY AND LEGITIMACY?

When dealing with a question such as if a governing body like the Security Council can legislate, it is unavoidable to permanently rely on two different types of analysis; one related with legality and another with legitimacy, provided the structure of the international system and the legal framework of the Charter of the United Nations.

On one hand, legality deals with the exercise of power within a certain legal system, taking into account its structure and content as delimiters of the extent of such action. Therefore, for this study the question would be if the Security Council is entitled to act as a legislator in conformity with International Law, and more specifically, with the Charter of the United Nations.

On the other hand, legitimacy is an issue illustrated by the relation between power and authority, as the former is complemented by the latter inside a democratic system. According to Dolf Sternberger, *legitimacy* “*is the foundation of such governmental power as is exercised both with a consciousness on the government’s part that it has a right to govern and with some recognition by the governed of that right*”.<sup>59</sup> From this perspective, attention has to

58 Alan Boyle & Christine Chinkin, *The Making of International Law*, 8 (Malcolm Evans & Phoebe Okowa, eds., Foundations of Public International Law, Oxford, 2007).

59 Dolf Sternberger, *Legitimacy*, in *International Encyclopedia of the Social Sciences*, Vol.

be put on the suitability of the Council's structure to legislate in terms of the representativeness of the interests of the members of the UN.

At the end, both inquiries have to be articulated in order to have an overall landscape of the advantages, disadvantages and limits to the Councils legislative function, as well as to bring elements to determine if it can be accountable for such action.

### *A. Questions on legality*

As it was mentioned in section II, the Security Council is bound by the dispositions of the Charter of the UN. This legal instrument constitutes at the same time the inspirational basis and the blueprint of the structure and functions of the Council; such relation implies that the organ does not operate in a legal vacuum when adopting its Resolutions.<sup>60</sup>

Nevertheless, concerning the legislative function, the Charter contains neither an express legal prohibition for the Council to extend its authority on the production of general far-reaching norms, nor an express authorization to do it. Moreover, neither the UN nor any of its specialized agencies was originally conceived as a legislative body, even if they have certain influence on the traditional law-making processes.<sup>61</sup>

Thus, one should go further to determine the legality of this action, looking at the Charter as a harmonized compendium of legal dispositions, and making a systematic interpretation of its normative dispositions.

There can be identified three blocks of relevant dispositions concerning the possible action of the Security Council as leg-

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9, 244 (David L. Sills, ed., Macmillan, New York, 1968).

60 Stefan Talmon, *The Security Council as World Legislature*, 99 *American Journal of International Law*, *AJIL*, 1, 175-193, 178 (2005).

61 This view was shared by the International Criminal Tribunal for the former Yugoslavia, ICTY in *Prosecutor v. Duško Tadić*, while "there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects". ICTY, *Prosecutor v. Duško Tadić, a.k.a. Dule*, Case IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995. Available at: <http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/tadic.html>.

islator; Chapter I, containing the Purposes and Principles of the United Nations (articles 1 and 2) which are to interpret and complement the subsequent dispositions;<sup>62</sup> Chapter V, enunciating the structure and general powers of the Council (articles 24 and 25); and Chapter VII, which develops the content and operative procedure of the actions with respect to the maintenance of international peace and security (articles 39, 41 and 48).

The general competence of the Council is established in article 24 (1), by which its *Primary responsibility* is the maintenance of international peace and security; read along with article 1 (1), such mandate has a concrete way to be carried out through the implementation of *effective collective measures*<sup>63</sup> in order to prevent or remove a situation contrary to this common aim. Thereafter, article 24 (2) limits the content and scope of such measures by attaching their implementation to the Purposes and Principles of the UN, and stating that the *specific powers* of the Council to accomplish its duties related with the mentioned primary responsibility are laid down, notwithstanding its other tasks,<sup>64</sup> in Chapter VII.

Article 25 complements its predecessor in two ways; on one hand, it constitutes the legal basis of the *authority* of the Security Council while consecrates that the members of the UN should agree to accept and carry out the decisions taken by the organ. On the other, it imposes limits when recalling the importance of the Charter as a general background which has to be systematically interpreted.<sup>65</sup>

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62 According to Bruno Simma, those are directly applicable law, and not just a non-binding political prescription. Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, 191 (Hart Publishing, Oxford, Portland, 2004).

