

STUDENT PAPER

Interpretation of legislative Security Council resolutions

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1. Introduction

This paper starts, as indeed do many such papers, with the premise that the end of the Cold War heralded a major shift in international politics and international law. For decades, tense political and diplomatic relations had deadlocked the system that, after the last World War, was established to secure international peace and security: the system of the United Nations (UN). As a result, its most powerful body, the Security Council, operated for years as a lame duck.¹ However, the sudden and peaceful decline of the USSR between 1989 and 1991, and the subsequent end to the diplomatic freeze between East and West, enabled the organs of the UN to finally explore the full potential of their powers. The Kuwait crisis in the early 1990s provided an opportunity for the Security Council to flex its muscles, authorising states to use ‘all necessary means (...) to restore international peace and security in the area.’² Since then, the Security Council has invoked its power to impose binding obligations on UN Member States on numerous occasions. For example, it obliged Libya to extradite those suspected of the Lockerbie bombing,³ established criminal tribunals for the former Yugoslavia and Rwanda⁴ and took action against Taliban support for suspected terrorists in Afghanistan.⁵

A second cliché, which this paper takes as a point of departure, is that the terrorist attacks of 11 September 2001 have had a huge impact on the constitution of the international political and legal system. The effects can be felt on many levels. Locally, the heightened security

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1 For instance, before 1990 the Security Council hardly ever used its power to legitimise the use of force. Pre-1990 practice consists of the authorisation of the use of the UN flag in the Korea War (1950-1953) in Resolution 84 (7 July 1950) and the enforcement mandate granted to ONUC in the Congo in 1961 (Resolution 161, 21 February 1961). The former, however, was only possible because of the Russian boycott of the Security Council meetings and the fact that Taipei occupied the seat of China. The latter could only be passed with two abstentions (Russia and France). See E.C.Luck, *UN Security Council – Practice and Promise*, 2006, pp. 49-51, and B. Conforti, *The Law and Practice of the United Nations*, 2005, pp. 68-69.

2 Security Council Resolution 678, UN Doc. S/RES/678 (1990).

3 Security Council Resolution 748, UN Doc. S/RES/748 (1992).

4 Security Council Resolution 827, UN Doc. S/RES/827 (1993), establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Security Council Resolution 955, UN Doc. S/RES/955 (1994), establishing the International Criminal Tribunal for Rwanda (ICTR).

5 Security Council Resolution 1267, UN Doc. S/RES/1267 (1999). See also A. Marschik, ‘The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power’, *IJLL Working Paper 2005/8*, accessible at <http://www.ijll.org/publications/2005-18Marschik.asp>, accessed on 26 October 2008.

measures at airports and other important landmarks affect the daily lives of millions of people. On a national level, the consequences of the 'war on terrorism' are illustrated by the installing of new governments in Afghanistan and Iraq. The developments even reach the global institutional level. Shortly after the terrorist attacks in New York, the Security Council passed Resolution 1373.⁶ Contrary to all earlier binding resolutions, this text does not explicitly address any particular situation, but instead confronts the general threat of 'international terrorism'.⁷ The document imposes wide obligations on the UN Member States, such as to 'take the necessary steps to prevent the commission of terrorist acts'.⁸ Along similar lines, Resolution 1540 (2004)⁹ requires states to 'refrain from providing any form of support to non-State actors that attempt to develop (...) nuclear, chemical or biological weapons'.¹⁰ In effect, both Resolution 1373 and Resolution 1540 impose general and abstract obligations that are not limited in space or time.¹¹ As such, they add a new and unprecedented feature to the power of the Council: the power to legislate.¹²

The fact that the UN Charter allows the Security Council to impose binding obligations on UN Member States in a particular crisis seems undisputed.¹³ This does not mean, however, that a legislative role of the Security Council is generally accepted. On the contrary, many scholars have argued that the United Nations Charter does not provide a legal basis for such a power.¹⁴ As this article shows, however, the international community of states display a high level of political acceptance of the Council's expanded abilities. In other words, while the resolutions seem to lack a firm legal foundation in the Charter, they might be politically validated by the general UN membership.

This poses interesting questions for the role of such resolutions in the international legal and political arena. In particular, it raises concerns about the validity of the resolutions. This, in turn, is reflected in the methods for their interpretation. Confusion as to the correct interpretation of Security Council resolutions can have far-reaching consequences, as the 2003 invasion of Iraq evidenced.¹⁵ Since there is serious doubt about the validity of Resolutions 1373 and 1540 within the academic and diplomatic community, the question of their interpretation becomes ever more relevant. This article first considers what distinguishes 'traditional' from legislative Security Council resolutions. It subsequently looks at the grounds of validity of the latter. These findings are used to determine guidelines for the application and interpretation of these texts.

6 Security Council Resolution 1373, UN Doc. S/RES/1373 (2001).

7 Interestingly, no definition of this concept was provided and neither is there a generally accepted international definition available.

8 See *supra* note 6, Para.2(b).

9 Security Council Resolution 1540, UN Doc. S/RES/1540 (2004).

10 *Ibid.*, Para. 1.

11 See S. Talmon, 'The Security Council as World Legislature', 2005 *American Journal of International Law*, p. 176.

12 See, for instance, L. Szasz, 'The Security Council Starts Legislating', 2002 *American Journal of International Law*, pp. 901-905 and Talmon, *supra* note 11.

13 See, for instance, M. Perrin de Brichambaut, 'The Role of the United Nations Security Council in the International Legal System', in: M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, 2000, pp. 269-276.

14 See, for instance, B. Elberling, 'The *Ultra Vires* Character of Legislative Action by the Security Council', 2005 *International Organizations Law Review*, pp. 337-360, and D.H. Joyner, 'Non-proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council', 2007 *Leiden Journal of International Law* pp. 489-518.

15 See E. Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis', 2007 *International and Comparative Law Quarterly*, pp. 83-118.

2. 'Traditional' Security Council resolutions

2.1. General characteristics of Security Council resolutions

A Security Council resolution is the formal medium of the Council to express its collective will.¹⁶ Accordingly, in the broadest terms it is a decision by an organ of an international organisation: the UN.¹⁷ Despite the generality of this statement, certain crucial elements can be derived from it.

First, by virtue of being a decision of an organ, resolutions are *unilateral* acts.¹⁸ This means that the Security Council can impose its decisions upon UN Member States that are not members of the Security Council, without the consultation or consent of the latter. The absence of the subjected parties in the decision-making process distinguishes resolutions from treaties, to which all parties have to agree in order to be bound.¹⁹

A second characteristic is that resolutions, by virtue of being decided within the framework of an international organisation, are not adopted in a legal vacuum.²⁰ As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) stated,

'[t]he Security Council is an organ of an international organisation, established by a treaty which serves as a constitutional framework for that organisation. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organisation at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organisation. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (not bound by law).'²¹

Thirdly, it is important to realise that Security Council resolutions are principally political documents, which could possibly have legal effect. They are generally drafted in an atmosphere of political negotiation, not as an exercise of legal reasoning.²²

2.2. Procedural considerations

The political nature of these resolutions is reflected in their drafting procedure. Resolutions are generally proposed, amended and agreed upon in informal negotiations, often involving only a few members. Typically, one delegation prepares a text that is circulated among and revised by small groups of states. The results are then presented in informal consultations with the rest of the Council, where the representatives agree on a final formulation.²³ The formal adoption takes

16 See Art. 25 1945 UN Charter, 3 Bevens 1153. Another, though unofficial, means are Presidential Statements. These Statements are normally read out at public meetings of the Security Council, after prior approval by all the Council's members. See S. Hulton, 'Council Working Methods and Procedure', in: D.M. Malone (ed.), *The UN Security Council – From the Cold War to the 21st Century*, 2004, p. 238, and F.L. Kirgis, 'The Security Council's First Fifty Years', 1995 *American Journal of International Law*, pp. 519-520.

17 See C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2005, p. 61

18 See M.C. Wood, 'The Interpretation of Security Council Resolutions', 1998 *Max Planck Yearbook of International Law* p. 75, and Papastavridis, *supra* note 15, pp. 87-88.

19 See M. Bos, 'The Interpretation of Decisions of International Organizations', 1981 *Netherlands International Law Review*, p. 5, and Papastavridis, *supra* note 15, pp. 87-88.

20 See, for instance, N. Angelet, 'International Legal Limits to the Security Council', in: V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, 2001, pp. 71-82, and D. Tladi, 'Reflections on the rule of law in international law: the SC, international law and the limits of power', 2006 *South African Yearbook of International Law*, pp. 231-243.

