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ARTICLES

Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity

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Abstract
This article considers the relationship between the United Nations and its member states in view of the Security Council's assertion of legislative powers. It claims that the exponential growth in UN powers at the expense of the powers of its member states cannot be arrested by legal means, because of the nature of the UN system and the absence of legally enforceable criteria and compulsory dispute-settlement mechanisms. For this reason, it proposes a different approach to law-making in the area of international peace and security – one that is built around the principle of subsidiarity, as reflected in Article 2(7) of the UN Charter. The role of the principle of subsidiarity in this respect is to determine which authority is best suited to exercise legislative power and how such power should be exercised in order to attain the objective of peace and security more efficiently. It is thus contended that the principle of subsidiarity promotes co-operative relations between the United Nations and its member states by protecting the latters' jurisdictional authority from unnecessary interference.

Key words
Article 2(7) UN Charter; member states; powers; proportionality; Security Council legislation; subsidiarity; United Nations

1. Introduction

The concept of legislation is rather unfamiliar in international law. If legislation implies a normative act promulgated unilaterally by an authorized organ and containing general, abstract and directly binding legal norms,[1] there is no body or process in international law entrusted with the power to habitually enact legislation.[2] Instead, law-making in the international system is multi-sourced and multi-layered,

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1 J. Brunnée, 'International Legislation', in *Max Planck Encyclopedia of Public International Law*, available online at www.mpepil.com. H. Kelsen, *General Theory of Law and State* (1945), 256, at 269–72; D. R. Miers and A. C. Page, *Legislation* (1990), 1–2.

2 *The Prosecutor v. Dusko Tadić a/k/a 'Dule'*, Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction, Case No. IT-94–1-AR72, 1995 (hereafter, '*Tadić*'), para. 43: 'There is . . . no legislature, in the technical sense of the term, in the United Nations system . . .. That is to say, there exists no corporate organ formally empowered to enact directly binding law on international legal subjects.'

whilst its content and binding force vary.[3] The main reason why law-making at the international level does not amount to legislation as described above is because one of the most fundamental principles of international law is the principle of state sovereignty, which, by stressing the importance of consent in international law-making, impedes the introduction of superseding law-making mechanisms and norms. That having been said, international law-making has experienced some profound changes over the years. Some of these changes concern the range of participants in the law-making process, with the inclusion therein of actors other than states, such as international organizations, whereas other changes refer to the diversification of international legal acts. More than that, in recent years, and particularly in the aftermath of the terrorist attacks of 2001, the UN Security Council adopted resolutions of legislative character. Here, reference is made in particular to Security Council (SC) Resolution 1373 (2001), which mandated states to prevent and suppress the financing of terrorist acts, to criminalize certain acts relating to terrorism, and to freeze funds or the financial assets of certain individuals, and to SC Resolution 1540 (2004), which obligated states to prevent non-state actors from developing, acquiring, manufacturing, possessing, transporting, or transferring weapons of mass destruction (WMD).

These resolutions are different from the resolutions usually adopted by the Security Council, which are primarily of executive character, namely individuated, expeditious, and finite. They are also different from other quasi-legislative acts promulgated by the Security Council, such as presidential statements or declaratory resolutions,[4] which have no normative effect. The legislative character of the aforementioned resolutions stems from their normative matrix – that is, the general and abstract character of the norms contained therein, the *erga omnes* binding force of the obligations imposed on states, and the fact that they have been promulgated unilaterally. According to a state representative to the Security Council, by adopting these resolutions, 'for the first time in history the Security Council enacted legislation for the rest of the international community'.[5]

The enactment of legislation by the Security Council transforms the character of the international law-making process by introducing a vertical, uniform, and global law-making mechanism. In this instance, it is not the collective will of states (in the many different forms that that may take) that produces legal norms, but the legislative act itself, which is now adopted unilaterally by a single organ of the international society.[6] By the same token, the enactment of legislation by the

3 See, in general, A. Boyle and C. Chinkin, *The Making of International Law* (2007).

4 E.g., S/PRST/2002/6 (15 March 2002) and SC Res. 1265 (1999) on protection of civilians in armed conflict; S/PRST/1998/18 (19 June 1998), S/PRST/1999/21 (8 July 1999), S/PRST/2001/31 (31 October 2001), SC Res. 1261 (1999), SC Res. 1379 (2001), SC Res. 1325 (2000), and SC Res. 1327 (2000) on women and children affected by armed conflict; S/PRST/2001/16 (28 June 2001) and SC Res. 1308 (2000) on the threat posed by the AIDS pandemic to security and stability.

5 UN Doc. A/56/PV.25, at 3 (Costa Rica). P. C. Szasz, 'The Security Council Starts Legislating', (2002) 96 AJIL 901; S. Talmon, 'The Security Council as World Legislature', (2005) 99 AJIL 193.

6 As Jose Alvarez put it, SC legislation 'circumvents the vehicle *par excellence* of community interest', namely the multilateral treaty. J. Alvarez, 'Hegemonic International Law Revisited', (2003) 97 AJIL 873, at 874–5. Representative of Nepal S/PV.4950 (Resumption 1), at 14.

