Functions and Powers

Article 24

(1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

(2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

(3) The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

61 The legal basis of these implied powers is, from that perspective, not Art. 24 (1) directly, but rather various provisions in the Charter, including their necessary implications. This understanding is compatible with the reading by Hans Kelsen who observed that Art. 24 (1) was intended only to stress the political importance of the Security Council, and 'not to establish a positive legal effect'. In that reading the provision is 'not … a general determination of the competence of the Security Council', and thus not a legal basis for a general power.[116]

62 The existence of such powers which are unspecified but not disjunct from the overall function of the Council is supported by scholarship.[117] Due to vagueness of the concepts of 'international peace and security' these powers are broad and allow for very flexible action, but they are not unlimited.

II. The Various Types of Powers

63 The Security Council is not limited to performing executive-type 'police' functions. Historically, however, the American representative at the conference of San Francisco had famously characterized the Security Council as the world's 'policeman'.[118] A policeman's job is both to prevent and to repress violence in concrete cases, not normally to enact general rules for unknown cases in the future. But the policeman function, while it may have been on the minds of the drafters, has not been inscribed into the text of the Charter.

64 The Charter itself does not mention executive, legislative, or judicial functions of the Security Council. The ICTY Appeal Chamber's *Tadic* decision on jurisdiction highlighted that the division of powers which is largely followed in most municipal systems 'does not apply to the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut', the Tribunal stated.[119]

65 Still, the main activity of the Council has been of an executive type in the sense of taking and enforcing decisions which relate to concrete situations. Especially its Chapter VII powers, where the Council makes a factual assessment (Art. 39) upon which it takes binding decisions as a consequence, resemble the functions of the executive branch in domestic jurisdictions.[120]

III. Notably the Power to Take 'Legislative' Measures

66 The Council has in the past also taken measures of a legislative or law-making quality. That practice has given rise to occasional criticism by members, and to an intense scholarly debate.[121] It now seems settled that the Council may in principle 'legislate' but only under specific conditions which can be drawn from the Charter framework and from practice.

[116] Kelsen (n 55) 283.
[117] See eg Manusama (n 54) 39.
[118] Mr Stassen in commission I, UNCIO VI, 29 (Doc 1006, I/6).
[119] ICTY, *Tadic Jurisdiction* (n 105) para 43.
[120] Tzanakopoulos (n 67) 9.
[121] See P Szasz, 'The Security Council Starts Legislating' (2002) 96 AJIL 901–05; J Tercinet, 'Le pouvoir normatif du Conseil de Securité: le Conseil de Sécurité peut-il légiferer?' (2004) 37 RBDI 529–51; E Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?' (2004) 28 Fordham

1. Practice

A Council decision has a legislative character when it imposes general and abstract obligations, and when it is not limited to one particular and concrete situation, but applicable to an indefinite number of cases.[122] A different type of quasi-legislative effect is brought about through the enforcement by the Council of non-binding standards (such as industrial codes of conduct), by the Council's contribution to the formation of customary law,[123] and by Council decisions pushing members to accede to entire existing treaties.[124] These indirectly law-making decisions do not pose similar problems to the actually legislative ones and will not be discussed here. **67**

The main examples of law-making resolutions in the proper sense are Res 1373 (of 18 September 2001) on the financing of terrorism and Res 1540 (of 28 April 2004)[125] on weapons of mass destruction. Also the establishment of the Criminal Tribunals for the former Yugoslavia by Res 827 (25 May 1993) and for Rwanda by Res 995 (8 Nov 1994) were pieces of legislation in the sense described above, because the resolutions actually contained the statutes of the tribunals, ie general and abstract texts which regulate the functioning of novel institutions. Finally, also the two resolutions which exempted US soldiers from the jurisdiction of the ICC (Res 1422 (12 July 2002) and 1487 (12 June 2003)) have been counted among the 'legislative' ones, because they contained general and abstract obligations. **68**

2. Admissibility in Principle

The Council is entitled to adopt legislative resolutions. Decisions of that kind are not inadmissible or even illegal on the ground that they are of a wrong type. As a matter of practice, by far the majority of members has supported the legislative resolutions. Those few members who objected could not block the development towards an overall acceptance.[126] **69**

This acceptance can rely on a reasonable interpretation of the Charter. Its wording allows law-making resolutions of the Council, although this was not the historic intent, as stated above. The principle of speciality does not prohibit law-making by the Council. Although no explicit Charter provision authorizes the Council to adopt binding acts with **70**

Intl LJ 542–90; Akram and Haider Shah (n 80); A Marschik, 'Legislative Powers of the Security Council' in RSJ Macdonald and DM Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Nijhoff 2005) 457–92; C Denis, *Le pouvoir normatif du Conseil de Securité: portées et limites* (Bruylant 2005); S Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL 175–93; B Elberling, 'The Ultra Vires Character of Legislative Action by the Security Council' (2005) 2 Intl Org L Rev 337–60; LM Hinojosa Martinéz, 'The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political, and Practical Limits' (2008) 57 ICLQ 333–59; P Neusüß, *Legislative Massnahmen des UN-Sicherheitsrats im Kampf gegen den internationalen Terrorismus* (Herbert Utz 2008); M Frenzel, *Sekundärrechtsgesetzgebungsakte internationaler Organisationen: völkerrechtliche Konzeption und verfassungsrechtliche Voraussetzungen* (Mohr Siebeck 2011) 54–74. See also Krisch in Introduction to Chapter VII MN 31–34 on 'quasi-legislation'.

