The United Nations Security Council, our new global legislator?

El Consejo de Seguridad de las Naciones Unidas, nuestro nuevo legislador global?

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RESUMEN: El Consejo de Seguridad es el organismo de las Naciones Unidas encargado de mantener la paz y la seguridad internacionales. En ese sentido, el Consejo de Seguridad tiene una amplia gama de mecanismos legales a su disposición, algunos de los cuales incluyen la posibilidad de promulgar resoluciones vinculantes que deben ser

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cumplidas por los miembros de las Naciones Unidas, y que también pueden hacerse cumplir. Sin embargo, el Consejo de Seguridad no fue creado como un órgano legislativo, y en ese sentido, es posible que, a través de la promulgación de resoluciones vinculantes que se asemejen a actos legislativos, el Consejo de Seguridad pueda estar actuando ultra-vires y como algún tipo de legislador global partiendo de su papel original en la Carta de las Naciones Unidas.

PALABRAS CLAVE: Consejo de Seguridad, Naciones Unidas, Actos legislativos, Resoluciones vinculantes, Legitimidad.

ABSTRACT: *The Security Council is the United Nations organism in charge of maintaining international peace and security. On that account, the Security Council has a wide range of legal mechanisms at its disposal, some of which, include the possibility to enact binding resolutions that must be complied by the members of the United Nations, and can be also enforced. However, the Security Council was not created as a legislative organ, and in that sense, it may be possible that trough the enaction of binding resolutions that resemble legislative acts, the Security Council may be acting ultra-vires and as some sort of global legislator departing from its original role in the United Nations Charter.*

KEY WORDS: *Security Council, United Nations, Legislative Acts, Binding Resolutions, Legitimacy.*

INTRODUCTION

Since the end of the Cold War, the Security Council (SC/Council) has obtained a dominant role in the United Nations (UN) system. Its participation in perhaps three of the most important events in contemporary modern history, the dissolution of Yugoslavia, the war in Iraq, and the war on terror and the raise of terrorism as a global threat, have positioned the SC as a powerful organism with broad capacities. The limits and scope of those capacities in fields such as international law-making, human rights, sovereignty and even the legitimacy of the UN system, have produced questions on the possibility that the SC may act as a global legislator through its binding resolutions.

The purpose of this work is to identify if such power should be allowed, and which advantages and disadvantages may develop from those capacities. In part 1 of this article we deal with the possibility

that legislative resolutions of the SC may be in accordance with its powers under the UN Charter (Charter). Additionally, we will analyse if their characteristics resemble those of legislative acts, and as such give support to the idea that the SC should be allowed to legislate. In part 2 we would take a look to possible limitations and doubts around SC legislative actions and will try to evaluate the good and bad outcomes that SC legislation might cause to the international community.

1. LEGAL EFFECT OF SECURITY COUNCIL DECISIONS

1.1 Power to legislate

According to Article 24 of the (United Nations, Charter of the United Nations, 1945) the main responsibility of the SC is the maintenance of international peace and security, as such, the SC is allowed, inter alia, to make recommendations or take those measures necessary to fulfill its duty. However, is there any possibility for the SC to act as a legislator in accordance with its powers as conferred by the Charter?

A traditional reading of the Charter would consider that the SC 'is not properly speaking an organ that creates law, but merely one that interprets and applies existing law' (Boyle and Chinkin, 2007, p. 109). Nonetheless, a review of the recent tendencies in the SC practice, allows us to see that on several occasions, the Council has acted in a broader sense than what would seem available to its powers under a conservative approach.

For instance, the Council has been able to create rights and obligations through its resolutions (UNSC, Resolution 143, 1960), to establish that the enactment of a national law constituted a violation of international law and consequently rendered those actions null and void (UNSC, Resolution 478, 1980). Furthermore, in a broader exercise of its duties, the SC has been able to delimitate a boundary between States, to determine the responsibility of a State under international law, and the adjudication of compensation claims (UNSC, Resolution 687, 1991). As such, the UNSC was able to make legally binding decisions based on questions of law, a matter that is generally conducted by a court (Boyle and Chinkin, 2007).