Security Council disturbs the balance of power between the United Nations and its member states. Although states are feted as the primary subjects of international law, enjoying inherent and plenary jurisdictional authority and freedom, they see that the United Nations is gradually displacing them from certain areas of their jurisdictional authority and, even more importantly, it imposes on them obligations to which they have not consented. Questions are thus raised about the scope of UN powers and the configuration of relations between the United Nations and its member states. The reactions of certain states to the adoption of these legislative resolutions are telling. Although states recognized the need to bring into force laws to deal with security threats such as terrorism, they appeared wary of the Security Council's assuming legislative functions because such a practice 'deviates from time-tested modes of creating multilateral obligations',[7] whilst some of them questioned the Charter basis of such resolutions.[8]

This paper will thus inquire into how the relationship between the United Nations and its member states can be recalibrated as far as law-making is concerned in the area of international peace and security. It is suggested that such recalibration comes in the form of the principle of subsidiarity, viewed here as a structural principle that sits at the intersection of United Nations' and member states' powers and informs the manner in which their respective powers should be exercised. More specifically, subsidiarity filters assertions of legislative power by the United Nations and its member states with regard to issues pertaining to international peace and security; it identifies the level most appropriate to exercise that power; and, finally, it determines how it should be exercised in order to attain the common good of peace and security more efficiently. The paper therefore proceeds as follows. In the first part, I will present the context within which such tensions arise; this mainly refers to the changing constellation of power between the United Nations and its member states. In the second part, I will discuss the principle of subsidiarity and its place in the UN system. And, in the last part, I will apply the principle of subsidiarity to SC legislation. Before I proceed, two caveats are in order. First, although subsidiarity can apply to different areas of international law-making, such as to human rights or international criminal law, this paper will confine itself to the case of SC legislation in peace and security in light of Resolutions 1373 and 1540. Second, this article will not examine those procedural issues or issues of accountability and judicial control that the application of subsidiarity to SC legislation may give rise to, not because they are not important, but because the aim of this paper is different: it is to put forward a conceptual template and identify the conceptual tools for the application of the principle of subsidiarity to SC legislation.

7 According to India's Representative to the SC, 'India cannot accept any obligations arising from treaties that India has not signed or ratified'; see Letter Dated 27 April 2005 from the Permanent Representative of India to the United Nations addressed to the President of the Security Council, S/2004/329. Also see Representative of Philippines UN Doc. S/PV.4950, at 3; Representative of Switzerland UN Doc. S/PV.4950, at 28.

8 Representative of Algeria and Iran UN Doc. S/PV. 4950, at 5 and 32, respectively; Egypt UN Doc. S/PV. 4950 (Resumption 1), at 3; Pakistan UN Doc. S/PV.4956, at 3.

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2. United Nations' powers and the powers of its member states

When states create international organizations (IOs), often by concluding a treaty, they delineate their fields and means of operation through the principle of conferral.[9] According to this principle, states transfer specific competences and powers to an IO in order to achieve certain common objectives. 'Competences' are the spheres of authority of the organization whereas 'powers' refers to any 'instrumental tool available within a given sphere of competence'.[10] Powers are thus the key to making competences real and effective.[11] From the above, it becomes apparent that IOs are entities whose jurisdictional authority, namely their political and/or legal power to act, is circumscribed and dependent. As the International Court of Justice (ICJ) said in the *Reparation for Injuries* Advisory Opinion, IOs are not states, still less 'super-states', and their rights and duties are therefore more limited than those of states.[12] By delimiting the competences and powers of an IO, states also protect themselves against any subsequent power grabbing by that IO. That having been said, the relationship between IOs and member states is more complex and indeed more dynamic than the above account reveals. For example, and as far as the United Nations is concerned, although states have transferred certain competences and powers to the Organization (primarily in relation to peace and security),[13] it has not been possible to enumerate in detail all its powers or to foresee all the circumstances under which the United Nations might be called upon to act. Moreover, the UN Charter is formulated as an enabling document. It contains programmatic principles and purposive objectives whose realization may require powers additional to the ones initially conferred on the Organization. If the United Nations is a 'political body, charged with political tasks of an important character, and covering a wide field, namely, the maintenance of international peace and security'[14] and if 'the fulfilment of the other purposes will be dependent upon the attainment of that basic condition',[15] the United Nations should not only exercise its powers to their 'full extent',[16] but also assume additional powers in order to attain 'the master idea'[17] behind its creation, that of maintaining international peace and security. Another

9 H. G. Schermers and N. M. Blokker, *International Institutional Law: Unity within Diversity* (2003), paras. 209–210.

10 P. H. F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity: Analysis of Their Legal Status and Immunities* (1994), 75–8; M. Virally, 'La notion de function dans la théorie de l'organisation internationale', in *Mélanges offerts à Charles Rousseau* (1974), 277, at 294.

11 K. Skubiszewski, 'Implied Powers of International Organisations', in Y. Dinstein and M. Tabory (eds.), *International Law at a Time of Perplexity* (1989), 855, at 858.

12 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep. 179 (hereafter, '*Reparation for Injuries*').

13 Art. 24 and Chapters VI, VII, VIII of the UN Charter.

14 *Reparation for Injuries*, *supra* note 12, at 179; J. Klabbers, *An Introduction to International Institutional Law* (2009), 12.

15 *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, [1962] ICJ Rep. 151, at 168 (hereafter, '*Certain Expenses*').

16 *Jurisdiction of the European Commission of the Danube*, Advisory Opinion of 8 December 1927, PCIJ Publications (1927) Series B No. 14, at 64; *Reparation for Injuries*, *supra* note 12, at 179; B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002), 15.