Bruno Simma, *The Charter of the United Nations: a commentary* (Oxford University Press, Oxford, 2002).

63 Measures which, according to article 50 of the Charter, may have a preventive or enforcement character.

64 Such additional prerogatives are contained in chapters VI, VIII and XII of the Charter.

65 In the same way, article 48 acts as an operative complement to article 25, giving legitimacy to the action of the Council under Chapter VII.

Paul C. Szasz, *The Security Council Starts Legislating*, 96 *American Journal of International Law*, *AJIL*, 4, 901-905, 901 (2002).

Therefore, the Council may determine if such actions have to be taken by some members or by all the members; would this imply the possibility of comprehensive measures such

Therefore, could the legislative function of the Council be attached to such collective measures as an alternative to guarantee international peace and security? In so far as its prerogative to act as a legislator cannot be inferred from the general clause of competence contained in article 24, it is necessary to rely on the specific provisions which develop this area of action.

Thus, according to article 39 of the Charter, the activation of the Council's competence to produce measures with respect to threats to international peace and security is conditioned by the production of a decision –a political statement with legal consequences– which establishes a link between a factual situation and the need to protect such interests.

Provided such declaration, article 41 consecrates the power to impose “*measures not involving the use of armed force*”, then putting illustrative examples such as the interruption of economic relations or means of communications, and the severance of diplomatic relations. Even if those examples are merely descriptions of non-military actions, the definition provided by the article is vague, and it wouldn't be accurate to include the possibility of impose general obligations to the international community as one of the authorized prerogatives, more if article 24 refers to *specific powers* when it indicates the location of the Council's permitted actions.

Could it be possible to infer, as the representative of Brazil suggested under the framework of Resolution 1540 (2004), that the competence of the Council to produce general norms shouldn't been linked to Chapter VII since article 25 of the Charter provides that all decisions enacted by this organ shall be accepted and carried out by States? In other words, that article 25 is sufficient to authorize the Council to act as a legislator.

As it was mentioned, articles 24 and 25 shall be interpreted together,<sup>66</sup> in the sense that the authorization conferred by the

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as the enactment of general obligations?

66 This study diverges with authors like Axel Marschik and Ian Johnstone (cited work, p. 82) whom sustain in a different way that “*a combined reading of Articles 24 and 25, and Chapter VII confer broad authority on the Council to take whatever measures it deems necessary to maintain and restore international peace and security, as long as it does not run*



latter (the imposition of an obligation of compliance to the member states of the United Nations) is limited to the maintenance of international peace and security under the operational range of Chapter VII, as the presumable legislative function of the Council is not directly linked to chapters VI,<sup>67</sup> VIII<sup>68</sup> and XII,<sup>69</sup> which are the alternatives.

In conclusion, the analysis on the legality of legislative powers under the framework of the Charter of the United Nations shows that such legal instrument doesn't authorize it to produce general far-reaching norms binding all the members of the Organization as a manifestation of the implementation of enforcement measures under its primary responsibility to maintain international peace and security.

Thereafter, and provided the practice of the Council through Resolutions 1373 (2001) and 1540 (2004) analyzed in section II, from the point of view of *legality* it is acting *ultra vires*;<sup>70</sup> even if the argumentation line inside such legal documents pretended to create a link between the pretended legislative action of the Council and the measures authorized by the Charter in order to maintain international peace and security, such interpretation didn't take into account the legal instrument as a whole, having as main consequence that the acts coming from such actions wouldn't be binding to the States, in terms of articles 25 and 48.<sup>71</sup>

But on the other hand, the same study on the practice of the Council displayed two attitudes; repetition, as Resolution 1540 (2004) was produced 3 years after the first legislative attempt, and acceptance by the general membership of the United Na-

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*afoul of the purposes and principles of the UN*". Such argumentation stays short because precisely, a comprehensive reading of the mentioned legal dispositions shows that the authorization to exercise a prerogative has to be explicit (it can be read *specific powers* in article 24), considering their nature and extent.

67 Pacific Settlement of Disputes.

68 Regional Arrangements.

69 International Trusteeship System.

70 Literally "*beyond powers*", it is when a decision has been reached outside the powers conferred on the decision taker by the law.