Some SC resolutions create organs that seem outside its powers under the Charter, like the International Criminal Tribunal for Former Yugoslavia (ICTY) (UNSC, Resolution 827, 1993), and the International Criminal Tribunal for Rwanda (ICTR) (UNSC, Resolution 955, 1994). Although the idea that the SC was authorized to create an international court was contested in the Tadic Case, on basis that the SC acted ultra vires (ICTY, Prosecutor v. Dusko Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para 27), the ICTY supported the actions of the Council by stating that the Charter allowed the SC a wide range of discretion when deciding how to perform its duties. Therefore, its activities, as described in Chapter VII of the Charter, should be understood only as examples of conduct. Specially, when implementing non-forcible measures to maintain international peace and security (ICTY, Prosecutor v. Dusko Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, paras 28-36).

In that sense, the ICTY sustained early findings of the International Court of Justice (ICJ) about the exercise of implicit powers by organs of the UN. As understood by the (ICJ, Reparation for Injuries Suffered in the Service of the United Nations (Reparation for injuries) Advisory Opinion, 1949), '[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication. As being essential to the performance of its duties'(p.182-183).

Consequently, even if no express authorization exists under the Charter, no provision would actually impair the SC from legislating. Specially if the Council supports its actions on implied powers that are necessary to upheld the objectives and purposed of the UN Charter and for the accomplishment of its duties.

1.2. The normative validity of UNSC Resolutions

For some authors, the normative value of a legal rule is shown by 'its capacity to oppose state policy as the key to its constraining relevance' (Koskenniemi,1990, p.8). In that case, to be considered as law, a norm should be able to maintain its independence from political considerations. To endow an eminently political organism like the SC with legislative powers would diminish the autonomy of international law. Consequently, a norm must be able to comply with some objec-

tive criteria, that 'will tell which standards qualify as legal rules and which do not' (Koskenniemi,1990, p.10).

Such standards can be assumed to exist in Article 38 of the ICJ Statute. SC resolutions are evidently political decisions, moreover, they are not mentioned in the acknowledged sources of international law. (United Nations, Statute of the International Court of Justice, 1945). However, such restrictive view would fail to appreciate the characteristics of SC resolutions as well as the importance that political procedures play in the formation of international law.

In first place, it is important to consider, that SC decisions have a superseding capacity. As sustained by the ICJ, they prevail over obligations contained in other instruments (ICJ, Libyan Arab Jamahiriya v. United States of America Provisional Measures, 1992), this is possible because the (United Nations, Charter of the United Nations, 1945) prescripts that 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail' (art.103). Consequently, UNSC resolutions are endowed, with a higher hierarchy than other sources of international law.

Furthermore, it is essential to take into account, that legal conceptions born within the municipal system of law, are not necessarily transferable to the international sphere. One of such ideas is the concept of a division of powers, that allows us to distinguish the legal character of measures sanctioned by different organs of the State, and set a clear difference and hierarchy between those enacted by a legislative organ, commonly regarded as law, and those understood as executive provisions.

The international community of States lacks such categorical distinction. As portrayed by the (ICTY, Prosecutor v. Dusko Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995), there is 'no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects'(paras 43). Therefore, the political and executive nature of the SC shouldn't undermine the legal nature of its resolutions, although some legal and constitutional limitations to

perform legislative should exist. This, however, will be reviewed in part 2 of this article.

1.3. Legal characteristics of UNSC resolutions

Another point of view tells us that the SC's legislative aptitudes can be measured by its capacity to 'enact general, abstract norms that are directly binding on all Member States of the UN' (Marschik, 2005, p.18). As described in the Charter, SC resolutions are compulsory. This means, that all members of the UN are obliged to comply with the decisions of the Council (United Nations, Charter of the United Nations, 1945). Furthermore, the binding effect of SC resolutions is also recognised by the ICJ, in terms of the (ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia Advisory Opinion, 1970), a 'binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence' (para.117).

However, can this mean that each and every one of the SC resolutions is endowed with binding capabilities? For some States SC decisions are only obligatory if they are related to breaches of peace or acts of aggression in conformity with Article 39 of the Charter (Higgins, 1976). As such, SC resolutions related to, inter alia, Chapter VI of the Charter, would lack a binding effect and should only be regarded as recommendations.

However, it's not clear if the intention of the drafters of the Charter was to restrict binding decisions of the SC to those enacted under Chapter VII, subsequent practice of States in this matter as well, makes no conclusive determination on the issue (Higgins, 1976). Perhaps then, the best view, is to rely on the actual intention and language of each SC resolution.