17 C. De Visscher, *Theories and Realities in International Law* (1968), 260–1.

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factor that lends itself to the growth of UN powers is the fact that the United Nations is endowed with permanent organs that are independent from states. Thus, in the exercise of their powers, they not only impact on states, but can also produce a redistribution of power, vis-à-vis the member states as well as amongst themselves. It should also be noted in this regard that the competence of each organ to determine the scope of its respective powers is self-referential and self-judging, measured only against the aims it pursues.[18] Furthermore, UN organs, with the exception of the ICJ, are not organically limited as far as their powers are concerned according to predetermined jurisdictional domains because they do not operate on the basis of the principle of separation of powers. According to this principle, each institution in the tripartite division of institutions into legislative, executive, and judiciary can only exercise powers commensurate with its jurisdictional domain. In the United Nations, instead, there is no real correlation between organs and types of power or between powers and specific instruments, but the UN political organs, such as the Security Council or the General Assembly, can exercise different powers and employ a variety of instruments – legislative, executive, or even quasi-judicial – depending on the nature of the problem at hand and the objective sought to be achieved. For all of the above reasons, the principle of conferral provides little restraint to the expansion of UN powers. As a matter of fact, the question of what powers belong to the United Nations has been answered in functional and teleological terms, with emphasis being placed on UN purposes as moulded by the demands of international life.[19] As Judge Azevedo put it, 'the aims of the United Nations must be served so that mankind may flourish'[20] and, for this reason, according to Judge Alvarez, the text of the Charter must be 'vivified' and the United Nations attributed with rights that it does not possess, provided that they are 'in harmony with the nature and objects' of the Organization.[21] Or, in the words of the former UN Secretary-General Dag Hammarskjöld, a concept of the United Nations as 'a dynamic instrument of government' is to be preferred over that of a 'static conference machinery', if the United Nations is to save succeeding generations from the scourge of war.[22]

From the very beginning, the ICJ has been instrumental in reading UN powers in teleological terms. According to the ICJ, 'the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice'[23] and it went on to say that 'under international law, the Organization must be deemed to have those

18 *Interpretation of Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV)*, Advisory Opinion, 28 August 1928, PCIJ Publications (1928) Series B No. 16, at 20; *Certain Expenses*, *supra* note 15, at 168. Also see Doc. 887 IV/2/39 UNCIO Vol. 13 (1945), at 668–9; and Doc. 664 IV/2/33, UNICIO Vol. 13 (1945), at 633–4.

19 E. Lauterpacht, 'The Development of the Law of International Organizations by Decisions of International Tribunals', (1976/IV) 152 RCADI 377, at 420–66; M. Hexner, 'Teleological Interpretation of Basic Instruments of Public International Organizations', in S. Engel (ed.), *Law, State and International Legal Order: Essays in Honour of Hans Kelsen* (1964), 119; J. Klabbers, *An Introduction to International Institutional Law* (2009), 53–73.

20 *Competence of the General Assembly for the Admission of a State to the United Nations Advisory Opinion*, [1950] ICJ Rep. 23–4 (Judge Azevedo, Dissenting Opinion).

21 Ibid., at 17–18.

22 D. Hammarskjöld, 'Two Differing Concepts of United Nations Assayed: Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1960–15 June 1961', (1961) 15 Int. Org. 549.

23 *Reparation for Injuries*, *supra* note 12, at 180.

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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'.[24] *Essential*, however, does not mean 'absolutely essential' or 'indispensable',[25] but means that which enables the United Nations to function in view of its objectives and also in view of the 'necessities of international life', as the ICJ was quick to add in another instance.[26]

Truth to tell, the ICJ has been rather ambivalent as to how extensive such additional powers can be. In the *Reparation for Injuries* Advisory Opinion, it linked such powers to the aims pursued by the United Nations and not to the expressed powers granted to the Organization, which is what Judge Hackworth advocated.[27] In the *Certain Expenses* Advisory Opinion, the ICJ conceded that, even if the UN purposes are broad, neither these purposes nor the powers to effectuate them are unlimited. However, it went on to say that 'when the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organisation'.[28] In the *Nuclear Weapons* Advisory Opinion, the ICJ was more circumspect as to the scope of additional powers that certain specialized IOs may assume but, when it came to the United Nations, it reaffirmed its view that the United Nations possesses broad powers commensurate with its objectives. More specifically, the ICJ found in that instance that the World Health Organization (WHO) lacked the power to request an advisory opinion concerning the legality of the threat or use of nuclear weapons. For the Court, the principle of speciality,[29] the other aspect of the principle of attribution, is more restrictive as far as the powers of specialized agencies such as the WHO are concerned. Yet, the ICJ allowed for some flexibility in the way the powers of specialized agencies should be interpreted by noting that the interpretation should be made in such a way as to take into account the logic of the whole UN system.[30] With regard to UN powers, however, the Court repeated its findings in the *Reparation for Injuries* case, namely that the Organization also has those powers that are *essential* for the performance of its duties.[31]

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24 *Reparation for Injuries*, *supra* note 12, at 182 (emphasis added); *Certain Expenses*, *supra* note 15, at 167–8, 170, 179; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep. 2, para. 110; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 225, para. 25 (hereafter, '*Nuclear Weapons*'); see also Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 US 316 (1819), regarding the scope of federal powers: '[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'

25 Lauterpacht, *supra* note 19, at 430–2.

26 *Nuclear Weapons*, *supra* note 24, para. 25.

27 *Reparation for Injuries*, *supra* note 12, at 198 (Judge Hackworth, Dissenting Opinion); and *Certain Expenses*, *supra* note 15, at 268 (Judge Koretsky, Dissenting Opinion).