71 Stefan Talmon, *The Security Council as World Legislature*, 99 *American Journal of International Law*, *AJIL*, 1, 175-193, 182 (2005).



tions through compliance with the obligations imposed, as if they would have implicitly accepted the legislative function in the hands of this body, once in the past an executive body. Going further, can it be inferred, as Karl Zemanek points out, that as a consequence of the acceptance of the States, the constituent treaty of the Organization was formlessly amended to include such competence?<sup>72</sup>

### *B. Questions on legitimacy*

In the case of the Security Council exercising legislative powers, legitimacy can be assumed as a sociological question about law-making,<sup>73</sup> while the inquiry is not just about the fact of exercise a prerogative, but on the compliance and recognition by the addressees of such action; in other words, it becomes a critical issue in the case of international institutions taking binding decisions on States without their specific consent.<sup>74</sup>

Such issue can be boarded through two perspectives: 1. From an *objective* point of view, if the Council is suitable to develop a legislative function taking into account its non-representative structure, and 2. From a *subjective* point of view, if the member states of the United Nations accept or not the practice of the Council through which general far-reaching obligations have been imposed to them.

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72 Axel Marschik, *The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power*, 8 (Institute for International Law and Justice, IILJ Working Paper 2005/18). Available at: <http://ssrn.com/abstract=871758>.

Karl Zemanek, *Is the Security Council the Sole Judge of Its Own Legality?: a re-examination*, in *The Law of International Relations: Liber Amicorum HansPeter Neuhold* (August Reinisch & Ursula Kriebaum, eds., Eleven International Publishing, Utrecht, 2007).

73 Alan Boyle & Christine Chinkin, *The Making of International Law*, 99 (Malcolm Evans & Phoebe Okowa, eds., Foundations of Public International Law, Oxford, 2007).

74 Alan Boyle & Christine Chinkin, *The Making of International Law*, 99 (Malcolm Evans & Phoebe Okowa, eds., Foundations of Public International Law, Oxford, 2007).

## 1. Legitimacy and the structure of the Security Council

Whether the Security Council is making a conscious effort to make additions or changes in the law of nations,<sup>75</sup> or has political reasons to look for innovative means to enforce the international rule of law,<sup>76</sup> the minimum standard demandable should be that the structure of the organ which is going to assume legislative powers has to be suitable to comply with such function. In this case, meaning representativeness of all the member of the United Nations, and expertise to produce norms.

Concerning representativeness, the actual apparatus of the Council is far from being a body competent to concentrate the opinions of all the member states of the United Nations; according to articles 23 and 24 of the Charter, the Council shall consist of fifteen Members of the United Nations, with 5 permanent members (P5) and 10 un-stable posts (NP10) designated by the General Assembly for a period of two years. Although the Charter purports for an equitable geographic distribution of the latter in order to recreate an atmosphere of inclusion, such criteria happens to be incapable to generate a democratic environment, provided that sometimes the greatest dissents can be found even inside regional agglomerations.

Moreover, the distribution of power inside the Council is clearly uneven, provided that even if article 27 (1) of the Charter establishes that each member has one vote, the P5<sup>77</sup> have as a resource the veto power –a negative vote on a substantive draft resolution–,<sup>78</sup> able to block any initiative of the NP10.<sup>79</sup> For instance, if the latter agreed unanimously to impulse a resolution

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75 Stefan Talmon, *The Security Council as World Legislature*, 99 *American Journal of International Law*, *AJIL*, 1, 175-193, 175 (2005).

76 Alan Boyle & Christine Chinkin, *The Making of International Law*, 112 (Malcolm Evans & Phoebe Okowa, eds., *Foundations of Public International Law*, Oxford, 2007).

77 P5: Permanent members of United Nations Security Council: Russian Federation, United States of America, China, United Kingdom, France.

78 Article 27 (3) of the Charter.

79 NP10: Non permanent members: Bosnia and Herzegovina (2011), Brazil (2011), Colombia (2012), Gabon (2011), Germany (2012), India (2012), Lebanon (2011), Nigeria (2011), Portugal (2012), South Africa (2012).

(why not a legislative one), although the amount of affirmative votes in order to approve a Resolution is 9, such obstruction would be enough to stop the initiative. In other words, a non-representative political organ would act in the interest of its most powerful members than on behalf of all States.<sup>80</sup>

Likewise, even if article 31 of the Charter establishes the participation of non-members in the discussions of questions brought before the Council, such involvement depends on the *discretionary calling* of the latter, when it feels that the State might be specially affected, and without a vote.<sup>81</sup>

Therefore, as the Council is not a deliberative body, and the legislative function can't be attached to a democratic environment, such prerogative would be contrary to the principle of Sovereign Equality of States, consecrated in Chapter I of the Charter,<sup>82</sup> which implies the legal identity of the State in international law, as well as the equality of status with all the other political units as members of the international community.