Therefore, when a resolution is construed as a decision rather than a recommendation it should be understood as binding to State members of the UN. Decisions obtained in conformity with Chapter VII dispositions should be accounted as the principal source for binding decisions of the SC (Boyle and Chinkin, 2007).

As mentioned by the (ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia Advisory Opinion, 1970):

'The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council'(para.144).

Furthermore, maintenance of peace and security is a vast field of action. As no definition of concrete ways on how to handle such duty exist in the Charter, the SC has been able to, inter alia, enact binding resolutions to reinstate democracy in a country (UNSC, Resolution 940, 1994), or to ask for the recognition of environmental damage (UNSC, Resolution 687, 1991).

Consequently, it seems clear that article 39 of the Charter grants the SC the power to determine the existence of those activities that constitute a risk to international peace and security. Likewise, SC resolutions are accorded prima facie validity (ICJ, Libyan Arab Jamahiriya v. United States of America Provisional Measures, 1992, para.42), and it is up to the SC to state its jurisdiction over those matters considered within its powers (ICJ, Certain expenses of the United Nations Advisory Opinion, 1962, p.168) .

On the issue of generality, however, many examples of SC practice seem to indicate that its resolutions are absent of such characteristic. For instance, SC decisions that dealt with terrorism, e.g. the resolution that demanded the extradition of three suspects in the assassination of the Egyptian president Mubarak (UNSC, Resolution 1054, 1996), or the request on the Taliban government of Afghanistan to surrender Osama Bin Laden (UNSC, Resolution 1267, 1999), created mandatory obligations based on Article 25 of the UN Charter. Yet, they were only focused on a specific situation and directed to particular States.

The same can be said about the creation of the ICTY and the ICTR, as both tribunals were shaped as a response to a singular event, and count with constrained jurisdictional capabilities. The ICTY was created for 'prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia'(UNSC, Resolution 827, 1993). While the ICTR was based on 'the sole purpose of prosecuting persons responsible

for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States' (UNSC, Resolution 955, 1994).

Another example is, SC Resolution 687, in which, the SC found Iraq liable for breaches of international law and consequently imposed a series of obligations on that State (UNSC, Resolution 687, 1991). As was mentioned before, those decisions were closer to actions developed by a judicial organism rather than those available to a legislative entity.

The possibility that the UNSC could exercise quasi-judicial powers was recognised by the (ICTY, Prosecutor v. Dusko Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995), by declaring that, 'the Security Council is not a judicial organ and is not provided with judicial powers (though it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings)' (para 37).

However, law making as developed by judicial organs differs from proper legislative acts. As understood by (Happold,2003), 'courts do play a law-making role, but that role is one of refinement and elaboration' (p.598). Therefore, even if the SC was acting under its quasi-judicial powers as a possibility recognised by the ICTY, the Council failed to create any general norm, 'that is, directed to indeterminate addresses and capable of repeated application in time' (Kirgis, 1995, p. 520). Because, as shown before, Resolution 687 only made determinations and imposed obligations applicable only to Iraq.

Nevertheless, Some SC resolutions can show that in fact, the Council has been able to create general norms for the whole international community when dealing with global threats such as terrorism or the proliferation of biological, chemical and nuclear weapons.

For instance, Resolution 1373 is a response to the infamous terrorist attacks that occurred on September 11, 2001, in that resolution, the SC decided that States should refrain from inter alia, financing terrorist acts, provide support to those who were involved in terrorist acts, and cooperate for the suppression of terrorist activities and the prosecution of its perpetrators (UNSC, Resolution 1373, 2001).

On its part, UNSC Resolution 1540 was created for the purpose of producing an 'effective response to global threats in the area of non-proliferation'(UNSC, Resolution 1540, 2004).

Both resolutions were endorsed as a response to a threat to international peace and security, however such risk is not defined as a particular situation. In case of Resolution 1373, the SC condemned the terrorist attacks that happened on US soil but acknowledged 'that such acts, like any act of international terrorism, constitute a threat to international peace and security' (UNSC, Resolution 1373, 2001).

Whereas in Resolution 1540 no indication was made to a precise case of 'proliferation of nuclear, chemical and biological weapons, as well as their means of delivery' (UNSC, Resolution 1540, 2004), but to the conduct itself. As such SC determinations made reference not to a concrete act as a threat to peace and security, but to an abstract phenomenon.