28 *Certain Expenses*, *supra* note 15, at 168.

29 *Nuclear Weapons*, *supra* note 24, para. 25.

30 Ibid., para. 26.

31 Ibid., para. 25.

What emerges from the ICJ jurisprudence is that the United Nations has either very broad implied powers in order to achieve its aim of peace and security or has, in fact, inherent powers – that is, all the powers that derive from the UN objectives.[32]

It is in this context – that is, the exponential expansion of UN powers culminating in the assertion by the Security Council of legislative powers – that the jurisdictional authority of the United Nations is pitted against the jurisdictional authority of its member states. States feel that the balance of power between the United Nations and themselves has been disturbed and that their jurisdictional capacity is declining, whereas that of the United Nations is increasing. Legal discourse tends to portray the problem as one of competing jurisdictions that need to be separated by a competent organ on the basis of the law. However, such an approach is not helpful because the legal criteria, if they exist, are not at all clear whereas the availability of judicial processes to resolve disputes or the legally binding effect of their decisions is haphazard. The flaws of the 'technical' approach are evident in those cases mentioned above, such as the *Reparation for Injuries* and the *Certain Expenses* cases, in which the ICJ was called upon to give an advisory opinion as to the scope of UN powers. More specifically, the Court was asked to give its opinion, in the former case as to whether the United Nations has specific powers to bring a claim for reparation due in respect of damage caused to a victim of a wrongful act and in the latter case as to whether the General Assembly has the power to provide for the financing of measures designed to maintain international peace and security, in this case, peacekeeping operations, which required a finding as to whether the General Assembly has the power to establish such operations. According to France, one of the parties that provoked the General Assembly's request for an advisory opinion in the *Certain Expenses* case, if the issue of how the peacekeeping operations should be financed is to become a legal one, then it is the UN Charter that should provide the relevant answers.[33] The Court was, however, asked to deliver its legal opinion in a context in which, on the one hand, there is an organization that, as explained above, has broad powers and objectives and, on the other, there are no legally enforceable criteria in the Charter to demarcate the said powers. Therefore, the ICJ invoked policy considerations. It took the view that the nature and scope of UN powers are not determined by any specific provision in the Charter, but by the ends pursued by the Organization, which justifies the arrogation of new powers.[34] Although the ICJ's advisory opinions are silent on the question of how the relationship between the United Nations and its member states should be configured, this is the default question lurking behind the request in the *Certain Expenses* case. As Judge Fitzmaurice put it in his separate opinion, 'what is really in question here is the relationship of the Member States *inter se*, and vis-à-vis

32 F. Seyersted, *The Common Law of International Organisations* (2008), 29–33, 65–70; N. White, *International Organisations* (2005) 88, at 132–3.

33 Lettre du Gouvernement de la République française au Greffier, *Certain Expenses*, *supra* note 15, at 133.

34 This approach was castigated by Judge Spender, who said that '[w]hen, however, the Court is called upon to pronounce upon a question whether certain authority exercised by an organ of the Organization is within the power of that organ, only legal considerations may be invoked and *de facto* extension of the Charter must be disregarded', ibid., at 197 (Judge Spender, Separate Opinion).

the organisation as such'.[35] According to France's submissions, member states have not alienated themselves from their powers by becoming UN members, but only '*dans la stricte mesure où ils y ont consenti*'.[36] For the French government, the General Assembly's budgetary decisions outside the strict confines of the powers bestowed upon it by the Charter amount to '*un pouvoir législatif mondial*'.[37]

The Court did not deal with this issue but, by adopting a goal-oriented approach to UN powers, it disposed rather abruptly of the principle of conferral, which, as noted above, provides guarantees to member states that their powers will not be appropriated by the IO.[38] The ease with which the Court dispensed with this principle is explained by the one-dimensional focus of its analysis: for the Court, the question was what powers the United Nations can assume in the light of its purposes and not what powers the United Nations can assume vis-à-vis its member states in the light of its purposes. By adopting an all-or-nothing approach to UN powers, the ICJ may have also encouraged, even if involuntarily, antagonistic relations between the United Nations and its member states. It is not surprising, then, that the Court's opinions neither impressed states, some of which opposed them,[39] nor assuaged states' deeper anxieties as to how membership of the United Nations and striving for peace and security can be combined with preserving their jurisdictional authority and integrity. Such anxieties are not unique to UN members only, but are also visible in other settings in which institutions have been endowed with broad objectives and powers that they tend to pursue dynamically. One should recall here the frequent and often terse jurisdictional clashes between the European Union and its member states, which, in contrast to the United Nations, take place in a system in which respective powers are more clearly demarcated and compulsory adjudication mechanisms exist.[40]

What the preceding discussion then shows is that a legal and indeed a judicial approach to the demarcation of powers between the United Nations and its member states is not always able to settle any disputes that may arise because the issue is not necessarily a technical one about delimitation of powers, but a more profound one about the jurisdictional autonomy and integrity of each respective order, and about the appropriate level of interaction between the United Nations and its member

35 Ibid., at 200 (Judge Fitzmaurice, Separate Opinion).

36 Lettre du Gouvernement de la République française au Greffier, ibid., at 133. See also Professor Tunkin's oral argument before the ICJ in Certain Expenses, Pleadings, Oral Arguments, Documents, at 397, and 'Memorandum of the USSR Government Concerning United Nations Operations for the Maintenance of Peace and Security', UN Doc. S/7841 (1967).

