

## **The Security Council as World Legislator? Theoretical and practical aspects of law-making by the Security Council**

*Panel discussion organized by the Permanent Mission of Austria to the United Nations and the Institute for International Law and Justice of the New York University School of Law, Nov. 4, 2004, Dag Hammarskjöld Library Penthouse, United Nations, New York.*

The Panel discussion organized by the Permanent Mission of Austria to the United Nations and the Institute for International Law and Justice of the New York University School of Law, which took place on November 4, 2004, in the Dag Hammarskjöld Library Penthouse in UN Headquarters, focused on the function of the Security Council as world legislator. A Panel of distinguished academics and practitioners addressed different aspects of the issue.

The first point raised in the discussion referred to the prerequisites for the Council to play the role of a legislative body, given the demise of the contractual framework of lawmaking. In order for any body to act as a lawmaker, it needs to have both sufficient resources and sufficient background information on the situation it seeks to regulate. It was maintained that the Council evidently lacks both resources and fact-finding capacity to function in such a manner. According to one opinion expressed during the discussion, important as the Council's task to maintain international peace and security may be, its actions do not make it a legislator. Nevertheless, the Council does have the power to impose binding obligations on member-States when acting under Chapter VII of the Charter of the United Nations.

According to one definition, lawmaking is the imposition of binding legal obligations – something that the Security Council has the power to do under Chapter VII of the Charter. However, according to another definition, lawmaking is the prescription of general rules that are applicable to all, and which are meant to remain in force for an indefinite period of time. If the Security Council were to prescribe such general rules, it would definitely be acting *ultra vires*. Between these two extremes, there are many other instances that can be perceived as lawmaking, such as the ability of the Security Council to make determinations (for example, when determining that a situation constitutes a threat to international peace and security), or its ability to create subsidiary organs (such as the International Criminal Tribunals for the former Yugoslavia and Rwanda). The Security Council can take measures to oblige States to comply with such binding decisions through collective measures. Still, even if the Security Council can bind all States, it cannot bind them but for a limited period of time. Given the economy of the Charter, the Council was created to serve as an organ to police situations, to deter future instability, and to act in a swift manner to these ends. These virtues of the Council as police officer are precisely its vices as a legislator.

The issue of legitimacy of Security Council lawmaking was another important theme. At San Francisco, the States did not intend to create a world government with a parliament and an executive and judicial branch. And yet, the powers allotted by the Charter to the Security Council certainly render it an international directorate with limited representativeness, if any, and with supranational power, especially since the States not represented in the Council undertake to accept and carry out its decisions. Even if this massive delegation of sovereign powers by the

States to the Council was not apparent during the first 40 years of its operation — due to the Cold War and the use of the veto, and the fact that crises usually took the form of armies marching across national frontiers, much like the Charter envisioned — the following two decades allowed the Security Council both to function and to reveal its shortcomings. Whereas it is a tempting candidate for swift, global legislation and crisis management, as it has proven in some instances (by creating Sanctions Committees, the *ad hoc* criminal tribunals, and so on), the Council lacks legitimacy, due to the lack of representativeness, the lack of explicit limits to its power (the notion of threat to international peace and security can be interpreted extremely broadly), and the lack of any form of review.

One remedy proposed for enhancing the legitimacy of the Council is for it to allow all affected States, which most of the times will be all States, to take part in a negotiation or consultation process prior to the taking of a decision. This participation of the States must be done as of right, in light of the lack of any other system of checks and balances. Since at the time there is no alternative to Security Council legislation, we must accept legislation by the few, but in consultation with the many. Even the principal shareholders, meaning the permanent five, understand that any other alternative would just further undermine the Council's legitimacy. Another remedy for enhancing legitimacy would be the control of Council actions even in the absence of formal procedures of review. Such control could be exercised by the members of the Council through voting, and by the General Assembly, which, if bold enough, may sanction the Council for its decisions. There can also be incidental control of the Council's actions' legality by international tribunals, as in the case of Tadic before the ICTY. In the latter case, the court reviewed the constitutionality of the acts establishing it. In the final analysis, the States themselves may take matters into their own hands and refuse to apply Security Council measures. This would enhance both the legality and the legitimacy of Council action by introducing another element of a checks-and-balances system, but requires courage on the part of the member States.

In conclusion, the Panelists and the participating legal advisers, practitioners, and academics acknowledged that the Council has an important role to play as a global legislator. Its legislative function can and should be expanded to meet the contemporary needs of the international community in the present circumstances. However, some remedies must be considered, in order to compensate for the Council's inherent shortcomings in the areas of both legality and legitimacy.

Antonios Tzanakopoulos

## ***Agenda***

### **Welcome:**

Under-Secretary-General Nicolas Michel, Legal Counsel, United Nations

### **Introduction:**

Ambassador Hans Winkler, Legal Adviser, Austrian Federal Ministry for Foreign Affairs

Simon Chesterman Executive Director, Institute for International Law and Justice

### **Chair:**

Ambassador Mohamed Bennouna, Chairman of the 6th Committee, Perm. Representative of Morocco

### **Panellists:**

Professor Georges Abi-Saab, Graduate Institute of International Studies, Geneva

Ms. Carol Bellamy, Executive Director, UNICEF

Professor Thomas Franck, New York University School of Law

Professor Martti Koskenniemi, University of Helsinki, Member of the International Law Commission

### **Discussant:**

Dr. Pemmaraju Sreenivasa Rao, Member of the International Law Commission