Furthermore, both resolutions are not addressed to a specific country financing or supporting terrorism (UNSC, Resolution 1373, 2001), or engaging in 'illicit trafficking in nuclear, chemical, or biological weapons and their means of delivery, and related materials'(UNSC, Resolution 1540, 2004). But to all States and as such its findings and obligations have general implications.

The characteristics of this resolutions also imply that they are not subject to a limited timeframe of operation. The abstract qualification of the activities that constitute threats to international peace and security demand that the measures contained within the resolutions be applicable as long as such behaviours remain in existence. Additionally, any permanent member of the UNSC would be able to ensure their permanence by exercising their right to veto (Caron, 1993,).

Conclusively, some SC resolutions can, in fact, resemble acts of legislation and can be performed in conformity with the powers bestowed upon the SC by the Charter. As such, and perhaps specially, in cases were a threat to peace and security may involve a risk of global scale, the SC should be allowed to pass legal decisions.

An over-conservative restraint upon the Council in the face of events as for example an atomic or biological threat by terrorist actors, may imply consequences of catastrophic proportionalities if not

every tool within the SC implicit or explicit powers can be used. That, however, shouldn't amount to an indiscriminate and unqualified use of the SC powers.

2. LIMITS AND LEGITIMACY

2.1. Consent and Coherence

From a positivistic point of view, the creation of international law is bound to the limitations of State consent (Boyle and Chinkin, 2007). As was mentioned by the (Permanent Court of International Justice, S.S. "Lotus", France v Turkey, (Lotus Case) Judgment,1927) 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will'(p.18).

Traditional sources of international law, such as conventions and custom are based on consent. In case of treaties, States freely accept or deny their participation within the regime of a convention (Vienna Convention on the Law of Treaties,1969), furthermore, they are allowed to present reservations to its provisions (Vienna Convention on the Law of Treaties,1969).

In the case of customary norms, a State can be exempted from the application of a rule in the process of becoming international custom, if it has visibly opposed its existence, becoming by this a persistent objector (Thirlway, 2014).

Consequently, it would seem that, SC resolutions of a legislative character could render the right of States to be bound by rules of their own choosing void, since there is no recognised possibility to opt out from a binding resolution of the SC. Specially because, as we saw in part 1 of this article, SC resolutions are granted overriding capacities from other sources of international law.

However, it is important to consider, that SC decisions are binding upon all State members of the UN due to provisions of Article 48 and 25 of the Charter. As such State members of the UN have acquiesced to the mandatory and overriding nature of SC resolutions. A state-

ment not without importance in a world where almost every State is a member of the UN[2].

Additionally, the possibility that the SC would be able to implement 'immediate, mandatory and enforceable changes to international law'(Boyle and Chinkin, 2007, p.233), should not be necessarily interpreted as an adverse scenario, because of the potential that binding resolutions may have for the promotion of coherence in international law (Boyle and Chinkin, 2007). For instance, SC Resolution 1373, 'creates uniform obligations for all 191 member states to the United Nations, thus going beyond the existing international counterterrorism conventions and protocols binding only those that have become parties to them.'(Rosand, 2003, p.234)

As no general definition of terrorism has been obtained due to absence of agreement, and therefore a comprehensive regime able of addressing the issue of global terrorism is still vague (Boyle and Chinkin, 2007). SC Resolution 1373 was able to fill some of the gaps in what (Boyle and Chinkin, 2007) call 'the piecemeal approach to law-making against terrorist activity' (p.4).

Thanks to its Counter-Terrorism Committee, Resolution 1373 allowed almost every State to 'take steps to enhance its counter-terrorism machinery, whether in the form of adopting anti-terrorism legislation, strengthening border controls, becoming party to international treaties related to terrorism, or becoming proactive in denying safe haven to terrorists and their supporters' (Rosand, 2003, p.548).

2.2. Sovereign Equality and effectiveness

The principle of sovereign equality of States is recognised in article 2 (1) of the Charter. In its legislative expression, it refers to the right of States to equally participate in the formation of international law (Simpson, 2004). Consequently, a question may rise towards the extent in which the participation of States in the process of international law-making, may be affected by legislative acts of an organ that lacks universal participation and is limited by the power of five permanent

2 For an actual account on how many States are part of the United Nations, see the United Nations web page, <http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> accessed 8 April 2017

members with a right to veto. Particularly, when other law-making procedures are available and perhaps endowed with a higher amount of legitimacy.