21 *Prosecutor v. Dusko Tadic*, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995, Para. 28.

22 Wood, *supra* note 18, pp. 80-82.

23 *Ibid.*, p. 80.

place in an official meeting, which often lasts no longer than two minutes.²⁴ According to Article 27 (3) of the UN Charter, resolutions have to be accepted by at least nine Security Council members, including all five permanent members.²⁵

Unsurprisingly, the Council is not very open to political and legal input from outside.²⁶ For a long time, the Council's sources of information were limited to those available to its Member States and third state participation was rarely seen. Since 1994 the Council now attempts to hold more public meetings, to include the wider UN membership in its daily business and to make more decisions by consensus, all with moderate success.²⁷ Other initiatives to increase the openness and transparency of the Council, such as increasing interaction with NGOs in so-called Arria Formula meetings,²⁸ providing information on the outcome of informal consultations and the improvement of the Presidential website,²⁹ have been displayed in the last decade. Moreover, there seems to be a trend towards consensus in Council decision-making, so as to increase the legitimacy and effectiveness of the Council.³⁰

2.3. Limits on resolutions

There are several types of Security Council resolutions, such as organisational resolutions, resolutions that contain recommendations and resolutions that are binding on Member States.³¹ For this article, the latter type is of primary interest. Under Chapter VII of the UN Charter, the Security Council can impose legal obligations on all UN Member States, thereby altering the rights and obligations of states.³² Article 103 of the UN Charter determines that such binding Council resolutions, being Charter obligations, prevail over obligations under other international agreements.³³ The power of the Council is far-reaching: whereas Articles 40 and 41 allow the Council to impose diplomatic sanctions, economic blockades or the interruption of means of communication, it can ultimately authorise the use of military force based on Article 42 of the Charter. It is interesting to note that the Council generally does not specify the articles it is acting under, but simply provides a general reference to Chapter VII.

There is an important limitation to this far-reaching decision-making power of the Council: in line with Article 39 of the Charter, it can only be applied in case of a threat to or a breach of the peace, or in case of acts of aggression. However, the Council has a very wide discretion to determine the existence of such a situation. For a large part, this is due to the political, rather than legal nature of these concepts.³⁴ Accordingly, the use of this power is often controversial and

24 *Ibid.*, pp. 80-81.

25 This is generally referred to as the veto power of the permanent members. Although the Charter explicitly requires an affirmative vote by the permanent members, it is a rule of customary law that permanent members may abstain from voting. See Conforti, *supra* note 1, pp. 65-68.

26 Wood, *supra* note 18, p. 80.

27 Security Council Presidential Statement, UN Doc. S/PRST/1994/81 (1994). See also Hulton, *supra* note 16, p. 237 and pp. 241-246.

28 *Ibid.*, p. 244.

29 *Ibid.*, p. 246.

30 *Ibid.*, p. 237.

31 See Amerasinghe, *supra* note 17, pp. 163-168, and Conforti, *supra* note 1, pp. 295-296.

32 See Perrin de Brichambaut, *supra* note 13, pp. 269-276, and A. Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', 2005 *European Journal of International Law*, p. 61.

33 E. Rosand, 'The Security Council as Global Legislature: *Ultra Vires* or *Ultra Innovative*', 2004 *Fordham International Law Journal*, p. 556, Orakhelashvili, *supra* note 32, p.69, and Conforti, *supra* note 1, pp. 292-293, Perrin de Brichambaut, *supra* note 13, p. 274, and V. Gowlland-Debbas, 'The Functions of the UNSC in the International Legal System', in: M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, 2000, p. 294.

34 See *Tadic* case, *supra* note 21, Para. 29, and S. Lamb, 'Legal Limits to United Nations Security Council Powers', in: G. Goodwin-Gill *et al.* (eds.), *The Reality of International Law: essays in honour of Ian Brownlie*, 1999, pp. 374-379.

disputed.³⁵ Yet in general the following elements of a binding Security Council decision can be discerned.³⁶ First, the Security Council should act in response to an existing situation or crisis. Secondly, the situation or crisis, and thus the scope of the resolution, is limited to a particular country or region: the legal effect of the resolution does not reach beyond the particular crisis which the resolution seeks to address. Thirdly, the application of the resolution is restricted in a temporal dimension. Some resolutions contain a clear timeframe. Others may be restricted rather implicitly, but it is understood that the decision ceases to justify the obligations it puts on Member States when the threat to the peace dissolves. Fourthly, the Council's action should be directed at the enforcement of existing international legal obligations. In other words, it should apply the standards set by the international community, not its own standards. Fifthly and finally, every resolution is tailored to a specific situation and it cannot be taken as a prediction of what the Council will do in a similar situation.³⁷ To sum up, every resolution is a unique response to a particular situation that does not purport to create a legal precedent.

3. International legislation

Up until 2001, the decision-making power of the Security Council was, in practice and principle, limited to the criteria described above. In the aftermath of the 9/11 terrorist attacks, this has changed. Two decisions by the Council, Resolution 1373 (2001) and Resolution 1540 (2004), seem to go beyond the ambit of previous resolutions. In the academic literature, they are often qualified as exercises in international legislation.³⁸ Before we examine the latter term, we will take a brief look at the content and context of the two much-discussed resolutions.

3.1. Resolutions 1373 and 1540

When it comes to their structure and scope, Resolutions 1373 and 1540 are rather similar. Both tackle the global fear of terrorism and contain three main elements.³⁹ First, acting under Chapter VII of the UN Charter, they impose obligations on the conduct of states. For example, where Resolution 1373 '[d]ecides that all states shall prevent and suppress the financing of terrorist acts', Resolution 1540 obliges states to 'refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery.' Second, both resolutions call upon all states to adopt and respect all relevant international treaties. Resolution 1373 even reproduces some provisions from the 1999 International Convention for the suppression of the Financing of Terrorism (ICFT) directly in its text.⁴⁰ Third, the resolutions set up subsidiary committees to the

35 An interesting example is the Council's determination in Resolution 748, *supra* note 3, that the refusal of Libya to extradite two suspects in the Lockerbie case constituted a threat to the peace, although existing international law did not oblige Libya to do so. See Lamb, *supra* note 34, pp. 378-379.

36 Joyner, *supra* note 14, pp. 506-507, and Szasz, *supra* note 12, pp. 901-902.

37 It cannot however be guaranteed that it will not have this effect in practice, see P. Hulstrij, 'The Legal Function of the Security Council', 2002 *Chinese Journal of International Law*, p. 69.

38 See Elberling, *supra* note 14, M. Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations', 2003 *Leiden Journal of International Law*, pp. 593-610, Joyner, *supra* note 14, R. Lavalley, 'A Novel, if Awkward, Exercise in International Law-Making: Security Council Resolution 1540', 2004 *Netherlands International Law Review*, pp. 411-437, Marschik, *supra* note 5, Rosand, *supra* note 33, pp. 542-590, Szasz, *supra* note 12, pp. 901-905, Talmon, *supra* note 11, pp. 175-193.

39 See Happold, *supra* note 38, p. 594.

40 International Convention for the suppression of the Financing of Terrorism, adopted by the UN General Assembly in Resolution 54/109, UN Doc. A/RES/54/109 (1999), entered into force on 10 April 2002. Two other relevant General Assembly Declarations on the elimination of terrorism had preceded resolution 1373, namely in General Assembly Resolution 49/60, UN Doc. A/RES/49/60 (1994) and General Assembly Resolution 51/210, UN Doc. A/RES/51/210 (1996). The Security Council did not refer to either of these resolutions. See Szasz, *supra* note 12, p. 903.

Security Council to monitor their implementation, known as the Counter-Terrorism Committee (CTC) and the 1540 Committee respectively. Interestingly, neither of the resolutions provides for a non-compliance regime.

Regardless of their outer similarities, one striking procedural difference stands out. Resolution 1373 was adopted within two weeks after its triggering event, the terrorist attacks of 11 September 2001, and was drafted in opaque, bilateral negotiations. In contrast, the discussion on Resolution 1540 started in the autumn of 2003, more than six months before its eventual adoption.⁴¹ This process culminated in a public debate in the Security Council on 22 April 2004, which was open to and attended by non-members of the Council.⁴² Many states expressed caution towards the expansion of the power of the Security Council. The representative of Mexico voiced the concern of many by stating that

‘(...) my delegation is concerned about the precedent that this draft resolution could set for the handling of other new issues on the world agenda. We are not only concerned about the proliferation of parallel regimes to those already established, using channels outside the norms of existing treaties, but also about the growing trend that the Security Council seeks to legislate, particularly with regard to issues that have their own regime of rights and obligations, even if incomplete when it comes to non-State actors. We require resolute commitments from States and, in order to achieve that, we need the wide participation and discussion of all actors.’⁴³

This opinion was echoed by many other countries, especially by non-Western countries that feared that the Security Council was becoming an international legislator.⁴⁴ The next section will try to discover whether these concerns are justified.

