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The United Nations Security Council as a Centralising Agent of Normative Production

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The Security Council's ability to produce binding rules, delegated by the United Nations Charter, is the international peacekeeping system's central feature. Such prevision finds its original legal ground in the Charter's 25th article construction, which establishes that the UN members agree to accept and apply the decisions made by the Security Council according to the above mentioned Charter. Even though this device is apparently clear, it does not reveal its nature's true dimension. After all, to whom is directed a decision from the Council? In other words, what is the real extension of its normative effects? On the other hand, what is the decision's authority founded on? What exactly is the range of the limitation regarding the expression "in accordance with the present Charter" from article 25? The answers to these questions have a two-sided nature, and even though not quite obvious, a deep impact in determining the tension level on international law, which oscillates between unity and decentralization regarding its normative process.

The Scope of a Security Council Decision's Normative Effect

Formally, the decisions taken by the Security Council according to the article 25 from the United Nations Charter are undoubtedly directed to the Member States within the boundaries of each case. In thesis, the existence of a legislative power with general competence remains unknown to international law. Therefore, it is noticeable that the particularities of the normative production system at the United Nations, even though existing, should theoretically have a limited range regarding the States

which the formal consented link to the Organization's constituent treaty can be demonstrated. Such conclusion is notorious and it arises from the formal logic of necessary consent. In this case, on paper, establishing the authority potential of Security Council's decisions instead of its scope should be sufficient to determine its delegated role regarding the formation of international law. Such evidence, even though real at first, does not cover the issue entirely and new matters deriving from the redefinition of the role played by consent in international law formation can be observed.

The Scope of Security Council Decisions Vis à Vis Third States

Given that the United Nations Charter is a treaty, it should be regulated by the 1969 Vienna Convention. Therefore, the article 2, paragraph 1, sub-paragraphs (g) and (h), in which third States are those that did not express the consent to be linked to the treaty, is applied. In this respect, the third States' real situation before a Security Council decision should be verified in advance. Such issue has an apparently limited scope due to the Charter's universal tendencies. Indeed, almost all of the international community States are currently members of the United Nations. Therefore, in 2005, the United Nations featured 191 members. In 1999, Kiribati, Nauru and Tonga were admitted. In the following year, so were Tuvalu, Serbia and Montenegro. In 2002, finally, East Timor and Switzerland acceded to the status of members of the United Nations. Such scenario implies that only rare examples remain outside the UN system, in which the State formula can be questioned, not only due to enduring conflicts such as the case of Taiwan, but also because of a specific private statute such as the Vatican¹ or the Palestinian Authority².

Nevertheless, such a universal scope is not obtained in a definite and final form. International society is not static in time. New states can emerge from the disruption of others or even have access to certain independency settled on the self-determination principle. Examples such as the Soviet Union or the former Yugoslavia collapse, or even the German or the Yemen unification are not discarded in the future. These examples can generate new States. The potential existence of third States regarding the United Nations Charter then evokes the problem of conciliating the argument in which the Security Council decisions are solely circumscribed to the States that have agreed to what comes from the Charter's article 2 (6), which determines that: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." In other words, the question about the scope of the Security Council's decisions regarding the UN non-member States remains.

The answer is operated in a way to admit the Security Council's decisions binding strength regarding non-member States. Initially, such bond justifies itself in general International Law, which recognizes that the Security Council decisions' imperative nature does not necessarily arise from what is written in the Charter's 25th article. It is,

¹ Even though the Vatican is not considered a member State, it answers for a permanent mission at the Organization's center.

² Mathias Forteau, *Le dépassement de l'effet relatif de la Charte, La Charte des Nations Unies, Constitution mondiale?*, Regis Chemain, Alain Pellet, Cedric Paris X, Cahiers internationaux n. 20, Ed. Pedone, Paris, 2006, p. 130.

above all, the result of a customary law settled on the need of peacekeeping³. Such possibility is foreseen in article 38 from the Vienna Convention, which establishes that ‘a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.’ Indeed, as supported by the ICJ in the *Military and Paramilitary Activities in and against Nicaragua*: certain rules from the Charter may enjoy consuetudinary status, which would make them binding to the international community’s set⁴. In this case, it is not a problem concerning the Charter’s extension to third States. It will impose itself not due to the conventional rules that come from the Charter and protect its relative nature. An artifice capable of ensuring the rule’s binding nature while originated from another international law source can be hence observed.