As for example, those performed under the General Assembly (GA), an organism that is able to 'adopt resolutions on any subject, convene law-making conferences, adopt treaties and initiate codification projects' (Boyle and Chinkin, 2007, p.116). Certainly, the GA has played a pivotal role in the development of international law, the number of instruments sponsored by the GA, and its capacity to influence the formation of customary law should not be underestimated (Boyle and Chinkin, 2007).

However, law-making by treaties is a cumbersome process, negotiation, as well, as the ratification needed for a treaty to be in force can take several years. This can also be said about the amendment processes required to keep up a convention in conformity with the ever-changing moments of the international community.

Although, Umbrella treaties, like the UNFCCC, acknowledge swifter methods of amendment and further development of a treaty trough institutional bodies that are allowed to make, 'within its mandate, the decisions necessary to promote the effective implementation of the Convention' (United Nations, United nations framework Convention on Climate Change,1994, art.7). And the existence of package deal treaties that allow a faster process of negotiation trough consensus such as UNCLOS are certainly examples of a quicker process for the creation of international norms. No assurance of an immediate response can be expected when dealing with an imminent and unpredictable threats to international peace and security like terrorism.

In terms of the (United Nations High-level Panel on Threats, Challenges, and Change, A more secure world: our shared responsibility, 2004):

> 'Several United Nations anti-terrorist conventions have laid important normative foundations. However, far too many States remain outside the conventions and not all countries ratifying the conventions proceed to adopt internal enforcement measures. Also, attempts to address the problem of terrorist financing have been inadequate' (p.49).

When inactivity presents itself as a menace to prevent a threat to international peace and security of a major scale, perhaps the safest path is to ensure effective action. Even if this amounts to renounce a small portion of sovereignty. As sustained by (Fassbender, 2000):

> '[T]he world clearly requires an exercise of more, no less authority on a global level [...] For the alternative is either inertia or unilateral action taken by a State or a group of States without assuring the target State and the general membership of the international community of that minimum of participation and procedural justice which is characteristic of the decision-making process of the Security Council'(p.14).

For some authors like (Koskenniemi, 1995), '[t]he Charter was meant to be based on a separation of functions. Therefore, usually, the Council and the Assembly operate independently of one another' (p.337). According to article 12 of the UN Charter, the SC role in matters of international peace and security supersedes those of the GA. In that sense, the SC was crafted as both a hierarchical and effective organism.

As portrayed by (Blum,2005), when talking about the "More Secure World" report of the UN, the 'Security Council "was created to be not just a representative but a responsible body, one that had the capacity for decisive action." To this end, the "five permanent members were given veto rights but were also expected to shoulder an extra burden in promoting global security' (p.639).

Such task, however, is only possible as much as those States who are not part of the SC are allowed to participate and decide in other matters of the organisation (Koskenniemi, 1995). Consequently, we can say that the GA balances the SC as it endows legitimacy to an otherwise hegemonic organisation.

Therefore, the danger that legislative resolutions of the SC seem to entail to sovereign equality can be minimized, when like with Resolution 1373, those decisions are able to find support in previous GA declarations (United Nations, General Assembly Declaration 49/60, 1994), or sponsored conventions (United Nations, International Convention for the Suppression of the Financing of terrorism, 2002).

2.3. Legitimacy

SC resolutions effectiveness comes hand in hand with the perceptions of legitimacy that surround not only the decision in itself but its whole process of adoption. As exposed by (Caron, 1993), 'If the U.N. loses its credibility, the Security Council would still be able to order governments about, but its orders would have lost their international sheen and look more like big-power bullying' (p.560).

As we mentioned in part 1 of this article, the international system doesn't recognise a clear-cut separation of powers. This, however, doesn't amount to an unqualified use of the powers of an organism. (Sato, 2001) has advanced the idea that it is possible to evaluate if the SC is acting in a legitimate way by 'adopting a frame of reference based on the type of decisions the council makes' (p. 330).

For instance, when proceeding within the spectre of its quasi-judicial powers, the SC is not allowed to seize 'a judicial function which does not belong to it but to other organs of the United Nations according to the Charter'(ICTY, Prosecutor v. Dusko Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 38).

As such the establishment of the ICTY answered to an exercise of the SC primary duties towards international peace and security and was enacted 'pursuant to an authority found within its constitution, the United Nations Charter' (ICTY, Prosecutor v. Dusko Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 44).