[122] Talmon (n 121) 176; Rosand (n 121) with note 11.

[123] See on both types of 'law-making' Krisch in Introduction to Chapter VII MN 32.

[124] cf Akram and Haider Shah (n 80) 438.

[125] See R Lavalle, 'A Novel, if Awkward, Exercise in International Law-Making: Security Council Resolution 1540' (2004) 51 NILR 411.

[126] Neusüß (n 121) 326 and 342 and 366. Members overwhelmingly accepted the particular decisions because they approved of their specific contents. But the resolutions were not only intended and accepted as isolated acts but had a precedential value (as a matter of form), see eg Szasz (n 121) 905. But see Elberling (n 121) for the position that legislative decisions are in violation of the Charter and invalid (esp 352).

a legislative content, it does not rule it out, either. Article 41 constitutes a sufficient legal basis for legislative acts.[127] That provision authorizes the Council to take 'measures' not involving the use of force. 'Measures' is a broad term which does not limit the Council to concrete and particular decisions, but which encompasses legislative measures.[128]

71 The concept of 'threat to the peace' in Art. 39 has evolved to also comprise general situations, such as terrorism. The Council's 'primary responsibility for the maintenance of international peace and security' (Art. 24) requires it both to remove and to prevent threats to the peace (Art. 1 (1)). Consequently, a proactive (and not just a reactive or remedial) dimension is inherent in the mandate of the Council. This means that it must be allowed to deal with abstract as well as specific threats to the peace.[129]

72 The principal objections which have been raised against legislative decisions are ultimately not convincing. At first sight, the Council's law-making activity seems to affect the institutional balance within the Organization. It is the General Assembly which is entrusted with the 'progressive development of international law' (Art. 13 (1) (a)), and not the Council. However, the Assembly is explicitly limited to recommendations, debates, and encouragement, and clearly has no authority to enact binding laws. The institutional set-up of the Organization is not similar to a State with the Assembly as the legislature and the Council as the executive.[130] Therefore, law-making by the Council does not—as a matter of form—interfere with the Assembly's competences.

73 The second fundamental objection is that the imposition of binding, general, and in temporal terms unlimited obligations on States which are for the most part not members of the Council overturns the cornerstone of the international legal system, namely the principle that States can be bound only on the basis of their consent which ultimately flows from sovereignty.[131] The sovereigntist concern cannot be fully alleviated with the formalistic response that members, by ratifying the Charter and by endowing the Council with the authority to adopt binding legal acts, have in principle consented for the future to be bound by decisions which might impose yet unknown obligations on them, and have to that extent limited their sovereignty. Members did not foresee and could not reasonably foresee that the Council would engage in law-making. By not delineating the Council's powers more strictly, the members have not forgone their right to protest against novel types of decision-making. They have not given a blank cheque to the Council.

74 Besides affecting State sovereignty and the consent principle, law-making by the Council appears to enjoy a low degree of legitimacy because that body is not or is hardly representative, not legally and barely politically accountable to all States (and their populations), and because the law-making procedure is rather intransparent, hardly

[127] This statement can also be based on an argument *e contrario* from Art. 40, which explicitly states that provisonal measures must be directed at 'the parties concerned'. In contrast, Art. 41 mentions no specific addressee (Frenzel (n 121) 67).

[128] ICTY, *Tadic Jurisdiction* (n 105) para 35: 'It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force". It is a negative definition.'

[129] Talmon (n 121) 181.

[130] '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. It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States.' ICTY, *Tadic Jurisdiction* (n 105) para 43.

[131] See notably Hinojosa Martinéz (n 121) especially 339–40 and 359.

deliberative, and not inclusive but exclusive. Although these legitimacy flaws affect all types of Council activity, they are more serious when it comes to law-making action because the Council's quasi-laws interfere more with the rights of third States and of citizens than decisions limited to concrete situations. Overall, law-making by the Council might constitute 'hegemonic international law' which carries the risk of (further) eroding the legitimacy of the Council.[132]

This objection which combines concern for institutional functions and for those values which State sovereignty ultimately seeks to protect, namely the consent of the governed, is the most pertinent one. While it is not strong enough to prohibit law-making by the Council, it nourishes the normative quest for a close circumscription of its law-making activity. 75

3. Normative Constraints on Legislative Action of the Council

Numerous members have formulated conditions under which they would be prepared to accept law-making resolutions. These statements, together with the acquiescence of other States, constitute subsequent practice which must guide the interpretation of the Charter which both founds and limits the Council's powers. At the same time, these conditions accommodate the normative concerns sketched out above. Based on this, the Charter can and should be interpreted so as to allow law-making decisions if the following requirements are met.[133] 76