37 Lettre du Gouvernement de la République française au Greffier, *Certain Expenses*, *supra* note 15, at 134.

38 L. Gross, 'Expenses of the United Nations for Peace-Keeping Operations: The Advisory Opinion of the International Court of Justice', (1963) 17 Int. Org. 1, at 5: 'What is material is that in the Court's view the "freedom of action" of the Members is limited not by explicit provisions of the Charter but by the comprehensive ends to the attainment of which the Organization is dedicated. The Court here seems to discard the dictum of its predecessor in the *Lotus* case that "the rules of law binding upon States . . . emanate from their own free will" and that restrictions upon the independence of States cannot therefore be presumed.'

39 See UNYB (1962), at 541 ff.; Res. 1/9/65 GAOR.

40 See Art. 5 CTEU and Arts. 3, 4, 6 of CTFEU. *Brünner v. European Union Treaty* (German Constitutional Court), [1994] 1 CMLR 57; *Polish Membership of the European Union (Accession Treaty)* (Polish Constitutional Court), Judgment J18/04 of 11 May 2005. J. Weiler, *The Constitution of Europe* (1999), 39–56; Klabbers, *supra* note 19, at 31–7.

states in the pursuit of the common goal of peace and security. Such tensions will always be immanent, because both the United Nations and its member states, whilst representing different loci of authority, operate within the same policy field and pursue common goals. Law-making with regard to terrorism and WMD is but one example in which UN powers seem to be on a collision course with those of member states. What is needed, therefore, is a change of perspective: from one that focuses on separating different jurisdictional authorities to another that focuses on mediating between them, in order to identify the appropriate level at which power will be exercised for attaining the common good — an aim to which all actors subscribe, and in which they have invested. This comes in the form of the principle of subsidiarity, as will now be explained.

3. The principle of subsidiarity and its place in the UN Charter: Article 2(7) UN Charter

The origins of the principle of subsidiarity go back to Aristotle, but it is Catholic doctrine that popularized this concept. Subsidiarity was invoked in 1891 by the Catholic Church and has been reaffirmed since then in different contexts as a principle of social ordering of constituent parts in order to serve and attain the common good.[41] In Catholic teaching, the concept of subsidiarity tries to reconcile the individual and social aspects of human existence in its search for personal fulfilment and, for this reason, it encourages intervention by larger units only when the individual unit cannot attain its fulfilment without such assistance.[42] Thus, the main values underpinning subsidiarity are the value of autonomy, mutual assistance, and the fulfilment of each unit and of the referent order as a whole.

From its origins in Catholic social doctrine, subsidiarity gradually acquired political dimensions when it was applied to organized and composite political orders, whether state or international ones.[43] Within political orders, subsidiarity assists in regulating the relationships between and among different power holders with a view to attaining the common good effectively and less intrusively. More specifically, subsidiarity determines which level of authority will achieve the objectives of the proposed action more efficiently and justify action by a higher level of authority only if the proposed objectives cannot be achieved equally well by the lower levels

41 See, e.g., '*Quadragesimo Anno*: Encyclical of the Pope Pius XI on Reconstruction of the Social Order' (1931), paras. 79–80, in D. J. O'Brien and T. A. Shannon (eds.), *Catholic Social Thought: The Documentary Heritage* (1992), 42, at 60; J. Komonchak, 'Subsidiarity in the Church: The State of the Question', (1988) 48 *The Jurist* 298. Benedict XVI, *Pursuing the Common Good: How Solidarity and Subsidiarity Can Work Together*, Allocution to the Participants of the Plenary Assembly of Pontifical Academy of Social Sciences, *L'Osservatore Romano*, 4 May 2008, at 1.

42 I. Feichtner, 'Subsidiarity', in *Max Planck Encyclopedia of Public International Law*, available online at www.mpepil.com. G. A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', (1994) 94 *Columbia Law Review* 331, at 382; P. G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', (2003) 97 AJIL 38, at 42–6; Komonchak, ibid., at 301–2.

43 '*Pacem in terris*, Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity, and Liberty, April 11, 1963', in O'Brien, *supra* note 41, at 153–4, paras. 140–141: 'The same principle of subsidiarity which governs the relations between public authorities and individuals, families and intermediate societies in a single State, must also apply to the relations between the public authority of the world community and the public authorities of each political community.'

of authority and only if that action does not interfere unnecessarily with their authority. That said, subsidiarity does not define the common good, which is defined by the stakeholders at a prior stage and through a different process.[44] Furthermore, subsidiarity does not define the scope of powers that each unit possesses or how they are allocated. Again, this is determined at an earlier stage and by a different process. Instead, subsidiarity mediates between different, albeit interlocking, authorities and provides the conditions and the reasons for preferring one level of authority to exercise power over the other on a case-by-case basis.[45] Put differently, subsidiarity is about the dialectics of power in composite polities. Its role is thus flexible. It can have a negative connotation of limiting the opportunity for exercising power as well as a positive one of legitimizing the assertion of power by any one of the referent units. In the same vein, it can be a centralizing as well as a decentralizing force.