Besides, the chapter VI from the Charter admits the possibility that a non-member State forward any controversy in which it takes part to the United Nations. Therefore, if it can benefit from such possibility, it is natural to consider that it should equally be linked to a specific Security Council decision due to a specific controversy⁵. Indeed, in 1960, when answering to a demand by the Republic of Congo – at the time not admitted to the United Nations yet – the Secretary General made a statement recognizing that the liabilities contained in articles 25 and 49 from the United Nations Charter were applied in analogy to the non-member States. Ergo, the practice consisted in demanding that these States resign the Security Council’s resolutions due to the principles announced in article 2 from the Charter⁶.

However, the problem is not extinguished, and it acquires a new framework in the 90’s decade when, after the first Iraq war and the conflicts in the former Yugoslavia, the Security Council adopts a new formula and decides that its sanctions deriving from chapter VII of the Charter must be extended to all States. At the same time, it demands that non-member States equally act according to its requirements⁷. It is noted that the decision’s authority potential is decreased in this case. The integration of the non-member States as recipients of the mentioned resolution is accompanied by a demand, not by a formal decision. Thus, the rule is in fact extended to the non-member States, but with a differentiated normative authority level.

New queries can equally emerge from the application of article 24 from the Charter, which states that the Security Council must act on the member States behalf. Finally, can one understand that, before such delegated competence, the Security Council subsequently produces a decision concerning a third State without its consent? What is the reason to the existence of article 6 of the Charter if it is actually valid to member

³ E. Suy e N. Angelet, *Article 25, La Charter des Nations Unies constitution mondiale*, J. P. Cot, A. Pellet, M. Forteau, *La Charter des Nations Unies: commentaire article par article*, Economica, Paris, 2005, p. 911.

⁴ C.I.J. Rec. 1984, pp. 92 ss.

⁵ Some authors refer to the boundaries contained in this argument before the quality of a certain State’s permanent neutrality, as the Switzerland case before its admission at the United Nations was. In this case, the obligations that arose from a certain State’s neutrality before general international law must prevail regarding the individual Security Council decisions. B. Simma, *The Charter of the United Nations a Commentary*, Oxford University Press, 2002, p. 460.

⁶ E. Suy e N. Angelet, *Article 25, La Charter des Nations Unies constitution mondiale*, J. P. Cot, A. Pellet, M. Forteau, *La Charter des Nations Unies : commentaire article par article*, Economica, Paris, 2005, p. 909.

⁷ Resolution 661 from 1990 and 757 from 1992.

States, as well as to the non-member ones? Lastly, before the exclusion of a specific State of the United Nations, would the Charter be applied to it? These are questions which answers are not yet clear, but they can demonstrate that the role of consent in forming International Law via a Security Council decision has a selective nature.

The Scope of the Security Council Decisions Vis à Vis International Organisations or Non-State Actors

The Security Council may address the content of a specific resolution to international organizations or even to non-state actors. In the first case, the idea that the Charter can be indirectly applied to derived subjects of International Law is supported, since the members from any international organizations are equally members of the United Nations. Such argument is sustained by article 48 of the Charter, which states that: ‘the action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine’. Given this, ‘such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members’⁸.

In the case of the non-state actors there is a tendency to request them to settle to the injunction contained in their resolutions, as the case of resolution 1333 in 2000, which imposes sanctions addressed to the Taliban regime in Afghanistan⁹. However, before non-state actors that are parties in a specific conflict, the Security Council tends to be more imposing and demands the end of hostilities. This is the case, for example, of resolution 1193 in 1998, which is directed to the various afghan factions, requiring the end of hostilities and violations of Human Rights¹⁰.

The Security Council Decisions Affect Third States as They Serve as an Inspiration to the Normative Production Via Other Sources

The Security Council certainly produces a derivative law that can eventually contribute to composing international law by other means and with a broader scope. This is the case, for example, of resolutions 827 in 1993 and 955 in 1994 concerning the institution of the International Criminal Courts to the former Yugoslavia and Rwanda. These cases dealt with individual decisions regarding specific qualified situations as Peace threats and they were only valid to the two hence mentioned institutions. Nevertheless, when defining the concept of relevant crimes to this jurisdiction’s competence, it is right to affirm that the Security Council decisions would considerably influence the international criminal law – still in construction – production process. Indeed, such resolutions exerted a decisive influence on articles 6, 7 and 8 of the Rome Statute, which establishes the International Criminal Court. It is right to affirm that, in this case, the Security Council legislates about internal matters characterizing a specific situation. There is no

⁸ United Nations Charter, article 48.