Concerning expertise, legislating requires attentiveness to the range of secondary issues that may be affected by the principal subject matter of the discussion.<sup>83</sup> The Council was conceived as an executive organ, provided the qualities which are connatural to their actions: promptness and effective results; its composition is not based on proficient jurists or legislative technicians from required auxiliary disciplines, but diplomatic representatives of States, aiming to obtain a political advantage for their governments.<sup>84</sup>

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80 Ian Johnstone, *The Security Council as Legislature*, in *The UN Security Council and the Politics of International Authority*, 81-104, 84 (Bruce Cronin & Ian Hurd, eds. Routledge Security and Government Series, New York: 2008).

81 This is what happened with Resolution 1540 under the framework of the 4950 meeting of the Council.

82 Article 2 (1) of the Charter.

83 Ian Johnstone, *The Security Council as Legislature*, in *The UN Security Council and the Politics of International Authority*, 81-104, 83 (Bruce Cronin & Ian Hurd, eds. Routledge Security and Government Series, New York: 2008).

84 For instance, concerning Resolutions 1373 and 1540 the Council was inattentive to human rights issues. Ian Johnstone, *The Security Council as Legislature*, in *The UN Security Council and the Politics of International Authority*, 81-104, 83 (Bruce Cronin & Ian Hurd, eds. Routledge Security and Government Series, New York: 2008).

Thus, Article 7 of the Charter establishes a series of principal organs of the United Nations; the General Assembly and the Economic and Social Council are deliberative bodies and international policy developers;<sup>85</sup> the International Court of Justice is entitled to act as the main judicial organ;<sup>86</sup> and the Security Council happens to be an executive machinery in order to bring and maintain political stability to the inter-State community.

Therefore, whether the United Nations requires a deliberative body structurally and functionally capable to exercise the legislative function, it would be the General Assembly; the analysis on legality showed that it cannot be inferred from the Council's competences the possibility to produce abstract, impersonal, permanent and binding norms.<sup>87</sup> If the SC is charged with a double task –police and legislator–, the necessary existence of a system of checks and balances would be absent, as the power is going to be assembled in one body.<sup>88</sup>

## 2. Legitimacy and the attitudes of the addressees

Provided the exercise of legislative powers by the Council, the attitude of the addressees of such prerogative permits to establish if it was legitimized to act as a legislator from the point of view of the ones who have to act according to such performance; the support of its very foundation remains at the individuals which renounced to a part of its absolute sovereignty, in order to create an international system in charge of the maintenance of international peace and security, the development of friendly rela-

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85 See articles 10 and 62 of the Charter, respectively.

86 See article 92 of the Charter.

87 Moreover, the discussions which took place in San Francisco (*travaux préparatoires*) didn't reveal any intention of giving such faculties to the political organ. Axel Marschik, *The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power*, 7 (Institute for International Law and Justice, IILJ Working Paper 2005/18). Available at: <http://ssrn.com/abstract=871758>.

88 Martti Koskenniemi, *The Police in the Temple. Order, Justice and UN: a Dialectical View*, 6 *European Journal of International Law*, *EJIL*, 2, 325-348 (1995). Available at: <http://www.ejil.org/pdfs/6/1/1299.pdf>.

tions among the nations, and the achievement of international cooperation in solving international problems.

Thus, the production of Resolutions 1373 (2001) and 1540 (2004) reached a milestone in the history of the Security Council, provided the enactment of abstract, impersonal, permanent and binding norms to the members of the United Nations, challenging the conventional process by which the international community used to make international law. According to the records, the reaction of the subjects concerned was of major acceptance, even if on the scenarios of deliberation such as the 4950<sup>th</sup> meeting, various concerns were exposed by States and groups of States.<sup>89</sup>

For some authors as Karl Zemanek, the repetition (the Council have produced so far not just one but two Resolution with similar characteristics and tacit acceptance by the state members of the UN suggested the amendment of the Charter in order to include such powers and competences.<sup>90</sup> For others as José E. Álvarez, the situation is, to the contrary, far from being a tacit acceptance from the States, much less a reform of the Charter; “*many lawyers continue to assume (or pretend) that what the Council does either reflects the existing rules of force or the international community’s changing assessments of what those rules ought to be*”.<sup>91</sup>

Moreover, the exercise of the legislative function created tension inside the structure of the United Nations, among the General Assembly –the representative organ– and the Security Council, concerning the adoption of a resolution through which the latter exercised such powers:

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89 See section II.