3.2. International legislation

What is international legislation? Yemin characterises legislative acts, including those of organs of international organisations, as follows: ‘[l]egislative acts have three essential characteristics: they are unilateral in form, they create or modify some element of a legal norm, and the legal norm is general in nature, that is, directed to indeterminate addressees and capable of repeated application in time.’⁴⁵

In addition, Talmon states that ‘the hallmark of any international legislation is the *general and abstract character* of the obligations imposed.’⁴⁶ In this light, can Resolutions 1373 and 1540 be qualified as legislative resolutions?

The first criterion is that the resolutions should be unilateral in form. As decisions of the Security Council, Resolutions 1373 and 1540 both tick that box.⁴⁷ Secondly, the resolutions should create or modify some element of a legal norm. In both cases, the Security Council has acted under Chapter VII of the UN Charter, imposing binding norms on UN Member States. In both cases, too, new legal norms are created or modified. The adoption of Resolution 1373 turned

41 See Marschik, *supra* note 5, p. 16.

42 Security Council 4950th meeting, UN Doc. S/PV.4950 and S/PV.4950 (Resumption 1) (2004).

43 *Ibid.*, p. 5.

44 See, for example, the statements by Algeria and South Africa, Record of Security Council 4950th meeting, *ibid.*, pp. 5 and 22.

45 E. Yemin, *Legislative Powers in the United Nations and Specialized Agencies*, 1969, p. 6.

46 Talmon, *supra* note 11, p. 176 (emphasis in text)

47 See Section 2.1.

the then non-binding norms of the ICFT into rules of general global application.⁴⁸ Similarly, Resolution 1540 filled a gap in the existing international legal framework.⁴⁹ The third element of Yemin's definition of international legislation draws attention to the most controversial element of the resolutions: their general and abstract character. Up until 2001, all binding Security Council decisions had addressed a specific situation with a clear geographical and temporal limitation. Resolutions 1373 and 1540, however, deal with *global* threats, respectively the threat of 'international terrorism' and the proliferation of nuclear, chemical and biological weapons to non-state actors. 'International terrorism' is nowhere defined in Resolution 1373, nor is there a generally accepted definition of this concept.⁵⁰ Resolution 1540 tries to clarify notions such as 'means of delivery' and 'non-state actor', but these descriptions remain rather vague and they do not apply outside the context of the resolution itself.⁵¹ Furthermore, the resolutions have no direct addressees. Although it could be argued that both resolutions were drafted with certain particular target states in mind, the fact that they oblige *all* UN Member States to make far-reaching changes to their domestic legal systems underlines their general application. Moreover, the resolutions do not provide a restriction in time. Whereas the mandates of the CTC and the 1540 Committee need to be extended once in a while, the obligations on Member States seem to apply indefinitely. The fact that Member States are left with a wide discretion to implement the norms again suggests that the latter are of a 'general and abstract character'. With this last element, all criteria set by Yemin and Talmon have been fulfilled. It would thus be quite right to qualify Resolutions 1373 and 1540 as *legislative* resolutions.

3.3. Legal and political impact of legislative resolutions

Taking into account the fact that various states have expressed their concerns about Security Council legislation, do states accept the new powers of the Council, and do they consider themselves bound by the resolutions? On the one hand, states seem to be critical towards legislative acts of the Council. Several delegations held that they can only be used in 'exceptional circumstances',⁵² and almost all states displayed concern with regard to these powers being too readily applied. On the other hand, there are clear indications of a positive attitude towards both resolutions and their underlying policies. First, both resolutions are generally regarded as necessary and useful tools in the fight against terrorism.⁵³ Accordingly, they were adopted unanimously.⁵⁴ Secondly, many states are currently in a process of revising their domestic laws to adapt them to the requirements of the resolutions, and they actively cooperate in capacity-building and information-sharing projects.⁵⁵ Thirdly, the work of the CTC and the 1540 Committee is universally endorsed. The vast majority of states have submitted the obligatory country

48 By the time of the adoption of resolution 1373, only four states had ratified the Convention. It entered into force on 10 April 2002, after the twenty-second ratification by San Marino. Currently, 167 states are parties to the Convention. See UN Treaty website of the ICFT, accessible at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=373&chapter=18&lang=en>, accessed on 25 October 2008.

49 Nineteen of the states that spoke at the public meeting of the Security Council on 22 April 2004 explicitly recognised the existence of a gap in international law relating to the non-proliferation of nuclear, chemical and biological weapons. See Record of Security Council 4950th meeting and resumption, *supra* note 42. See also Rosand, *supra* note 33, pp. 546-551.

50 The General Assembly adopted a very broad definition of 'terrorism' in Resolution 49/60, UN Doc. A/RES/49/60 (1994), but this resolution is not conclusive, nor does it speak of 'international terrorism'. See A. Cassese, *International Law*, 2001, pp. 258-259.

51 See Laval, *supra* note 38, pp. 429-430.

52 See Record of Security Council 4950th meeting, *supra* note 42, especially the statements by the Philippines, Switzerland, Korea and Liechtenstein.

53 The same countries as mentioned in note 52, together with many others, applauded the decisive action of the Security Council.

54 Voting records can be found at <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&menu=search&submenu=power#focus>, accessed on 25 October 2008.

55 E. Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism', 2003 *American Journal of International Law*, p. 337, and Marschik, *supra* note 5, p. 16.

reports, and they are often multiple reports.⁵⁶ Furthermore, subsequent resolutions have extended the mandate of both committees in time, and added tasks and instruments.⁵⁷ All in all, there seems to be little doubt that state practice has acknowledged the new legislative powers of the Security Council.

The latter conclusion raises an interesting question. On the one hand, the above-mentioned displays a political acceptance of Resolutions 1373 and 1540 by the international community. States feel obliged to comply with the rules laid down in both resolutions and to act accordingly. It thus seems that they accept the validity of these rules. On the other hand, this does not prove that the UN Charter provides a legal basis for legislative action by the Security Council. The next question that arises is thus: what is legal basis for the new powers of the Council? Can it be the UN Charter, or are there other means of validity?

4. Legislative resolutions and the UN Charter

4.1. General legal framework of Security Council resolutions

Article 24 lays down the main function of the Security Council: it has ‘primary responsibility for the maintenance of international peace and security’, and thus acts on behalf of all UN Member States when carrying out these responsibilities. The powerful position of the Council in the UN system is guaranteed by Article 25, which states that ‘the Members of the United Nations agree to accept and carry out the decisions of the Security Council *in accordance with the present Charter*’ (emphasis added). Accordingly, a decision by the Council is only binding when it is *intra vires*,⁵⁸ that is, when it complies with the UN Charter. But what does compliance with the Charter actually mean?

In general, Security Council decisions have to comply with a set of procedural rules and certain substantive limitations. The former are laid down in Articles 27 to 32 of the UN Charter. An example of the latter can be found in Article 24(2) of the Charter, namely that the Security Council ‘shall act in accordance with the Purposes and Principles of the United Nations’. The Purposes and Principles are listed in Articles 1 and 2 of the Charter. Two aspects of these provisions should be highlighted. First, Article 1 names as one of the Purposes the ‘principles of justice and international law’. Is the Council thus bound by existing international law, even if it acts under Chapter VII of the Charter? This seems to be disputed.⁵⁹ However, it could be argued that, even if the Charter does not explicitly bind the UN to international law, this does not mean that its organs are not bound by it.⁶⁰ Moreover, there are certain legal provisions that are considered to be so important that no state is allowed to derogate from them. These are generally known as norms of *ius cogens*. It would be awkward if states would be able to establish an organ to circumvent norms from which they themselves cannot derogate.⁶¹

56 Currently, all UN Member States have submitted one or more reports to the CTC and the total number received is over 600, whilst 137 countries have submitted their report to the 1540 Committee. The countries that have not sent in their report are all countries with limited administrative capacities. See <http://www.un.org/sc/ctc/page9.html> and <http://www.un.org/sc/1540/nationalreports.shtml>, accessed on 25 October 2008.

57 See, for example, Security Council Resolution 1535, UN Doc. S/RES/1535 (2004) and Resolution 1624, UN Doc. S/RES/1624 (2005), enhancing the CTC, and Security Council Resolution 1637, UN Doc. S/RES/1637 (2006), extending the mandate of the 1540 Committee.