The European Union is the best-known supranational institution in which subsidiarity has become one of the constitutional principles.[46] The United Nations is another organization in which the principle of subsidiarity applies even if it has never been mentioned expressly. For example, subsidiarity informs inter-institutional relations between the United Nations and other security actors,[47] as well as intra-institutional relations between the Security Council and the General Assembly.[48] Above all, it informs the relationship between the United Nations and its member states in Article 2(7) UN Charter. According to that article, the United Nations should not intervene in matters falling essentially within a state's domestic jurisdiction. It is true that most interpretations of that article try to decipher the content of the limitation contained therein,[49] and do not approach it in the way suggested here – that is, as an expression of the principle of subsidiarity. Yet, such interpretations fail to elucidate its content because the meaning of the phrase 'matters within the domestic jurisdiction' or the meaning of 'intervention' is '*à la fois juridiquement indéterminé et juridiquement indéterminable*'.[50]

It has been maintained, for example, that those matters that are excluded from domestic jurisdiction are matters of international concern. As the Permanent Court of International Justice (PCIJ) put it, 'the question whether a certain matter is or is not within the jurisdiction of a state is an essentially relative question; it depends on the

44 For a critique of the presumption that there is agreement on the objectives, see G. Davies, 'Subsidiarity as a Method of Policy Centralisation', in T. Brouder and Y. Shany (eds.), *The Shifting Allocation of Authority in International Law* (2008), 79.

45 T. Schilling, 'A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle', (1994) 14 *Yearbook of European Law* 202, at 206.

46 See Art. 5 CTEU and Protocol (No. 2) On the Application of the Principles of Subsidiarity and Proportionality annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.

47 Chapter VIII of the UN Charter.

48 Arts. 10–14 UN Charter; GA Res. 377 (Uniting for Peace); *Certain Expenses*, *supra* note 15, at 162–3.

49 L. Preuss, 'Article 2, Paragraph 7', (1949/I) 74 RCADI 547; C. Rousseau, 'La détermination des affaires qui relève essentiellement de la compétence nationale des Etats', (1952/I) AIDI 137, at 157; A. A. Cançado Trindade, 'The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations', (1976) 25 ICLQ 715; A. D'Amato, 'Domestic Jurisdiction', in *Encyclopaedia of Public International Law*, at 3090; Simma, *supra* note 16, at 148–71; J.-P. Cot and A. Pellet, *La Charte des Nations Unies: Commentaire article par article* (2005), 485–507; B. Conforti and C. Focarelli, *The Law and Practice of the United Nations* (2010) 155–75.

50 Rousseau, *supra* note 49, at 157.

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development of international relations'.[51] According to another view, those things that are excluded from the domestic preserve are matters regulated by international law. Yet, according to a third view, that article protects a small bundle of rights that are inherent to state sovereignty and thus removed from the reach of international law without, however, being conclusively defined.[52] The same lack of interpretative determinacy mars the word 'intervention'. The debate has focused on whether it refers to any coercive action below the enforcement threshold that is explicitly exempted from the purview of Article 2(7) or to any type of interference, such as political or economic interference. The different constructions of that article not only make its content elusive, but themselves tend towards contradictions or self-negating results.[53] For example, if what is exempted from Article 2(7) is matters that concern the international community or matters that are the subject of international regulation, that article loses any content or purpose to the extent that the United Nations is the embodiment of the international community and creator as well as facilitator of international law. On the other hand, it can always be 'possible for a State to maintain, without necessarily laying itself open to an irresistible charge of bad faith, that practically every dispute concerns a matter essentially within its domestic jurisdiction'.[54] Furthermore, if the United Nations is precluded from taking any action other than enforcement because such action may impact on member states, this would severely curtail its powers, emasculate its effectiveness, and raise questions about its existence. UN practice concerning Article 2(7) has equally failed to clarify its content but instead shows that the invocation of domestic jurisdiction never succeeded in stopping UN organs from asserting their powers with regard to matters that were claimed to fall within a state's domestic jurisdiction. This led one commentator to say that domestic jurisdiction is 'undergoing a continuous process of reduction'.[55]

It appears, then, that the impact of Article 2(7) has been negligible and that it has become devoid of juridical meaning or purpose in the UN system. Although it was introduced as a complement to the principle of conferral in order to protect the jurisdictional authority of states, it failed to prevent the expansion of UN powers just as the principle of conferral failed to arrest such 'power creep'.

That having been said, if Article 2(7) still has a place in the UN system and a role to play, what is needed is to revisit its underlying principle and its 'spirit'.[56] First, it should be recalled that Article 2(7) was introduced in order to protect the

51 *Nationality Decrees Issued in Tunis and Morocco Case*, Advisory Opinion of 7 February 1923, PCIJ Publications (1923) Series B No. 4, at 24.

52 Ibid.

53 According to Preuss, 'Far from representing a definite concept which would be a clear guide for future action and which would resolve conflicts in this very delicate field of international action, the adoption of Article 2(7) merely postponed the division of opinion which would be certain to arise in the future', cited in I. S. Claude, Jr, *Swords into Plowshares* (1971), 183.

54 *Case of Certain Norwegian Loans*, [1957] ICJ Rep. 9, at 52 (Judge Lauterpacht, Separate Opinion).

55 Cançado Trindade, *supra* note 49, at 765. Simma, *supra* note 16, at 149: 'It has not . . . proved to be an effective tool for denying the United Nations the power to act.' Schermers and Blokker, *supra* note 9, para. 212.

56 D'Amato, *supra* note 49, at 3095: 'Like the claim of self-determination, it is hard to understand what "domestic jurisdiction" means exactly, but easy to appreciate the spirit in which it is invoked and the meaning that its proponents would ascribe to it in any given context.'