90 Cited in Axel Marschik, *The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power*, 8 (Institute for International Law and Justice, IILJ Working Paper 2005/18). Available at: <http://ssrn.com/abstract=871758>.

Karl Zemanek, *Is the Security Council the Sole Judge of Its Own Legality?: a re-examination*, in *The Law of International Relations: Liber Amicorum HansPeter Neuhold* (August Reinisch & Ursula Kriebaum, eds., Eleven International Publishing, Utrecht, 2007).

91 José E. Álvarez, *International Organizations as Law-makers*, 189 (Oxford University Press, Oxford, 2005).

*Incidentally, the General Assembly's reception of Resolution 1373 can at best be described as tepid. In its own later resolution, 'measures to eliminate international terrorism', it refers to the Council's resolution only once, citing one if the nonbinding paragraphs. Moreover, the Sixth Committee made no effort to incorporate any provisions of Resolution 1373 into the draft of a comprehensive convention on international terrorism on which the Assembly has been working for some years. Perhaps the Assembly was merely reacting to the Council's failure to refer at all to the Assembly's 1994 and 1996 declarations.<sup>92</sup>*

Adapted to the context and structure of the international community, authority is a political source of legitimacy. The thing is that from the point of view of some of the addressees, the authority of the Council as legislator happens to be disputed,<sup>93</sup> even if the Resolutions were voted unanimously and the obligations imposed have been complied properly.

When there were spaces for deliberation, doubts raised to the ears of the Organ; whether that in comparison with Resolution 1373, Resolution 1540's process of production reflected an evolution on the inclusion of the emergent opinions outside the Council members, at the end, the legal pieces reflected a strong support to the will of the affiliates, especially the one(s) who backed the legislative action, and restricted the certainly various dissenting opinions. As Mr. Don MacKay, the representative of New Zealand, expressed:

*However, the draft resolution will not succeed in its aim without the support and acceptance of Member States. Such acceptance requires the Council to dispel any impression of negotiations behind closed doors or that a small group of States is drafting laws for the broader membership without the opportunity for all Member states to express their view.<sup>94</sup>*

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92 Paul C. Szasz, *The Security Council Starts Legislating*, 96 *American Journal of International Law*, *AJIL*, 4, 901-905, 902 (2002).

93 See specially the intervention of Mr. Vijay Nambiar, representative of India. S/PV.4950, April 22 2004, 23. Available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap%20VII%20SPV%204950.pdf>.

94 S/PV.4950, April 22 2004, 21. Available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap%20VII%20SPV%204950.pdf>.

In conclusion, it cannot be denied the efficacy of the Resolutions, while they produced general binding norms which were obeyed by the international community; it is a matter of fact. Nevertheless, legitimacy is not just a question of results (compliance), but of freedom of will. A slightly perceivable sensation of political compromises and pressure is on the air.

*C. Is the Council's legislative function a manifestation of Hegemonic International Law?*

Having arrived to a point on the reflection about the Security Council's legislative powers where the only feasible reason found for supporting such situation is that such organ would be capable to react in a fast way to prevent or stop a threat to international peace and security by producing general binding obligations faster than classic law-making processes, it is time to raise the million dollars question: is the Security Council performing as a global *hegemon*?<sup>95</sup>

The term “*international hegemonic law*”, firstly used by Detlev Vagts,<sup>96</sup> illustrates the arbitrary exercise of power at the collective or global level, given the egalitarian and participatory precepts of the modern international law and organization,<sup>97</sup> by “*replacing pacts between equals grounded in reciprocity, with patron-client relationships in which clients pledge loyalty to the hegemon in exchange for security or economic sustenance*”.<sup>98</sup>

Thus, the production of general norms by the Security Council is far from being incidental to its efforts to enforce the political

95 “*The hegemon (leader) dictates the politics of the subordinate states upon whom it has hegemony via cultural imperialism –the imposition of its way of life, i.e. its language (as imperial lingua franca) and bureaucracies (social, economic, educational, governing), to make its dominance formal– and, so, render as abstract its foreign domination of the subordinate state; thus, power does not rest in a given person, but in the way things are*”. Henry Kissinger, *Diplomacy*, 137-138 (Simon & Schuster, New York, 1994).