58 Lamb, *supra* note 34, p. 367.

59 ‘On the question of applying the law to the United Nations itself, there is a surprising degree of uncertainty as to whether the organisation is bound by, for example, the human rights treaties for which it has been the primary vehicle.’ Chesterman, ‘An international Rule of Law?’, 2008 *American Journal of Comparative Law*, p 352. See also Rosand, *supra* note 33, p. 556.

60 Tladi, *supra* note 20, pp. 233-234.

61 Orakhelashvili, *supra* note 32, p. 60.

Secondly, an important Principle of the UN is that ‘nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State.’⁶² There is one important *caveat*: the Security Council’s powers under Chapter VII are not limited by this provision. Still, the inclusion of this text points to the fact that the application of Chapter VII powers, also in the case of legislative resolutions, should always be balanced against the principle of state sovereignty.⁶³

In conclusion, it seems that decisions of the Security Council are only valid if they remain within the framework of the UN Charter. Accordingly, the Security Council has to take into account the requirements of general international law, and must abide by *ius cogens* norms. Moreover, it has to consider the sovereignty of the UN Member States when it applies its decision-making power. To what extent do the legislative resolutions comply with these requirements?

4.2. *Limits of the Charter*

When it adopted Resolutions 1373 and 1540, the Security Council stated that it was ‘acting under Chapter VII of the Charter of the United Nations.’ It was previously pointed out that Chapter VII resolutions can only respond to existing situations, that their application is limited in space and time, and that they can only apply existing international law – exactly the four requirements from which legislative resolutions derogate.

Can the validity of legislative resolutions be based on Chapter VII? A closer look at Article 39 might provide us with some interesting insights. The article reads as follows:

‘[t]he Security Council shall determine the existence of any threat of the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.’

Two major issues of interpretation arise. First, the Security Council may only issue binding decisions in case of a ‘threat to the peace, breach of the peace, or act of aggression.’ Resolutions 1373 and 1540 both deal with global and general threats. Do such situations fall within the scope of a ‘threat to the peace’, as provided for in Article 39? Secondly, Article 39 states that the Council may take ‘measures’. These measures are listed in Articles 40, 41 and 42. It might be questioned whether the term measures includes the imposition of general obligations.⁶⁴

With regard to the first issue, it has been argued that an expansion of the scope of ‘threat to the peace’ fits within a development that has been going on for decades. Originally, the notion merely applied to inter-state conflict. Over the years the concept has been broadened, so as to include intra-state conflict and conflicts between states and non-state actors. Taking into account that the concept of a ‘threat to the peace’ is primarily a political notion, it has been argued that the inclusion of global threats by non-state actors is the next step in the development of the concept.⁶⁵ There is, however, one major flaw in this argument. The concept of a ‘threat to the peace’ has been progressively interpreted so as only to include new and different actors. Whereas, traditionally, a conflict was fought between the military of different states, it is now recog-

62 Article 2(7) of the UN Charter.

63 Lamb, *supra* note 34, pp. 368-379.

64 Talmon, *supra* note 11, pp. 179-182.

65 *Ibid.*, and Rosand, *supra* note 33, pp. 553-555.

nised that an internal struggle between domestic factions can constitute a threat to the peace as well. Still, this new definition applies only to specific situations. Never before has the leap been made from a threat to the peace in a specific situation to a threat to the peace on a global scale. The determination that ‘international terrorism’ poses a threat to the peace is as abstract as the statement that ‘violent conflict’ constitutes a threat to the peace. Article 39 of the UN Charter makes it clear that the Security Council cannot adopt general rules relating to violent conflict *in abstracto* – it can only respond to an existing situation. As an analogy, the adoption of general rules dealing with international terrorism goes beyond the language of Article 39 of the Charter.

Secondly, some argue that the term ‘measures’ is wide enough to include general and abstract obligations. This argument, however, is vulnerable to a similar critique as that mentioned above. Talmon states that ‘if the Council can require states to freeze the funds of every single person who commits a specific terrorist act, it must – *a fortiori* – also be able to order states to freeze the funds of all persons who commit such acts. In this sense, the imposition of general obligations is nothing but the generalization of individual obligations.’⁶⁶

Whereas this might seem logical, it should be emphasised that the generalisation of individual obligations is not just the result of a slippery slope, but that it fundamentally alters the character of the norm. When the Security Council decides to freeze the funds of one person or entity, this can be seen as a sanction. If, however, the Council decides to generalise its action, it is no longer imposing a sanction – it is applying a general rule. The terms ‘sanction’ and ‘rule’ differ greatly, exactly on the issue of generality: a sanction applies to a particular person or entity in a particular situation, whereas a rule applies to unidentified addressees in an indefinite number of situations. Linguistically, the term ‘measure’ points to a sanction rather than a rule. The explicit and repeated use of the word ‘measures’ in Articles 40, 41 and 42 signals a deliberate choice for incidental instruments, and precludes the Security Council from imposing general and abstract obligations. This argument can be reinforced if we take a look at the type of enforcement instruments that can be applied under the said articles. For example, Article 41 lists the severance of economic or diplomatic relations, or the interruption of infrastructure or means of communication as possible actions by the Security Council, whereas Article 42 mentions ‘demonstrations, blockades and other operations by air, sea or land forces.’ All these instruments are typically applied to specific situations. Although the Security Council has a wide discretion to decide on the proper instruments to deal with a threat to the peace, it cannot use this discretion to alter the nature of these instruments.⁶⁷

We have to conclude that Chapter VII of the UN Charter does not provide a satisfactory basis for the legislative powers of the Security Council. The term ‘threat to the peace’ cannot be interpreted to include general and global threats. Furthermore, the use of the term ‘measures’ in Articles 40 to 42 of the Charter does not allow for the imposition of rules of general application. In other words, there is no explicit legal basis for the Council’s law-making powers in the Charter – the legislative resolutions seem to be invalid. There are, however, several ways to argue why these powers should be implied. The next section demonstrates why these arguments cannot uphold Chapter VII as a legal basis for legislative resolutions.

66 Talmon, *supra* note 11, p. 182.

67 Marschik, *supra* note 5, pp. 6-7.

4.3. Remedying the legal gap?

The first possible remedy might be provided by the idea of implied powers.⁶⁸ With respect to the UN, the ICJ remarked that ‘under 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’.⁶⁹ Can it be inferred that the Security Council needs legislative powers to adequately execute its tasks? The Charter is explicit in granting the Council an executive role, not a legislative one.⁷⁰ Accordingly, implying the power of law-making in the Council’s mandate not only greatly increases the power of the Council, it also significantly changes its function. Instead of being a ‘norm applier’, it would become a ‘norm creator’. It is doubtful whether the ICJ ever intended the doctrine of implied powers to have that effect.

Secondly, the validity gap might be filled through an evolutionary interpretation of the Charter. Some authors have argued that the Charter should not be interpreted too rigidly, but that it has to be considered as a ‘living tree’.⁷¹ These academics applaud the pragmatic approach of the Security Council to new and unexpected threats, which they argue could constitute a fundamental change of relevant circumstances.⁷² In their eyes, these new conditions allow for a broad interpretation of the UN Charter. Since the Charter is a treaty, its interpretation is governed by the Vienna Convention on the Law of Treaties (VCLT).⁷³ Articles 31 to 33 of the VCLT state, *inter alia*, that the terms of a treaty should be interpreted in accordance with their ordinary meaning, in light of their context and objects and purposes. According to some, the new threats of terrorism and nuclear, chemical and biological weapons necessitate a teleological interpretation to prevail over the ordinary meaning of the provision: new threats require the adoption of innovative instruments. However, it seems strange that such a loose line of argument could fundamentally alter the interpretation of well-established legal provisions. There should be room for an evolutionary interpretation of international legal provisions to keep the system in touch with political reality. This does not mean, however, that under-defined threats such as ‘international terrorism’ and ‘non-proliferation’ can be wheeled in to justify an interpretation with radical new effects.⁷⁴ This would create a dangerous precedent, which would make foreseeable the extension of Security Council powers in the areas of HIV/AIDS, bird flu and global hunger – all possible ‘threats to the peace’, if we allow for creative interpretation.

A third remedy that has been put forward is that of subsequent practice by states. In line with Article 31(3)(b) of the VCLT, it could be argued that the acquiescence of states to *ultra vires* acts, such as the adoption of legislative resolutions, rectifies the lack of a legal basis in the UN Charter.⁷⁵ Proponents of this argument attach great importance to the Charter as the fundamental source of validity for legislative resolutions. On closer analysis, it seems that they consider the acquiescence of states to be a tacit amendment to the Charter, so as to validate the law-making powers of the Council. This paper rejects such reasoning. The remedy of acquiescence is too weak a justification for such far-reaching powers. The subsequent practice of states

68 *Ibid.*, p. 7, and J. Klabbers, *An Introduction to International Institutional Law*, 2002, pp. 67-73.