Consequently, when the SC conducts itself in a legislative manner, a qualification of its behaviour may rise from the limits to its powers within the Charter. Articles 24 and 25 for example constrict the SC to act in conformity 'with the Purposes and Principles of the United Nations' (United Nations, Charter of the United Nations, 1945, arts. 24-25), allowing its decisions to be binding inasmuch they are ordained in accordance with the Charter.

As such, the view adopted by the ICJ, that an action committed for the accomplishment of the purposes of the UN Charter cannot be understood as ultra vires (ICJ, Certain expenses of the United Nations Advisory Opinion, 1962,), can be interpreted in the opposite sense. Any action that goes against the objectives and purposes of the Char-

ter should be understood as beyond its limits (Boyle and Chinkin, 2007), and therefore as illegitimate.

But are such qualifications possible, specially in a system, where judicial review of SC resolutions is a highly contested issue? (Alvarez, 1996). Indeed, no explicit allowance of judicial review is found within the UN Charter, and the (ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia Advisory Opinion, 1970) has expressly mentioned that 'the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned' (para.89).

Even if that possibility is accepted, judicial review SC decisions is limited, due to the pre-eminence of the SC in matters of international peace and security. Judicial review does not create 'any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such determination.' (Judge Elihu Lauterpacht, Separate Opinion Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1993, para. 100).

However, in some cases, courts have been able to interpret the Charter and evaluate the legal significance of SC resolutions. As for instance, on the limits, that peremptory norms impose over SC resolutions. For instance, (Judge Elihu Lauterpacht, 1993) clearly stated that:

'The concept of jus cogens operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot - as a matter of simple hierarchy of norms - extend to a conflict between a Security Council resolution and jus cogens' (para.100).

Another example can be found in the actions of the ICTY, where the Court sustained its capacity to conduct a legal review of a SC resolution on the incidental powers used for deciding its competence (ICTY, Prosecutor v. Dusko Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995). Consequently, although limited, judicial review is a tool that may be used by States or Organs of the UN to question the legitimacy of SC resolutions by addressing the legal and constitutional limitations of SC powers.

Furthermore, judicial review, specially by the ICJ should not be understood as the only available instrument for addressing issues of legitimacy. In that sense general acceptance can be understood as the more common assessment of legitimate decisions (Alvarez, 1996).

For instance, articles 10, 17 and 22 of the Charter, grant the GA the power to discuss any matter related with the Charter or with UN organisms, have pre-eminence over budget matters, and the possibility to create organisms that may question the legitimacy of SC decisions, those capacities, should not be undervalued. Additionally, other UN organisms and even entities outside the UN would be able to present a challenge to SC resolutions on questions of legitimacy within their competence (Alvarez, 1996).

Conclusively the SC is not an all-powerful organism capable of creating binding decisions on every matter. Its regulated, in first place by the restraints imposed by the objectives and purposes of the Charter, and by Jus Cogens. And in second place by the legitimacy of its actions, because although the SC capabilities in the field of international peace and security are certainly broad, its decisions can only be effective inasmuch as they are recognised as legitimate by the State members of the UN.

Organisms within the UN system, like the GA, may be able to operate as a counterbalance to SC powers. While other instances like the ICJ may be useful tools for considering the validity of SC resolutions. Therefore, to allow a qualified exercise of legislative powers to the SC, won't automatically affect the legitimacy of the UN and perhaps may even strengthen it.

Although several proposals to reform the SC composition have been advanced, the necessary consensus for the reforms, and the acceptance of the permanent members of the SC has not been reached. As such their realization is still elusive (Blum, 2005) and (Slaughter, 2005). In that sense, perhaps all these efforts would be better canalized to clarify SC legislative procedures and its limitations.

3. CONCLUSIONS

SC legislative activities are a reality. Several examples of SC practice show us that the Council has been able to operate in a wider sense that

would seem possible under a positivistic reading of the UN Charter. Furthermore, some of its decisions share the characteristics of legislative acts.

Likewise, SC law-making decisions seem to be in conformity with the UN Charter. Support for legislative activities of the SC can be found in the exercise of its implied powers for accomplishing its duties under the Charter. As well as in the acquiescence of the States parties of the UN to its actions.

Additionally, SC legislation may bring positive outcomes, because of its possibilities for improving the coherence of international law. Moreover, it is a quick and effective mechanism to resolve impending crisis on a global scale. Yet only if they are concluded under a legitimate process and within the limitations imposed by the UN Charter and Jus Cogens.