96 Detlev Vagts, *Hegemonic International Law*, 95 *American Journal of International Law*, *AJIL*, 4, 843-848, 843 (2001).

97 José E. Álvarez, *Hegemonic International Law Revisited*, 97 *American Journal of International Law*, *AJIL*, 4, 873-887, 873 (2003).

98 José E. Álvarez, *Hegemonic International Law Revisited*, 97 *American Journal of International Law*, *AJIL*, 4, 873-887, 873 (2003).



stability of the world, and is more an express attempt to make global law. Be it true or not that the main reason for such activity is the protection of values inherent to the international community, the way by which it is doing it is breaking the very conception of such society; sovereign equality of states, rule of law, the approach to law-making processes, and so on.

Such affirmation can be illustrated through two examples: on one hand, considering the link between legislative powers and Chapter VII of the Charter, it could constitute an open door for the application of coercive measures in the case of non-compliance with the general rules enacted by the Council, more if it is considered the lack of clarity of the content of the obligations created by the SC through its legislative resolutions.

On the other hand, relying on the structure of international obligations; taking into account that the legislative function in the hands of the Council is basically an unilateral decision taken by a political organ, does the obligations produced by such body have a different regime of compliance, provided a possible special hierarchy, or any especial effect on areas such as state responsibility as they are implemented in order to protect a collective concern –international peace and security–?<sup>99</sup>

However, despite of such a pessimist landscape, one has to think on the intrinsic limits that law and ethics (if separable) may set forth in order to –at least and while necessary adjustments to the United Nations system be discussed and implemented– balance the way power is been exercised by the Council when producing norms to the member States.

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99 This inquiry would merit the writing of another paper, but it can be inferred some preliminary inquiries; would this suggest the starting point of an autonomous branch on International Law? Could the logic of peremptory norms (obligatory regardless of the State's consent) be applied likewise in the case of Security Council when exercising the legislative function?



#### IV. LIMITS TO THE COUNCIL'S LEGISLATIVE FUNCTION AND OTHER PROPOSALS

Despite of the analysis which determined that the legislative action of the Council has serious problems of legality and legitimacy, the production of general binding norms to the member states of the United Nations is –although not in a pure way– an incontrovertible reality; as Álvarez points it out, “*the risks that Hegemonic International Law poses to international law and its formal principles, such as sovereign equality, are grave, but they are obvious*”.<sup>100</sup>

Nevertheless, the existence of a Rule of Law inside the International System is a certainty documented by the way that such apparatus has evolved to become a coordinated conglomerate of rules, institutions and procedures, inspired by values which, even if not absolutely uniform, represents basic postulates which capsules historical and social pacts of coexistence (maybe cooperation) between diverse subjects.

Such legal supremacy gives us a remarkable hope; although it could be implemented by the hegemon as an instrument of domination, law has inside its structure and inspirational configuration the remedy for prevent itself to be used as a political tool without limits, as well as the seed for its transformation, according to the dynamics of world order.

##### *A. Limits to the legislative function*

The most wide-ranging and accurate way to establish the limits to the Council's legislative function is by establishing a political statement on the international legal system by which the Charter of the United Nations assumes a constitutional position. Such perspective can be considered from two points of view. On one hand, in a *substantial* sense, while the Charter as a “*set of legal*

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100 José E. Álvarez, *Hegemonic International Law Revisited*, 97 *American Journal of International Law*, *AJIL*, 4, 873-887, 887 (2003).

*principles of paramount importance for every one of the subjects belonging to the social community ruled by it*”;<sup>101</sup> on the other, in an institutional sense, pointing to the “*designation of public organs, the separation of powers and the different institutions which are endowed each with its own competences*”.<sup>102</sup>

Thus, particular attention has to be posted on the way that the Charter is interpreted, in order to reflect the will of the international community, “*by including the opinion of the states not represented on the Council and the members of international civil society*”<sup>103</sup>, provided that there is still a risk, while “*when acting with [in] the Council, the hegemon can do almost anything, while still appearing to be acting consistently with the Charter’s vague Principles and Purposes*”.<sup>104</sup>

Hence, the inclusion of such various opinions requires the implementation of previous consultations in order to legitimize not just the production of the norms through Resolutions, but the very formal declaration which gives rise to them (that a situation constitutes a threat to international peace and security).