69 *Reparations for Injuries Suffered in the Service of the United Nations*, [1949] *ICJ Reports*, p. 12.

70 Whereas according to Art. 10 of the UN Charter the General Assembly ‘may discuss any question or any matter within the scope of the present Charter’, the Security Council is vested with ‘the responsibility for the maintenance of international peace and security’.

71 Rosand, *supra* note 33, pp. 569-573. See also Talmon, *supra* note 11, pp. 178-182, and Lavalley, *supra* note 38, pp. 421-424.

72 Lavalley, *supra* note 38, p. 422.

73 1969 Vienna Convention on the Law of Treaties, 1155 *United Nations Treaty Series* p. 331.

74 Elberling, *supra* note 14, pp. 351-352, and Happold, *supra* note 38, pp. 598-601.

75 Marschik, *supra* note 5, pp. 7-8.

may be helpful in the progressive interpretation of the UN Charter, but it cannot constitute an amendment to it.

In summary, we have seen that the UN Charter does not provide for a satisfactory legal basis for Resolutions 1373 and 1540. Chapter VII and other provisions of the Charter simply do not allow for law-making powers of the Security Council. In other words, the Charter cannot provide validity for legislative resolutions. Accordingly, it seems that the Security Council acted in excess of its authority when it adopted the legislative resolutions – it acted *ultra vires*.⁷⁶ We have seen earlier, however, that states fully accept the binding nature of these resolutions, that they act on them, and that they feel bound by their provisions: they consider the resolutions to be valid. On the one hand, we accept that, as a political fact, states approve of the legislative power of the Security Council. On the other hand, the Charter cannot validate these powers. How can we reconcile these two opposites? To answer this question, we have to reconsider the grounds of validity for Security Council resolutions.

5. Validity of Security Council resolutions

5.1. Validity and the UN Charter

Many authors have argued that the Security Council acted *ultra vires* when it adopted Resolutions 1373 and 1540, and that, they state, these resolutions are invalid regardless of their political support.⁷⁷ In short, the contested argument is that the UN Charter does not account for the law-making power of the Security Council, so that the fruits of the exercise of this power are invalid. When we dissect this argument, we find that it is based on the following scheme of deductive reasoning: a) a Security Council resolution is only valid if its substance can be based on the UN Charter, b) the Security Council had no power under the UN Charter to adopt legislative Resolutions 1373 and 1540, so c) Resolutions 1373 and 1540 are invalid. There is nothing wrong with the logic of this scheme. However, this article argues that the first premise of the argument is incorrect. Premise a) states that the validity of a resolution is solely based on compliance with a higher norm, namely the UN Charter.⁷⁸ The question is whether validity in international law should be understood in such an exclusive way. To answer this question, we will take a look at how the validity of Security Council resolutions is determined in practice.

5.2. How to determine validity

According to Lauterpacht, ‘the whole question of the effect of illegal acts is closely linked with that of the existence of suitable machinery for determining whether the act is in fact illegal’.⁷⁹ Indeed, the validity, or invalidity, of an act or decision cannot be established unless there is a way to challenge it. When we apply Lauterpacht’s statement to the issue of legislative resolutions, it calls on us to discern what is the ‘suitable machinery’, if any, for the determination of the validity

76 E. Osieke, ‘The Legal Validity of Ultra Vires Decisions of International Organizations’, 1983 *American Journal of International Law*, p. 239.

77 Elberling, *supra* note 14, pp. 352-355, Happold, *supra* note 38, pp. 609-610, Joyner, *supra* note 14, pp. 515-518.

78 Compare the positivist notions of Hart’s Rule of Recognition and Kelsen’s Grundnorm. According to Hart, the Rule of Recognition is a secondary rule that provides for the validity of primary, ‘normal’ rules. See H. Hart, *The Concept of Law*, 1994, pp. 100-123. Similarly, Kelsen argued that ‘the legal system is a strictly linear and hierarchical or pyramidal structure. Within this structure, the validity of a norm results purely from its conformity to a superior norm, ending with the norms of norms, or ‘grundnorm’, the unity of the system deriving here from this formal method of norm creation’, quoted from Gowlland-Debbas, *supra* note 33, p. 278.

79 E. Lauterpacht, ‘The Legal Effect of Illegal Actions of International Organisations’, in: D. Bowett *et al.* (eds.), *Cambridge Essays in International Law: Essays in Honour of Lord McNair*, 1969, p. 115.

of Resolutions 1373 and 1540. In theory, there are two possible entities that could determine their validity: either the ICJ or the UN Member States themselves.⁸⁰

In the past few decades, there has been a fierce debate on the possibility of a review of Security Council resolutions by the ICJ.⁸¹ On the one hand, many authors acknowledge the usefulness of a judicial review of Security Council acts, to ensure that the Council does not act *ultra vires*. On the other hand, there are those who argue that a legalistic approach fails to recognise the political position of the Security Council. This debate has not seen a winner as yet. However, even if it would be decided that the ICJ is able to review Security Council acts, there are certain significant practical problems that would limit the Court in its work. Firstly, the ICJ can only rule on Security Council resolutions in incidental cases. As a consequence, the review power of the ICJ would remain limited to Council decisions that play a part in a dispute between two or more state parties.⁸² A second problem is that the Security Council itself cannot be a party to a dispute before the ICJ – it lacks standing. This means that it cannot defend its actions when challenged. Moreover, the fact that the Council cannot act as a respondent precludes states from directly filing complaints against a Council decision, without the existence of an inter-state dispute.⁸³ Thirdly, the Statute of the ICJ does not provide for justiciable standards to review these acts. Accordingly, it has been argued that the ICJ should show deference to the political nature of the Council's decisions.⁸⁴ Fourthly, as Doehring argues, 'if a party should ever win a case, due to a Court's decision denying the binding force of a resolution, a third state, not being party in that case, may use the decision as an argument, but it cannot claim not to be bound on account of this decision.'⁸⁵ The existence of these substantive and procedural problems lead to the conclusion that the ICJ does not have the power to review the validity of Security Council acts, and that even if it would, this power would not be very effective.

The alternative is that Member States themselves determine the validity of Security Council decisions. Since formal procedures are absent, states can signal their approval or disapproval only through their actions. We have seen that state practice widely endorsed the adoption of Resolutions 1373 and 1540. States have acted upon these texts, and consider themselves bound by their provisions. This article argues that it is exactly this process that validated the resolutions. This form of validation goes beyond mere acquiescence or approval: state practice is not an aid in the interpretation of the Charter, but an independent source of validity itself. The argument here is that the practice of states, combined with their perception of a legal obligation, constitutes a basis for the validity of Security Council resolutions. We can formulate this differently: the existence of the objective element of state practice and the subjective element of a sense of legal obligation among the UN Member States establishes a legal rule that forms the basis for the validity of legislative resolutions – as such, this rule is customary in nature. Its function is to set out the criteria of validity for Security Council resolutions, even if these resolutions seem *ultra vires* at

80 G. Nolte, 'The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections', in: M. Byers, *The Role of Law in International Politics: Essays in International Relations and International Law*, 2000, pp. 316-320, Elberling, *supra* note 14, pp. 352-355, Joyner, *supra* note 14, pp. 515-518, D. Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter*, 2001, pp. 205-205.

81 See, for example, K.R. Cronin-Furman, 'The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship', *Columbia Law Review*, 106 (2006) pp. 435-463, Elberling, *supra* note 14, pp. 352-355, Joyner, *supra* note 14, pp. 515-518.

82 Elberling, *supra* note 14, p. 353.

83 Joyner, *supra* note 14, p. 517.

84 *Ibid.*

85 K. Doehring, 'Unlawful Resolutions of the Security Council and their Legal Consequences', 1997 *Max Planck Yearbook of United Nations Law*, pp. 91-92.

first sight. Before we go into the nature of this rule, the next section will explain how rules of customary law can validate Security Council resolutions.