⁹ Resolution 1333 from 2000, paragraph 7.

¹⁰ Resolution 1193 from 1998, paragraphs 2 to 15.

legislative perspective in general. Howsoever, the rule's scope may become broader by the international law production via other sources.

The Security Council Exceptional Role as a Legislative Actor

Indeed, even though the General Assembly, as well as the Security Council, produces rules, they do not act theoretically as legislative actors. The reason is that none of these organs have the power to make general and impersonal mandatory decisions. Regarding the General Assembly, there is an obligatoriness gap, while in the Security Council's concern there is not a general feature. This means that, in general, the Security Council's decisions are made regarding a specific case, besides having a definite recipient. Therefore, this fact guarantees the necessary link between the Security Council rule's authority and the consent given at the moment of ratification or adherence to the United Nations Charter.

However, the Security Council's positioning takes a new and unexpected route since 2001's terrible events. Indeed, under the pretense of combating international terrorism, the Security Council modifies the interpretation given to its resolutions' scope. It is right to affirm that for a long time the Security Council has adopted a series of resolutions concerning international terrorism combat. As defined as a peace threat or an act of aggression, nothing would prevent the Security Council to take the necessary steps according to what is claimed in article 41 of the Charter or to endeavor the convenient actions set in article 42. In the meantime, while following its traditions, they were necessarily linked to specific events and with precise targets. The Security Council is not a legislative organ, and its normative production cannot be general or impersonal.

The perception of reality was modified in 2001, September the 28th, with the adoption of resolution 1373, completed on November the 22nd by resolution 1377. Initially, they were both entitled – “threat to international peace and security caused by terrorist acts”. In this case, the use of the term “threat”, importing the singular, can be observed, while a plurality of acts is actually considered. The resolution 1373 innovates in an extraordinary way because as it enjoys a mandatory nature, it has a place over a general and impersonal territory. In the first case, there is not a precise definition of what terrorist acts would be. In the second one, there is no exact target determination. After all, as being generated in chapter VII from the Charter's context, which allows the Council to make decisions that are mandatory for all States, it determines that “every international terrorist act” is considered a threat to peace. There were some precedents in every other sense, but never have both perspectives been found united in a single resolution. In this case, a true international legislation, in which certain future behavior is normatized in an impersonal way, is analyzed. The mutation is extraordinary.

Legislating to the future in an impersonal way, the Security Council makes the respect to decisions established in certain conventions mandatory to States, even if they have not necessarily ratified or have even expressed their suspicion about it. In this concern, the 1999 convention on repressing terrorism financing can be notably observed. Therefore, the treaty relativity principle can be delimited and a redefinition of the consent's role in creating rules becomes apparent. In this case, the Security Council enforces respect to the conventional

clauses it may find convenient. The situation is even more impactful as the Security Council itself may, as the case is, create a committee responsible for following the resolution's appliance, and consequently establish the material means of pressuring the recalcitrant States, threatening them with possible future sanctions. Therefore, it can be observed that, in this case, not only the consent logic is reprogrammed, but also the rules' potential effectiveness finds itself elevated when compared to the classic conventional procedure.

Such exception was apparently reused by the Security Council, which recurred to the same procedure in the dissemination of massive destruction weapons' concern. Therefore, through resolution 1540 from 2004, April the 28th, the Council affirmed that "proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security". Actually, regarding chapter VII from the United Nations Charter, this means every State must abstain itself in any way from supporting non-state actors that try to obtain, produce, possess, transport, transfer or use nuclear, chemical and biological weapons, as well as their means of delivery. Yet, the Security Council establishes the control and prevention measures that must be taken for this purpose. In this sense, it can be noted that the Security Council action replaces the conventional procedure as it can act on States that have not yet adapted themselves to the requirements established in the Treaty on the Non-Proliferation of Nuclear Weapons from 1968. The Council itself institutes a committee responsible for supervising its decision's practical and effective appliance.

The Security Council Decision's Binding Nature

It is clear that if on one hand the article 25 from the United Nations Charter, when determining that the organization members accept and apply the Council's decisions according to the Charter, recognizes its binding mandatory nature, on the other hand, it does not mean that all of the Council's decisions will necessarily be endowed with fully ruling force. The boundaries are theoretically both formal and substantial. The first one arises from the meaning given to the expression 'decision'. The Security Council uses various nomenclatures in which the normative authority can be distinct. On the second case, the issue regarding the amplitude of the expression 'in accordance with the present Charter' contained at the end of article 25 arises. Could the Council's decisions be submitted to a substantial validity control? In other words, what does saying that a Security Council decision has a mandatory nature and a binding effect mean?