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jurisdictional autonomy of states as members of the United Nations.[57] Second, its role is to regulate the exercise of jurisdictional authority by the United Nations and its member states in the pursuit of common objectives and not to define the realm of jurisdictional authority enjoyed by the United Nations or member states, which is a prior question that is subject to different considerations. Third, the jurisdictional interaction between the United Nations and member states that emerges from that article and its different interpretations is relational and not fixed or organically separated.[58] Fourth, its nature is political rather than juridical, as a comparison with its predecessor, Article 15(8) of the Covenant of the League of Nations, which specifically included the criterion of international law, reveals, as well as the rejection of proposals to make the ICJ final arbiter of domestic jurisdiction.[59] This view is also supported by the *travaux préparatoires* according to which Article 2(7) was viewed not as 'a technical and legalistic formula'[60] but as a fundamental rule regulating the relationship of the United Nations with its member states and was considered 'inherent in the whole concept of an international organization'.[61] It is for this reason that it was transposed to the general-principles section of the Charter from the section on the peaceful settlement of disputes.

From the above, it emerges that Article 2(7) was placed at the intersection of United Nations' and member states' jurisdictional authority[62] and provides the context in which the powers of the United Nations meet those of its member states in the pursuit of the common goal of peace and security. It is only if it is seen in this way, as a filter of powers, that this article acquires normative and practical significance and meaning. It is in this vein, then, that it is claimed here that Article 2(7) is an expression of the principle of subsidiarity.[63]

4. Subsidiarity and legislation by the Security Council

Having explained in the previous section the function of subsidiarity and its place in the UN system, I will now consider its application to the case of SC legislation. Its application involves a number of more specific enquiries. It should be established, first, that the proposed legislation falls within the Security Council's jurisdictional powers and within an area in which states also have jurisdictional powers; secondly, that SC legislation deals with a transnational issue and serves the common purpose

57 UNCIO VI, at 508.
58 *Nationality Decrees Issued in Tunis and Morocco Case, supra* note 51, at 24.
59 UN Doc. 1019_I/1/42 (1945), UNCIO, Vol. 6, at 509–10.
60 R. B. Russell, *A History of the United Nations Charter* (1958), 907.
61 Ibid., at 900.
62 J. S. Watson, 'Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter', (1977) 73 AJIL 60, at 60.
63 Rousseau, *supra* note 49, at 142; Schermers and Blokker, *supra* note 9, para. 215; G. Ulfstein, 'Institutions and Competences', in J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009), 74–6. For other interpretations of this Article that resemble the principle of subsidiarity, see G. Arangio-Ruiz, 'Le domaine réserve: L'internationale et le rapport entre droit international et droit interne: Cours général de droit international public', (1990) 225 RCADI 391. According to him, this article protects states against the direct affects of UN decisions. According to another construction of this article, it represents the principle of proportionality. Simma, *supra* note 16, at 171.

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more efficiently than law-making by states; and, thirdly, that the legislative act is proportional to the ends sought.

The first enquiry is a necessary a priori inquiry because subsidiarity is relevant only when the Security Council shares legislative powers in the specific policy area with states; it is only then that questions about identifying the appropriate locus of jurisdictional authority arise. If the Security Council does not have legislative power with regard to the specific issue or the issue belongs to its exclusive powers or to the exclusive powers of member states, subsidiarity is not relevant.

With regard to the question of whether the Security Council possesses legislative powers in the area of peace and security, an affirmative answer is supported by the pervading teleological interpretation of UN powers explained previously – an interpretation that derives powers from objectives and purposes. Support can also be found in specific Charter provisions. According to Article 39, the Security Council can adopt 'measures' to maintain or restore the peace if it determines that a threat to the peace, a breach of the peace, or an act of aggression exists.[64] Such measures can be military according to Article 42 or non-forcible according to Article 41 but the list of measures included in this article is only indicative and not exhaustive.[65] This is because the situations that can trigger SC measures are defined in generic terms, such as a threat to the peace, which precludes any predetermination of the measures that will be employed by the Security Council. In this respect, what was said previously needs to be recalled, namely that there is no correlation between organs, powers, and instruments in the United Nations other than in relation to the objectives pursued by the United Nations. It can thus be safely said that the word 'measures' in Article 41 is agnostic as to what specific measures the Security Council may use but, depending on the circumstances, the Security Council can adopt a variety of measures of executive or of general character, such as legislation. For example, faced with a specific terrorist act, the Security Council may adopt specific and expeditious measures in order to maintain or restore the peace, but, faced with terrorism as a state of affairs, it may adopt legislative measures in order to suppress or eradicate it. It is in this vein that SC Resolution 1373 (2001) tries to deal in a general manner with certain aspects of terrorism, even though it was adopted against the background of the specific events of 9/11.

With regard to the second issue — namely that the Security Council needs to share legislative powers with states in the particular policy area — it may be contended that the Security Council enjoys jurisdictional pre-emption in all matters concerning peace and security because, according to Article 24 of the UN Charter, states have conferred on the Security Council primary responsibility in peace and security. The questions, then, are what does the word 'primacy' mean and what are its legal implications? The word 'primacy' is rather ambiguous but acquires meaning when interpreted in the context of the UN system as a whole. It can thus refer to institutional primacy as well as to subject-matter primacy. Institutional primacy

64 Art. 39 UN Charter.

65 *Tadić*, *supra* note 2, paras. 33–40; *Certain Expenses*, *supra* note 15, at 163–5, 177. H. Kelsen, *The Law of the United Nations* (1950), at 732–7; Simma, *supra* note 16, at 632, 705, 739.