5.3. *Validity through custom*

‘International custom, as evidence of a general practice accepted as law’ is one of the primary sources of international law, according to Article 38(1)(b) of the ICJ Statute. Its two constituent elements, namely ‘general practice’ that is ‘accepted as law’, are commonly referred to as the requirements of state practice and *opinio iuris*. The former requires the existence of a practice that is ‘both extensive and virtually uniform’.⁸⁶ Practice does not have to be universal and absolute: it is enough if the majority of states engage in consistent practice.⁸⁷ The second element holds that this practice ‘should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.’⁸⁸ In other words, states must perceive the practice as being dictated by international law. Traditionally, the development of international custom is seen as a slow process. Recently, however, it has been argued that the temporal element has lost some of its weight.⁸⁹ It may be concluded that rules of customary international law can emerge swiftly if there is convincing evidence of state practice and *opinio iuris*.

When we apply these requirements to Resolutions 1373 and 1540, we see that in both cases a great majority of states have accepted the power of the Security Council to adopt legislative resolutions. Moreover, states use these resolutions to justify their own acts and domestic legal reforms. Consequently, there seems to be a consistent practice of states allowing the Council to legislate, thus fulfilling the first requirement for the establishment of international custom. Strikingly, states also deem themselves to be bound by the resolutions. Accordingly, states seem to accept as law that in certain circumstances the Security Council can validly lay down general and abstract rules of international law that are binding on all states. The element of *opinio iuris* is established. We can thus identify a new rule of customary international law which validates the legislative resolutions.

It is not the first time that international custom is invoked as a basis for the validity of *ultra vires* acts. Two examples come to mind. First, in the *Namibia* case, the ICJ upheld the validity of Security Council Resolution 284 (1970), although two permanent members had abstained from voting. According to the Court, such a procedure ‘has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.’⁹⁰ Another, somewhat different example arose in the aftermath of the Kosovo crisis in 1999. In 2002, the United Kingdom formulated Guidelines that would allow for humanitarian intervention outside the UN Charter. In a public speech, the Foreign Secretary Robin Cook listed six principles that together would serve as a sufficient legal basis for an act normally thought to be in breach of international law.⁹¹ It is important to note that, if they would have been accepted as international custom, the Guidelines would not have created a direct right of humanitarian intervention. Rather, they set out criteria that could validate such an intervention in particular circumstances. The Guidelines

86 *North Sea Continental Shelf (Fed. Rep. of Germany v. the Netherlands)*, [1969] ICJ Reports, p. 43.

87 Cassese, *supra* note 50, p. 123.

88 *North Sea Continental Shelf*, *supra* note 86, p. 43. See also *The Case of the S.S. Lotus (France v. Turkey)*, [1927] PCIJ, Series A, no. 10, p. 28.

89 M. Byers, ‘The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq’, 2002 *European Journal of International Law*, pp. 33-34, and I. Brownlie, *Principles of Public International Law*, 2003, p. 7.

90 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] ICJ Reports, p. 22.

91 See United Kingdom Guidelines on Humanitarian Intervention, in: D.J. Harris, *Cases and Materials on International Law*, 2004, pp. 957-958.

take the prohibition on intervention in the domestic jurisdiction of other states as their point of departure. However, they recognise that an intervention might be valid if it is in reaction to an overwhelming humanitarian catastrophe, if it complies with the requirements of proportionality and if it is conducted as a collective, rather than unilateral, action.

The mere fact that these Guidelines were presented by a permanent member of the Security Council shows that states are not unwilling to find sources of validity for Council resolutions outside the UN Charter. It is true that the Guidelines have never been accepted as reflecting international custom. Still, they provide an interesting example of the possible content of a customary rule validating international acts. In the next section, we will see that the rule regarding legislative resolutions is of a similar nature.

5.4. A new rule of customary law: nature and consequences

We have to be very careful to determine the exact content of the customary rule that validates legislative resolutions. It is easy to think that the substance of the legislative resolutions itself has become part of international custom, such as the obligation to freeze the accounts of terrorists or the duty to prevent the sale of nuclear weapons to non-state actors. While this might be the case, it is not the point of this article. The rule of customary international law that emerged from the repeated adoption of legislative resolutions is in fact quite similar to the Guidelines on humanitarian intervention. It does not state that the Security Council can freely legislate. Rather, its starting point is that the UN Charter regulates the validity of Council conduct. Yet it holds that certain actions that go beyond the Council's mandate as formulated in the UN Charter might still be valid, as long as they comply with the conditions that the new rule lays down. Accordingly, in the words of H.L.A. Hart this would be a rule of a secondary nature, setting out the criteria with which primary rules have to comply to in order to be valid.⁹²

As stated, this new rule of customary international law does not do away with the UN Charter as a basis for the validity of Security Council actions. It remains an authoritative source of international law that can be used to validate actions by its organs. This article argues, however, that it is no longer the sole source of validity for these acts. It is held that states themselves have set new parameters against which they measure the validity of Security Council resolutions.

In order to have a good understanding of the nature of these parameters, we have to consider the earlier finding that there are no formal procedures to challenge the validity of Council acts. As a result, conclusions as to their validity must be drawn from state practice. Yet in the international arena the conduct of states is primarily motivated by political arguments, whilst legal considerations play a minor role.⁹³ As a consequence, the approval of legislative action by the Security Council is granted on the basis of criteria that are greatly inspired by political considerations. This means that the criteria for validity are highly political in nature and that they may leave some room for interpretation by states. An important consequence is that we should reassess our strict reading of validity. Traditionally, a resolution can be either valid or invalid.⁹⁴ This article does not go so far as to reject this distinction. It does hold, however, that

⁹² Hart, *supra* note 78, pp. 79-99.

⁹³ See, for instance, A. Watts, 'The Importance of International Law', in: M. Byers, *The Role of Law in International Politics*, 2000, pp. 5-16.

⁹⁴ See, for example, Judge Morelli who held that 'there are only two alternatives for the acts of the Organisation: either the act is fully valid, or it is an absolute nullity, because nullity is the only form in which invalidity of an act of the Organisation can occur', in *Certain Expenses of the United Nations*, [1962] *ICJ Reports*, p. 222, Separate Opinion of Judge Morelli. There is a difference between nullity and invalidity: if an act is null and void, it is invalid *ab initio*. Other invalid acts are deemed valid until they have been successfully challenged. See Joyner, *supra* note 14, pp. 515-518, and Elberling, *supra* note 14, pp. 352-355.

since validity is based on politically-inspired criteria, the one resolution may be more valid than the other. In other words, while the invalidity of a resolution remains an either/or question, the validity of resolutions that have passed the threshold depends on their degree of validity. Accordingly, this article follows the line of the Independent Kosovo Committee, which observed that ‘one way to analyze (...) international law (...) is to consider legality a matter of degree. This approach acknowledges the current fluidity of international law (...), caught between strict Charter prohibitions (...) and more permissive patterns of state practice (...).’⁹⁵

The point here is that the validity of legislative Security Council resolutions can be measured against the politically-inspired criteria of the new rule of customary international law. The more a resolution complies with these criteria, the more valid it is. The degree of validity of a resolution can influence the willingness of the international community to engage in enforcement action. To use the Guidelines as an example, the level of intensity of a humanitarian catastrophe determines whether the international community should react with diplomatic sanctions, or whether it should apply military force. As an analogy, the degree of validity of a legislative resolution might determine whether states start to harmonise their criminal legal systems to tackle international terrorism, or whether they merely enhance police cooperation. In other words, the compliance of a resolution with the new criteria has great influence on the interpretation and application of these texts. A more valid resolution can be interpreted more forcefully than a decision that fulfils the criteria of validity to a lesser extent. The exact content of the criteria is laid out in the next section. In order to define them, we will first contrast the legislative resolutions with ‘ordinary resolutions’ and with treaty law.

6. Criteria for the validity of legislative resolutions

6.1. Legislative and ‘ordinary’ resolutions

We have seen that, in principle, a binding Security Council decision can only be taken in response to a particular crisis. Such a decision is limited in space and in time, and is restricted to the application of existing international law. We have concluded that Resolutions 1373 and 1540 do not comply with these restrictions. Still, countries have accepted the binding nature of these legislative resolutions. What could be the reasons for their conduct?

First, most states recognise that international terrorism and the proliferation of nuclear, chemical and biological weapons constitute a serious threat to the international community.⁹⁶ Moreover, it is acknowledged that this threat is of a general and global nature.⁹⁷ Second, it should be recalled that many countries stress the exceptional circumstances under which both resolutions have been adopted.⁹⁸ The emphasis on the extraordinary character of the situation implies that states only feel bound by Resolutions 1373 and 1540 as long as there is some situation, or at least a feeling, of emergency. Third, it is important to realise that both legislative resolutions build on existing law. Resolution 1373 applies certain provisions of the ICFT, while Resolution 1540 fills a gap in the existing legislation. Although the resolutions did create new rules of international law, these rules were more or less implied in existing legal provisions. In this light, it could be held that a legislative resolution might be regarded as a provisional measure; it serves to

95 Independent International Commission on Kosovo, *The Kosovo Report*, p. 62, accessible at <http://www.reliefweb.int/library/documents/thekosovoreport.htm>, accessed on 26 October 2008. See also Byers, *supra* note 89, pp. 36-37.