Not all of the Security Council decisions are necessarily binding. The non-binding nature of the recommendations, as disposed by article 36 from the Charter, is nowadays pacific. The Court's position in the Straits of Corfu case is a good example. In this case, before the litigation that separated Albania from the United Kingdom, the Security Council, through resolution 22 from 1947, recommended the submission of the litigation to the ICJ based on article 36¹¹. The United Kingdom, the plaintiff, attempted to establish the Court's competence based on the recommendation's binding nature. The Court rejected such argument determining *prima facie* the distinction between the decision's authority and the Council's recommendations.

¹¹ C.I.J. Res. 1948, pp. 3-32.

Therefore, determining the distinction between decisions and recommendations is not purely semantics. Nevertheless, such conclusion does not extinguish half of the recurring issues. May a recommendation, for example, become actually mandatory in the future due to exterior reasons to its creation process? In this case, can one agree with Kelsen when he claims that a recommendation's binding strength can be verified when evoking United Nations sanctions? It is highly unlikely. The sanction is not a rule's constitutive element, and it evokes a distinct type of Council intervention. There is no possible way of comparing a political solution's means of action to a specific controversy in which the Council must adhere to what is foreseen in chapter VI of the Charter and the coercive means founded on chapter VII.

Can we conclude that a Security Council decision's binding nature is solely verified when it is made under the auspices of the Charter's chapter VII? Such argument seems equally not true. First of all, it weakens the Council's role as a primary entity responsible for peacekeeping. Second of all, such argument would exclude from article 25's context the decisions founded on the Charter's chapter VIII, as well as those with an investigative nature that follows article 34 of the Charter, both admittedly binding. Finally, it seems obvious that such conception on the Council decision's binding nature violates the Charter itself, because if it was the initial intention, such determination would be discriminated and contained in chapter VII. This fact would make article 25 unnecessary, and recurring to articles 48 and 49 of the Charter would be enough to guarantee the Council decision's binding nature¹².

Another relevant matter arises from the fact that the term 'decision' used by the Charter in article 25 does not have a precise meaning. The used terminology can denote a variety of injunction or imposition forms, or, in other words, a specific imperative proposition. After all, when using terms as 'demands' or 'engage', do the Security Council's decisions remain binding? In other words, except for the recommendations, can the Security Council actually produce decisions on chapter VI's context in which the authority is variable? In thesis, such terminology does not exclude the decision's mandatory nature by itself. However, the Council may address its decision to non-state actors and require a future agreement. Such decision would be non-binding. The same can happen before injunctions that come from a presidential declaration claimed on the Council's behalf.

Therefore, the linking authority results from an evaluation of the Security Council's intention¹³. In this sense, the ICJ's position on its consulting opinion from 1971, June 21st, regarding the legal consequences to the South Africa's presence in Namibia is revealing. According to the Court, 'it is necessary to carefully analyze the content of a Security Council resolution before making conclusions concerning its mandatory effect'. Due to the features arisen from article 25 it is convenient to determine if its recurring powers were properly applied in each case. This means that it is necessary to verify the resolution's terms that must be interpreted, the debates that preceded its adoption, and the evoked rules from the Charter. In other words, all the elements that could help give precision

¹² B. Simma, *The Charter of the United Nations a Commentary*, Oxford University Press, 2002, p. 456.

¹³ R. Higgins, *The place of international law in the settlement of disputes by the security Council*, *AJIL*, 64, 1970, pp. 1-18.

to the legal consequences of a Security Council resolution¹⁴. Before such argument, the Court determined the mandatory nature of the Security Council resolution 276 in 1970¹⁵.

As the ICJ claimed in its consulting opinion concerning Namibia¹⁶ or in its decision in 1992, April the 14th, on the Lockerbie case¹⁷, the Council's decisions benefit from a *prima facie* legal appearance. Evidently, this effect arises from the consent given to the constitutive United Nations treaty, which establishes in its 25th article that 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council'. A preliminary matter then arises. Does the origin of the binding authority of Security Council decisions lie in the *ad hoc* acceptance of the United Nations members or is it represented as an indispensable pre-condition to peacekeeping, in accordance to the international community's interest? The question is not purely rhetorical and must be evaluated while enlightened by the foreseen requirement in article 25 that the Council's decisions be accepted and applied 'in accordance with the present Charter'.