Moreover, the content of the legislative resolutions should be inspired by democratic values as accountability,<sup>105</sup> predictability and due process, considering that the notion of “*community interest*” can be used in a way which might create excessive

101 Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 *Max Planck Yearbook of United Nations Law, MPIL*, 1-33, 3 (1997). Available at: [http://www.mpil.de/shared/data/pdf/pdfmpunybdupuy\\_1.pdf](http://www.mpil.de/shared/data/pdf/pdfmpunybdupuy_1.pdf).

102 Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 *Max Planck Yearbook of United Nations Law, MPIL*, 1-33, 3 (1997). Available at: [http://www.mpil.de/shared/data/pdf/pdfmpunybdupuy\\_1.pdf](http://www.mpil.de/shared/data/pdf/pdfmpunybdupuy_1.pdf).

103 José E. Álvarez, *Hegemonic International Law Revisited*, 97 *American Journal of International Law, AJIL*, 4, 873-887 (2003).

104 José E. Álvarez, *Hegemonic International Law Revisited*, 97 *American Journal of International Law, AJIL*, 4, 873-887, 887 (2003).

105 This topic has special relevance in the case of the exercise of power and authority by international organizations such as the Security Council. Even if it is not the main focus of this paper, further references can be found in José E. Álvarez, *International Organizations: Accountability or Responsibility?*, Luncheon Address, Canadian Council of International Law, 35<sup>th</sup> Annual Conference on Responsibility of Individuals, States and Organizations, October 27<sup>th</sup>, 2006. Available at: <http://www.asil.org/aboutasil/documents/CCILspeech061102.pdf>.

International Law Association, *Accountability of International Organisations*, Final Report under the framework of the Berlin Conference (2004). Available at <http://www.ila-hq.org/en/committees/index.cfm/cid/9>.

outcomes, for instance in the case of international peace and security as a shared concern which merits the imposition of collective measures.

Complementary to this constitutional approach, the second restriction proposed is the attachment of the Council's action to the principle of proportionality. When adapted to the context of the legal function, such addressing means that "*the usual ways to create obligations of an abstract and general character must be adequate to achieve the aim by which they were implemented*",<sup>106</sup> in this case, the maintenance of international peace and security. If produced, Resolutions containing general binding obligations to the members of the United Nations should be considered as emergency legislation with the highest standards of preparation and monitoring provided the undemocratic way by which they were produced.

Thirdly, and assuming the international system as a whole, due attention has to be given to the preservation of the integrity of international law-making, considering that the present legal system cannot be overrode, especially because in any case there are pre-established mechanisms and procedures set forth to fill the gaps or generate an evolution of international law.<sup>107</sup>

Finally, special attention should be regarded on the structure of international obligations, as the existence of peremptory norms (*ius cogens*) implies a hierarchical limitation to the obligations produced by the Council.<sup>108</sup>

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106 Stefan Talmon, *The Security Council as World Legislature*, 99 *American Journal of International Law*, *AJIL*, 1, 175-193, 184 (2005).

107 In this case, the study dissents from Talmon's opinion, while he considers that the filling of a gap in international is a manifestation of the principle of proportionality. Stefan Talmon, *The Security Council as World Legislature*, 99 *American Journal of International Law*, *AJIL*, 1, 175-193, 184 (2005).

108 Erika de Wet mentions as examples the prohibition of unilateral use of force, the right to self-defence, the prohibition to commit genocide, the basic norms of International Humanitarian Law, the prohibition of racial discrimination and slavery, and the right to self-determination. Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, Oxford, Portland, 2004).