96 See, for instance, the statements of the Philippines, Algeria, Switzerland, Iran, Argentina and France during the public meeting of the Security Council on 22 April 2004, *supra* note 42.

97 See, for instance, Talmon, *supra* note 11, pp. 180-181, and Rosand, *supra* note 33, pp. 546-551.

98 See Section 3.3.

temporarily bridge a gap in existing legislation until a more definitive solution is found. It has indeed been argued that legislative action by the Security Council does not independently extend the body of international law. Rather, its main accomplishment is to speed up the process of international law-making.⁹⁹ Rosand notes that ‘in sum, the traditional law-making approach was proving inadequate for dealing with the global and imminent terrorist threat.’¹⁰⁰ In short, the existence of exceptional circumstances, their temporary nature and the clear links with existing law seem to benefit the legislative resolutions in their attempt to overcome the fact that their characteristics differ greatly from ‘ordinary’ decisions of the Security Council.

6.2. Legislative resolutions v. treaty law

There is one striking difference between inter-state treaties and Security Council resolutions: a treaty only binds parties that have consented to its provisions, whereas resolutions are imposed unilaterally. The fact that only the fifteen members of the Security Council, out of 193 UN Member States, decide on the resolutions signals a great ‘democratic deficit’.¹⁰¹ This is generally presented as one of the strongest arguments against the general law-making power of the Council; many authors argue that such power is contrary to the basic structure of international law, which is built on consensus.¹⁰² It is, however, not an argument that cannot be overcome. One remedy is to make the Security Council more open, representative and transparent. The Council itself learnt from the rather secretive and swift adoption of Resolution 1373; Resolution 1540 was only adopted after diligent negotiations with all the members of the Council and a public meeting in which the general UN membership could voice its opinion.¹⁰³ This was a first step in the process of reforming the working methods, and perhaps even the structure, of the Council. The results are not only reflected by the fact that Member States accepted the resolutions; it affected the format of the resolution as well. Whereas Resolution 1373 provides no definitions of key notions such as ‘international terrorism’, Resolution 1540 provides at least basic qualifications for terms such as ‘means of delivery’, ‘non-state actors’ and ‘related materials’. It is true that these definitions themselves remain rather vague. However, the imprecise nature of the resolutions might serve a purpose. The wide discretion that is left to the Member States makes it easier for the latter to accept the resolutions. States are allowed some room for the interpretation of the resolutions, which compensates for the lack of participation in the decision-making process.

6.3. New criteria: an inventory

From these considerations the following criteria can be deduced. First, a legislative resolution has to respond to a serious threat to the peace which is also a threat of a general and global nature. Secondly, it is to be seen as an exceptional measure, only to be applied in, and limited in time to, exceptional circumstances. Thirdly, there should be a clear link with existing international law, either by making non-binding provisions mandatory or filling an unfortunate gap in existing legislation. In this sense, Council legislation is to be regarded as a temporary or provisional measure. Fourthly, the fact that the Council has to legislate in line with other international law means that its resolutions cannot violate fundamental international legal norms, such as *ius*

99 Rosand, *supra* note 33, pp. 573-578.

100 *Ibid.* p. 577.

101 N.D. White, *The United Nations System: Towards International Justice*, 2002, pp. 89-101.

102 Talmon, *supra* note 11, p. 179. Some even place legislative resolutions in the context of the rise of ‘hegemonic international law’. See, for instance, J. Alvarez, ‘Hegemonic International Law Revisited’, 2003 *American Journal of International Law*, pp. 873-887, Byers, *supra* note 89, pp. 38-41 and Elberling, *supra* note 14, pp. 356-360.

103 See Record of Security Council 4950th meeting, *supra* note 42.

cogens provisions. Fifthly, the acts of Council legislation have to be directly relevant to combating the threat.¹⁰⁴ Sixthly, although the resolutions should set clear goals and objectives and avoid ambiguities, they should leave some discretion for the Member States to come up with solutions that fit in with their domestic legal culture.

Furthermore, there are certain procedural requirements. The seventh point is that the participation of the wider UN membership has to be guaranteed. As many authors point out, legislative Council resolutions have to reflect the general will of the international community.¹⁰⁵ To achieve this, the negotiation process should be as open and transparent as possible. Eighth, in formulating new legislation the Security Council should be aware of its complex role in the international community, and to proceed with great care to maintain the institutional balance between the principal UN organs, such as the General Assembly and the ICJ.

One element, the ninth, may be added: nowhere do Resolutions 1373 and 1540 provide for sanctions or other measures in the case of non-compliance. Although the resolutions do not explicitly state so, any form of enforcement action should be based on a new resolution. It is unthinkable that general and abstract resolutions such as Resolutions 1373 and 1540 could form a satisfactory foundation for sanction measures, individual countermeasures, or the use of force. In future legislative resolutions, the Council should make this ever clearer.¹⁰⁶

It may be concluded that these nine criteria constitute the framework in which the Security Council may exercise its new law-making powers. As such, they set the new parameters of validity for the legislative Security Council resolutions. Because of their political nature, these criteria are rather flexible. For example, the determination of a ‘threat to the peace’ or ‘exceptional circumstances’ is open to political interpretation. Furthermore, the level of discretion left to Member States, and the level of transparency in the decision-making process, might differ between particular legislative resolutions. Accordingly, it could be argued that the one legislative resolution might comply with the criteria to a larger extent than the other, and thus have a stronger mandatory effect. There could also be a situation in which the validity of different legislative resolutions depends on different criteria. Similarly, lesser compliance with one criterion might be compensated by greater compliance with another. For example, Resolution 1373 was passed in a rather opaque manner, as opposed to the relative openness that came with Resolution 1540. However, at the time of the adoption of Resolution 1373 the sense of emergency and exceptionality was far greater than when Resolution 1540 was adopted. Based upon these new criteria, it can be argued that the validity of the legislative resolutions can be determined by degree. The next section looks at the consequences of this conclusion for the interpretation and application of these resolutions.

7. Interpretation of legislative resolutions

7.1. International sources on interpretation

There are no well-established rules on the interpretation of Security Council acts.¹⁰⁷ The most direct reference to principles for interpreting Security Council resolutions can be found in the *Namibia* Advisory Opinion of the ICJ:

104 The Council cannot, for instance, make dispute settlement by the ICJ universally compulsory.

105 Szasz, *supra* note 12, p. 905, Rosand, *supra* note 33, p. 581, Talmon, *supra* note 11, p. 187, Lavalley, *supra* note 38, p. 424.

106 Rosand, *supra* note 33, pp. 586-587.

107 See Papastavridis, *supra* note 15, p. 117 and Wood, *supra* note 18, pp. 73-77.

‘[t]he 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 resolutions of the Security Council.’¹⁰⁸

In its determination the ICJ did not refer to the VCLT, which was adopted two years earlier but had not yet entered into force. The VCLT itself only applies to treaties agreed upon between states, not to unilateral acts of international organisations.¹⁰⁹ This means that Security Council resolutions fall outside the scope of Articles 31 to 33 of the VCLT. Still, it is an important source regarding the issue of interpretation, and it is interesting to note that the Court places more importance on the preparatory works (or *travaux préparatoires*) than the VCLT does. A third source of principles of interpretation is the ‘Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations’,¹¹⁰ which were recently drafted by the International Law Commission (ILC). These state that the unilateral acts of states should be interpreted in a restrictive manner, while ‘weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated’.¹¹¹ It should be noted that the Guiding Principles refer to declarations by states, not to acts of international organisations. Consequently, the principles cannot be directly applied to legislative resolutions. However, useful analogies can be drawn between the unilateral declarations of states and those of the Security Council.

When analysing these three sources, it seems that there are certain elements that should always be included in the principles of interpretation. First, the ICJ, the VCLT and the Guiding Principles attach great importance to, respectively, the ‘terms of the resolution’, ‘the ordinary meaning to be given to the terms’ and to ‘the text of the declaration’. These have to be interpreted in their context and, according to the VCLT, in light of its object and purpose. Secondly, due attention has to be paid to the relevant international legal context, as laid down in treaties, decisions of international organisations and other rules of international law. Thirdly, recourse may be had to supplementary means of interpretation, including the preparatory works and the circumstances surrounding the adoption of the resolution.¹¹² On basis of these three issues, we will be able to formulate some principles of interpretation.