After all, what do such requirements mean? Is it solely about the way in which States must apply the Council's decisions or does it establish that the States must only accept and apply the Council's decisions when they are conceived according to the Charter? The controversy lies in knowing if the States can control the Council's decisions and stop them from being effective by considering that they are not conceived in accordance to the Charter. The answer is unanimous. It is right to say that the Council's decisions do not depend on the posterior acceptance from its targets. Those are not the individual will's sum, but an act originated from a representative organ whose objectives are much broader than those of the authors and whose collective interest precedes the individual logic. Through the Security Council's actions, the United Nations must pursue its goal of peacekeeping and international security. Such obligation lies with its members and the article 2 (5) of the Charter demands that they support that goal's achievement. The posterior *ad hoc* control from States would certainly weaken such purpose and it would deprive article 25 from its utility.

Such understanding is accompanied by an extraordinary consequence. After all, if the United Nations system does not foresee a jurisdictional control mechanism in the manner of a constitutionality control, and if the expression 'in accordance with the present Charter' that accompanies the Council's decisions' binding recognition does not authorize the States to verify its implementation convenience, it is certain that this United Nations organ has the extent of its acting power, aiming to ensure the peace, elevated to an almost discretionary boundary. It interprets the scope of its own competence. Such understanding certainly contributes to the threat against peace interpretation's substantial amplitude. With certain freedom, the Security Council interprets such condition as it establishes the competence not only in conflicts between States and civil wars, but it also extends its scope to matters related to international terrorism, the transnational

¹⁴ C.I.J. Rec. 1971, p. 54.

¹⁵ E. Suy e N. Angelet, Article 25, *La Charter des Nations Unies, Constitutions Mondiale?*, Commentaire de la Charter des Nations Unies article par articles, Economica, 2005, p.914.

¹⁶ C.I.J. Rec. 1971, p. 22.

¹⁷ C.I.J., Rec. 1992, p. 15.

organized criminality, poverty, AIDS, etc. This perspective clearly demonstrates the changes in the Security Council role that, founded on cohesive interest, produces rules concentrated in nature with a broad substantial determination margin.

It is right to say that, in those cases, it is possible to consider that the States enjoy the capacity of verifying the procedure adopted when elaborating the resolution's regularity. However, even this limited control is subject to problems. First of all, the procedural control excludes the evaluation of the peacekeeping function's extension, which theoretically legalizes the Council's actions. Finally, the procedural control itself is limited, because in accordance to article 27 of the Charter, the adoption procedures of Council resolutions are deeply varied because of the powers exerted in a specific situation.

Conclusion

The international peacekeeping system is based on the Security Council's capacity to produce binding rules, delegated by article 25 from the United Nations Charter. However, some issues may be pointed out as it is known that not all of the Security Council's decisions have the power to link all of the States, nor do they always produce binding regulations.

In spite of such matters, it can be claimed that Security Council decisions are addressed to the member States that take part in each specific case. In these States there is a formal explicit nexus that can easily be demonstrated, in accordance to the necessary formal consent logic. On the other hand, determining the scope of the Security Council decisions in third States' cases is not a simple task. Usually, such decisions can affect third States. Besides, as these third States are able to forward controversies to the United Nations, it is natural to say that they should corroborate the Council's decisions. But although almost all of the existing States are part of the United Nations, its universal range was not completely achieved: there is a different level of normative authority in both cases. The scope of the Security Council decisions can also be analyzed regarding international organizations and non-state actors. The international organizations are equally part of the United Nations, but not the non-state actors. Given that, it is right to say that the non-state actors are required to follow the Council's resolutions.

It is also important to consider the Security Council's decisions as an inspiration for other law sources. This influence can be exemplified by Resolutions 827 in 1993 and 955 in 1994, which establish the International Criminal Court to the former Yugoslavia and Rwanda, respectively. It must be highlighted that the Security Council cannot be considered a normative agent, even though it produces binding rules and inspires other organs when creating laws.

Finally, as previously mentioned, not all of the Security Council decisions have a binding nature. Such a feature can be explained by the difference in the terminology applied by the Security Council itself, such as 'decision', 'regulation', etc., as they have different normative effects. Also, an evaluation of the Council's intentions is necessary to determine its decisions' scope.