In substance, the subject-matter must fall into the context of Chapter VII. First, law-making by the Council should react to a significant, new, and urgent threat in an emergency situation which qualifies as a threat to the peace in terms of Art. 39. Second, the Council must respect the institutional balance between the main organs and must therefore not adopt 'laws' which contradict General Assembly resolutions. Third, the resolution should be as little intrusive as possible in terms of material scope and temporary extension. This would imply that a Council decision cannot simply reduplicate entire treaties which are not in force or which have been ratified only by a small number of States, because such a far-reaching step is not necessary to address a threat to international peace and security.[134] A fourth factor is discussed controversially under the heading of the 'gap requirement'. It hinges first on the question whether the Council can—when exercising its enforcement powers under Chapter VII—deviate from general international law (customary law or treaties, or both).[135] From this starting point, some authors opine that the abrogation, or even de facto modification of the terms or the undoing of the effects of existing treaties (for example the Rome Statute[136]) is not admissible (even if it were generally possible under Chapter VII, notably by virtue of Art. 103) when the Council acts in a legislative mode. The authors argue that the Council may only legislate when there is a 'gap' in the treaty law, and may not abrogate existing treaty provisions.[137] However, if Art. 103 fully applies to legislative resolutions, a treaty 77

[132] J Alvarez, *International Organizations as Law-Makers* (OUP 2005) 184–217; Elberling (n 121).

[133] See eg Neusüß (n 121) 366; Talmon (n 121) 182–88; Hinojosa Martinéz (n 121) 339, 344–49.

[134] Talmon (n 121) 186.

[135] See on this problem Peters on Art. 25 MN 133–148.

[136] The question has been discussed with regard to Res 1422 and 1487 on non-transferral to the ICC because these resolutions were probably not in conformity with Art. 86 ICC Statute. See Talmon (n 121) 185–86 with further references.

[137] Hinojosa Martinéz (n 121) 346–47, 356–57.

override by the Council would in principle be no problem.[138] But in many cases, Art. 103 will not be applicable, all the more as the scope of application of Art. 103 should be construed narrowly in this regard.[139]

78 In procedural terms, the elaboration of legislative resolutions should be transparent. Also, the Council should seek a broad consensus among States. As far as the implementation of legislative decisions is concerned, the Council should grant members a leeway, and should assist them in carrying out the decisions. Overall, the Council must remain an exceptional and auxiliary law-maker only, it must make an effort of self-restraint, and may in no way rise up to a 'world legislator'.[140]

4. Outlook

79 Law-making activity of the Council appears necessary in some instances for maintaining international peace and security, especially in urgent situations where treaty making (within the General Assembly or outside of it) is too slow or unfeasible. But it must remain within legal limits. It is not clear which of the normative requirements discussed above are hard and fast legal constraints and which are basically legal policy demands. Probably the Council's past practice of consulting States has not given rise to a precise legal obligation to consult non-Council members on a draft legislative resolution before it is made final.[141] Due to the small number of events and the variations, that practice has not brought about a concretization or extension of the procedure laid out in Art. 28 by means of a tacit amendment. However, the general principle that any law-making resolution should be adopted only after some form of consultation of non-members of the Council in the drafting process, possibly channelled through the Assembly, finds some basis in Charter principles on State equality (Art. 2 (1)), and on the functions of the General Assembly (Chapter IV). The principle that law-making by the Council must remain the exception, and must remain 'emergency regulation', can be understood as an emanation of the Charter-based principle of proportionality. Overall, it seems fair to say that the Council is, when it enacts abstract and general rules, under stricter procedural and substantive limits than when acting in the classical executive mode.[142] A legislative Council decision overstepping these limits, however difficult they are to define, would be illegal, or *ultra vires* in the traditional terminology.[143]

80 Anyway, the major practical problem is the implementation and enforcement of the legislative resolutions.[144] The Council cannot by itself effectively monitor this, but is dependent on the cooperation of the members. To secure that cooperation, the Council must as far as possible forestall any criticism of lacking legitimacy. So in the end, law-making decisions must be based on an overall consensus of the international community both for normative and practical reasons.

[138] In that sense Marschik (n 121) 483.

[139] See on the effects of Art. 103 on Security Council decisions Peters on Art. 25 MN 200–212.

[140] Rosand (n 121) 579; Marschik (n 121) 484; Hinojosa Martinéz (n 121) 345, 356, and 358.

[141] Marschik (n 121) 485; Hinojosa Martinéz (n 121) 352 (participation is only a 'necessary political condition'); but see Talmon (n 121) 188. This practice has been celebrated as a step towards 'democratic' law-making within the UN (Lavalle (n 125) 436).

[142] Krisch in Introduction to Chapter VII MN 34.

[143] See on the legal limits of Security Council decisions and on the possible consequences of such an illegality Peters on Art. 25 MN 56–199.

[144] Talmon (n 121) 192–93.