*B. Some proposals for the update of the United Nations System*

Finally, those perspectives aimed to limit the Council's action should be implemented without missing in the landscape a more comprehensive process of reform and/or clarification of the United Nations System (starting from the Charter) in order to reach higher standards of equality, transparency and inclusion:

- Clarify the constitutional nature of the Charter as it was explained before, while a way to develop a methodology to interpret the actions of the Organs of the United Nations System, especially the case of the Security Council when utilizing Chapter VII as the legal base to impose collective measures with a legislative content.
- Review the structure and composition of the Council, in order to create a space of deliberation whether an action would affect a group or all the members of the United Nations, such as the case of a legislative Resolution. This, as a materialization of the Principles and Purposes contained in the Charter, especially the sovereign equality of States.
- Notwithstanding a connatural margin of appreciation for executive actions requiring prompt and effective decisions, define precise parameters for the Council's activity in order to have predictable outcomes of the measures taken to comply with the maintenance of international peace and security.
- Consecration of the International Court of Justice's Judicial Review to certain acts produced by the Council, as a manifestation of the checks-and-balances principle, as well as a reconciliation with the traditional sources system.
- Impulse a real interaction among the Council and the other institutional bodies of the United Nations, in order to legitimize the System as a coordinated set of entities, specialized according to their mandate.

## CONCLUSIONS

This paper intended to reflect on the nature and scope of the Security Council's legislative action, provided its practice over the last years, while it enacted –at least– two resolutions which presumably contain general binding obligations to the members of the United Nations.

Indeed, the analysis of such practice showed that after the end of the Cold War the Council became more active into the production of Resolutions containing normative elements (abstractness, permanence, impersonality and binding force) which consolidated its main function according to the Charter of the United Nations; the maintenance of international peace and security. Therefore, and as a consequence of symbolic events and political forces interacting onto the world order, Resolutions 1373 (2001) and 1540 (2004) emerged upon the global legal framework as clear attempts of such Organ not just to be involved into a process of interpretation or application of international law, but also to take direct part into the international law-making.

Having solved this first question, the study focused on two aspects related to legislative action; on one hand, if the Council is lawfully supported by the legal System, and on the other, the justification for such activity. The conclusion is –notwithstanding different academic positions– that this Organ is neither acting legally *vis-à-vis* a comprehensive interpretation of the Charter, nor legitimized to assume such position, provided the dynamics of world order (defined by egalitarian horizontal relations between sovereign states), and the lack of a preliminary deliberative process associated with democracy and social inclusion.

The consequent concern is if after such considerations, one might affirm that the Council is monopolizing the power to serve the interest of its members, if it is producing *hegemonic international law*. The fact that it is legislating without a legal authorization is nothing but an example of how mankind's his-

tory constitutes a process of permanent power accommodation, where the international legal discourse is being used and/or abused. The proof is in the pudding: the Council's irony when using "*political reasons to look for innovative means to enforce the international rule of law*".<sup>109</sup>

Nevertheless, the ultimate appreciation from such process is not pessimist, because at the end the relation between law and reality is not entirely subjective, as the former is able to impose limits to its own scope (even if not always completely effective), as well as to remind that there is some essence deeply attached to the very concept of humanity which can't be distort.

Hence, the proposal consist on two fronts of action: the first one, through the implementation of short-term measures in order to limit the Council's scope of action. The second front should consist on a reform of the United Nations System, in order to reach higher standards of equality, transparency and inclusion.

Thus the Charter has to be assumed as a Constitutional Instrument which sets ranges and limits of action, and has to be systematically interpreted and integrated to the international legal system in a proper way. The main challenge will always be who interprets it, and how its content and scope is been clarified; that is to say, how the Rule of Law can be claimed taking into account its comprehensive nature.

Therefore, "*the Security Council has to balance the realization of its primary goal with the realization of the secondary goals in the Charter*".<sup>110</sup> Through this methodology both questions on legality and legitimacy are going to be raised and the system will be conceived from a structural point of view as a harmonic entity. A good complement for the constitutional interpretation of the Charter should be the ICJ review of the legislative acts emanated from the Council, as a way to maintain a healthy approach of checks and balances.

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109 Alan Boyle & Christine Chinkin, *The Making of International Law*, 112 (Malcolm Evans & Phoebe Okowa, eds., Foundations of Public International Law, Oxford, 2007).

110 Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, 193 (Hart Publishing, Oxford, Portland, 2004).

The aim, at the end, is to “*establish a new and equitable system of international relations based on the equal participation of all States in the solution of international problems and the maintenance of international peace and security*”.<sup>111</sup>

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111 GA Res. 34/103 (1979). *Inadmissibility of the Policy of Hegemonism in International Relations*, par. 9. Available at: <http://www.un.org/documents/ga/res/34/a34res103.pdf>

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