7.2. *The terms of the resolution*

With regard to the first aspect of interpretation, the terms of the resolution, it should be noted that Security Council resolutions consist of two parts: the preambular paragraphs and the operative clauses. The former shed some light on the object and purpose of the resolutions. Moreover, they may include some important preliminary conclusions and statements of fact on which the rest of the resolution is built. For instance, in both Resolution 1373 and 1540, the determination that international terrorism and the proliferation of nuclear, chemical and biological weapons

108 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, supra note 90 p. 53.

109 See Article 1 of the VCLT, supra note 73: ‘The present Convention applies to treaties between States.’

110 International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, UN Doc. A/61/10 (2006).

111 *Ibid.*, principle 7.

112 See Art. 32 of the VCLT, principles 3 and 7 of the ILC’s Guiding Principles and the last sentence of the *Namibia* statement on interpretation.

constitute a threat to international peace and security is made in the first part of the resolution. The main obligations of Member States, however, are contained in the operative clauses. The opening words of each sentence play a crucial role. When the Security Council ‘decides’, it creates a binding obligation. This can be distinguished from non-binding determinations of the Council, introduced by words such as ‘recognises’, ‘calls upon’ or ‘declares’.

In the legislative resolutions, the introductory words are often followed by a set of general and abstract terms. For instance, the Security Council decides to ‘prevent and suppress the financing of terrorist acts’, or decides ‘that all States shall take and enforce effective measures to establish domestic control to prevent the proliferation of nuclear, chemical and biological weapons’. When interpreting the resolutions, it should be realised that the terms are wilfully abstract, so as to allow for discretionary power of the Member States. However, it is important to note that certain abstract terms do have a well established meaning within the institutional setting of the Security Council. A good example of that is the phrase ‘to use all necessary means’ in Resolution 678,¹¹³ which is understood as legitimising the use of force if expressed by the Council. In this respect, the ordinary meaning of the terms should be understood in its institutional context.¹¹⁴

7.3. Context

The context of the terms of legislative resolutions is further set by the ‘exceptional circumstances’ that make the Council exercise its law-making powers. We have seen that many states stress the exceptional nature of the legislative measures. Accordingly, an interpreter of legislative resolutions should be aware of the content and extent of the circumstances that have led the Council to agree on such far-reaching measures. In this sense, the terms of the resolutions have to be interpreted in a restrictive manner: they only apply in the face of a serious threat, and their scope does not extend beyond this threat.

It is furthermore held that the terms of the resolutions are to be interpreted in light of their object and purpose. The object of the resolutions is to be found in the UN Charter, which states that the primary function of the Security Council is to maintain international peace and security.¹¹⁵ The purpose, however, should be understood as a broad notion of intent. This is not limited to the intent of the Council itself. As was held earlier, legislative resolutions should reflect the general will of the international community as a whole. Consequently, this should be taken into account in the interpretation of Council legislation.¹¹⁶ The general will can mainly be derived from supplementary means of interpretation, as explained below.

Another contextual element is the international legal framework. It was argued that the rules laid down in legislative resolutions should have clear links with existing international law. Accordingly, they should be interpreted in line with these existing provisions. For example, the binding paragraphs of Resolution 1373 have been almost literally copied from the ICFT. As a consequence, they cannot be interpreted outside the context of this treaty. The same holds true for Resolution 1540, which purports to fill a gap in the existing law on non-proliferation. The binding provisions of this resolution have to be seen in the light of the wider context of non-proliferation law. Furthermore, it is very clear that all Security Council resolutions should be

113 *Supra* note 2.

114 Papastavridis, *supra* note 15, p. 101.

115 Article 24(1) of the UN Charter.

116 See Papastavridis, *supra* note 15, pp. 99-100.

interpreted in line with the whole body of existing international law, especially peremptory norms and *ius cogens*. Legislative resolutions cannot be presumed to derogate from these norms.

7.4. Supplementary means

Thirdly, supplementary means of interpretation play a very important role in the interpretation of legislative resolutions. In the *Namibia* case the ICJ mentioned the discussions leading up to the adoption of a resolution as one of the main elements to be taken into account. It could be argued that the discussions in general, and the *travaux préparatoires* in particular, become even more important in the interpretation of legislative resolutions. Since these resolutions should reflect the general will of the international community, the negotiation process concerning the resolutions will have to be more open than ever before. The Security Council will have to circulate more draft resolutions and hold more public debates. Consequently, the volume and availability of preparatory works will increase drastically. The intent of the international community can also be found in documents that do not originate from the Security Council, such as General Assembly resolutions. This whole body of materials should be used in the interpretation of legislative resolutions.

Other supplementary means are the circumstances of adoption. First, as was stated before, only resolutions that reflect the general will of the international community can be interpreted as to lay down general and abstract rules that are binding upon the UN membership. Second, it should be remembered that drafting a Security Council resolution is a highly political process. The input of lawyers may be limited, which can result in inconsistencies, unnecessary ambiguities and ungrammatical constructions.¹¹⁷ It is to be expected that, if the significance of Security Council legislation continues to increase, more attention will be paid to the legal details. However, legislative resolutions will retain their political nature, a fact that should not be overlooked in the process of interpreting these resolutions.

Finally, it should be emphasised that the interpretation of legislative resolutions can never justify enforcement measures, or the use of force. The resolutions are too general and too abstract to legitimise the application of specific measures or sanctions to particular international actors. Consequently, any action taken against non-compliers should be based on a new and different resolution. Non-compliance might be a reason to decide to adopt enforcement measures, but this can only be done after a new round of debate and a new vote in the Council.

7.5. Principles for the interpretive process

In summary, the following principles for interpreting legislative resolutions can be discerned. First, the introductory words of each paragraph of such a resolution indicate whether a decision is binding or non-binding. Second, legislative resolutions leave room for Member States to interpret the obligations themselves. A too rigid interpretation of the binding provisions seems to be unjustified. Third, in the interpretation of the terms of the resolutions, attention has to be paid to the special meaning of terms within the institutional setting of the Security Council. Fourth, the terms are to be understood in light of the exceptional circumstances and serious threat, which is identified in the preambular paragraphs. Fifth, it is recognised that the object of the resolutions is the maintenance of international peace and security, but that their purpose is to be found in the general will of the international community. This can be found in the *travaux préparatoires* and in documents of other relevant bodies, such as the UN General Assembly.

¹¹⁷ Wood, *supra* note 18, pp. 80-82.

Sixth, legislative resolutions have to be interpreted in line with existing international legislation. It has to be in line with both specific laws, for instance rules relating to terrorism or non-proliferation, and general rules, such as peremptory norms and *ius cogens*. Seventh, the role of the preparatory works is of great importance, especially when the transparency and openness of the law-making process increases. Eighth, legislative resolutions can never be interpreted as to justify enforcement measures or the use of force. Finally, it is to be understood that the Security Council operates in a political atmosphere, not a purely legal one. Any interpretation should do justice to the political complexity of the drafting process.

8. Conclusion

An eminent scholar and international lawyer stated that ‘international law is not rules. It is a normative system.’¹¹⁸ This article has tried to show how the parameters of the international normative system have shifted in light of the adoption of Security Council Resolutions 1373 and 1540. After distinguishing different types of Security Council resolutions and their characteristics, we discerned a new type, the legislative resolution, which was critically but well received by the international community. However, there is no legal basis for the law-making power of the Council in the UN Charter. While this seemed to threaten the validity of the legislative resolutions, we saw that states widely endorsed the Security Council actions. This made us question what the grounds for the validity of legislative resolutions can be. We discovered that the validity of Security Council action is primarily determined by UN Member States themselves. In this process, states seem to consistently apply a set of criteria that, when complied with, bind states to the Council’s law-making efforts. Together, these criteria constitute a new rule of customary international law. The rule is used to validate Security Council resolutions that go beyond the UN Charter. It is important to remember that this rule emerged out of the practice of political actors, the states. Consequently, its content is of a highly political nature and lacks the rigidity of purely legal standards. This conclusion was backed by an examination of the substance of the new parameters. In the end, nine criteria for validity were established. These criteria formed the basis of the formulation of a set of interpretive principles, which attempt to give some legal input to the discussion on and the analysis of legislative resolutions. It is important to note, however, that this is a first inventory, and is certainly not exhaustive. More than anything, this article hopes to have proven that the principal political nature of the Security Council’s work obliges lawyers to proceed with extra care when interpreting legislative resolutions.

118 R. Higgins, *International Law and How We Use It*, 1994, p. 1.