4. REFERENCES

Alvarez, J. E. (1996). Judging the security council. American Journal of International Law, 90(1), 1-39.

Boyle, A., and Chinkin, C. (2007). The making of international law. OUP Oxford.

Blum, Y. Z. (2005). Proposals for UN Security Council Reform. American journal of international law, 99(3), 632-649.

Caron, D. D. (1993). The legitimacy of the collective authority of the Security Council. American Journal of International Law, 87(4), 552-588.

Fassbender, B. (2000). Council, Its Powers and Its Legal Control. EJIL, 11(1), 219-232.

Happold, M. (2003). Security Council resolution 1373 and the constitution of the United Nations. Leiden Journal of International Law, 16(3), 593-610.

Hlggins, R. (1972). The Advisory opinion on Namibia*: Which un Resolutions are Binding under Article 25 of the Charter?. International & Comparative Law Quarterly, 21(2), 270-286.

Kirgis, F. L. (1995). The Security Council's first fifty years. American Journal of International Law, 89(3), 506-539.

Koskenniemi, M. (1990). The politics of international law. Eur. J. Int'l L., 1, 4.

Koskenniemi, M. (1995). The Police in the Temple Order, Justice and the UN: A Dialectical View. Eur. J. Int'l L., 6, 325.

Marschik, A. (2005). The Security Council as World Legislator?: Theory, Practice and Consequences of an Expanding World Power. International Law and Justice Working Papers, 2-35.

Rosand, E. (2003). Security council resolution 1373, the counter-terrorism committee, and the fight against terrorism. American Journal of International Law, 97(2), 333-341.

Rosand, E. (2004). The security council as Global Legislator: ultra vires or ultra innovative. Fordham Int'l LJ, 28, 542.

Sato, T. (2001). The Legitimacy of Security Council Activities under Chapter VII of the UN Charter since the end of the Cold War. The legitimacy of international organizations, 309-352.

Simpson, G. (2004). Great powers and outlaw states: unequal sovereigns in the international legal order (Vol. 32). Cambridge University Press.

Slaughter, A. M. (2005). Security, solidarity, and sovereignty: The grand themes of UN reform. American Journal of International Law, 99(3), 619-631.

Thirlway, H. (2010). The sources of international law. International law, 2, 115.

Treaties and other legal instruments

Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945) (UN Charter)

United Nations, Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) (ICJ Statute)

United Nations Security Council Resolution 143 (adopted 14 July 1960)

Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) (1969 VCLT)

United Nations Security Council Resolution 478 (adopted 20 August 1980)

United Nations Security Council Resolution 687 (adopted 3 April 1991)

United Nations Framework Convention on Climate Change (opened for signature 4 June 1992, entered into force 21 March 1994) (UNFCCC)

United Nations Security Council Resolution 827 (adopted 25 May 1993)

General Assembly Declaration 49/60 'Measures to Eliminate International Terrorism' (adopted 9 December 1994)

United Nations Security Council Resolution 940 (adopted 31 July 1994)

United Nations Security Council Resolution 955 (adopted 9 November 1994)

United Nations Security Council Resolution 1054 (adopted 26 April 1996)

United Nations Security Council Resolution 1267 (adopted 15 Oct. 1999)

International Convention for the Suppression of the Financing of Terrorism (opened for signature 10 January 2000, entered into force 10 April 2002)

United Nations Security Council Resolution 1373 (adopted 28 September 2001)

United Nations Security Council Resolution 1540 (adopted 28 April 2004)

List of cases

S.S. “Lotus”, France v Turkey, (Lotus Case) Judgment, (1927) PCIJ Series A no 10, ICGJ 248 (PCIJ 1927)

Reparation for Injuries Suffered in the Service of the United Nations (Reparation for injuries) Advisory Opinion (1949) ICJ

Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962 ICJ Reports 1962

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971

Questions of Interpretation and Application of the 1971 Montreal Convention

arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Order of 13 September 1993, separate opinion of Judge ad hoc Lauterpacht

Prosecutor V. Dusko Tadic A/K/A “Dule” (Tadic case) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (1995) ICTY case (IT-94-1)

Other Sources

United Nations High-level Panel on Threats, Challenges, and Change, A more secure world: Our shared responsibility (United Nations Department of Public Information 2004)

United Nations, ‘Growth in United Nations membership, 1945-present’ (www.un.org 2017)