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refers to the relationship between the Security Council and the General Assembly in the sense that the Security Council takes precedence over the General Assembly, whose role is subsidiary to that of the Security Council. This is corroborated by other Charter provisions according to which the General Assembly cannot make any recommendation with regard to questions relating to international peace and security while the Security Council is exercising its functions[66] and by the *Uniting for Peace Resolution* according to which the General Assembly can be seized of a situation that otherwise falls within SC competence and can recommend enforcement action only if the Security Council, 'because of lack of unanimity of the permanent members, fails to exercise its primary responsibility' for the maintenance of peace.[67] Above all, it is supported by the rationale behind the creation of two organs with overlapping powers in peace and security. More specifically, the founding states wanted an organ, the Security Council, with extensive and compelling powers in peace and security and a plenary organ, the General Assembly, with equally broad powers in peace and security to 'discuss' or 'recommend' but with no compelling powers.[68]

Subject-matter primacy refers to the area within the Security Council's areas of authority that should be given prominence by the Security Council in its operations, as well as to the specific matters within this area over which the Security Council enjoys pre-emptive powers. More specifically, having created an independent organ with broad and diverse powers, states instructed the Security Council to give priority to issues pertaining to international peace and security and, for this reason, they have also conferred on the Security Council sole powers with regard to 'prompt and effective' action. 'Prompt and effective action' does not, however, mean any action whatsoever but, according to the ICJ in the *Certain Expenses* case, it means enforcement action in the sense of military enforcement.[69] The Court in that instance distinguished the word 'action' from the word 'measures', which resonates with the wording of Articles 41 and 42 of the UN Charter, in that Article 41 uses the word 'measures' whereas Article 42, which is the basis for the use of force, uses the word 'action'. From the above, it can be safely said that, in so far as military enforcement is concerned, primacy implies exclusivity, whereas, in all other areas, the Security Council shares powers with member states. This view is corroborated by other provisions of the Charter. For example, the General Assembly does not have military enforcement powers[70] and, according to the *Uniting for Peace Resolution*, it can only recommend military action. Furthermore, states can undertake enforcement action only with the authorization of the Security Council[71] and this is also

66 Arts. 11, 12, 14 UN Charter.
67 GA Res. 377 (V).
68 Russell, *supra* note 60, at 646, 750–4; Simma, *supra* note 16, at 443–5.
69 *Certain Expenses*, *supra* note 15, at 163.
70 Arts. 11(2), 12(1), 14 UN Charter.
71 *Certain Expenses*, *supra* note 15, at 163; *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Jurisdiction of the Court and Admissibility of the Application, [1984] ICJ Rep. 381, para. 95; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 200, paras. 26–27; *Tadić*, *supra* note 2, paras. 22–25. For a similar approach to exclusive powers, see Art. 2(1) CTFEU.

the case with regard to regional organizations.[72] Likewise, whilst peacekeeping operations, as peace and security measures, can be established by states, international organizations, the General Assembly, or the Security Council, only peacekeeping operations that have an enforcement component involving the use of force fall within the exclusive competence of the Security Council.[73] Thus, to the extent that legislation is not military enforcement for which states have conferred exclusive powers on the Security Council, it is a power that the Security Council shares with states, which, at any rate, possess inherent legislative power in international law.[74]

If both the Security Council and member states enjoy legislative powers, the immediate question, then, is to decide when it is opportune for the Security Council to exercise such power, which is an inquiry into subsidiarity *stricto sensu*. More specifically, what needs to be ascertained is whether the issue has a transnational aspect, the regulation of which will satisfy an objective pursued by the United Nations and its member states, and whether that objective can be achieved by member states through the normal law-making processes or more efficiently by the Security Council. It transpires, then, that the default position is that law-making remains with the member states as long as they can attain the common objective effectively.[75]

As far as international peace and security are concerned, these are goals for the achievement of which both states and the United Nations strive. Furthermore, certain issues affecting peace and security may also acquire transnational character. The question, then, is whether the Security Council is a more appropriate forum to lay down rules than states, in view of the nature of the problem and the benefits that will accrue. This is a question that the principle of subsidiarity helps to answer and, as a matter of fact, it informed the process surrounding the adoption by the Security Council of its legislative resolutions on terrorism and WMD. More specifically, the Security Council intervened when the threat posed by terrorism and WMD acquired transnational dimensions affecting international peace and security, and when the disparities and gaps in the existing legal framework distorted or impeded efforts at efficient regulation and enforcement.[76] Terrorism acquired a transnational dimension when its aims, means, methods, participants, or victims spread beyond

72 Art. 53 UN Charter.

73 *Certain Expenses*, *supra* note 15, at 164; N. Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', (2006) 11 JCSL 465.

74 As was said above, the SC shares powers in peace and security with the GA, but the latter does not have legislative powers in the meaning used here. The SC also shares powers in peace and security with the ICJ, but the latter exercises judicial and not legislative powers. For example, in the *Nicaragua* case, the Court held that no restriction has been placed as to when to exercise its functions and that both the SC and the ICJ 'can therefore perform their separate but complementary functions with respect to the same events', *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Jurisdiction of the Court and Admissibility of the Application*, [1984] ICJ. Rep. 14, para. 95.

75 Art. 5(3), CTEU; Protocol (No. 2) On the Application of the Principles of Subsidiarity and Proportionality, *supra* note 46, Art. 5.

76 See, e.g., statement by Representative of Republic of Korea S/PV.4950 (Resumption 1), at 8; 'given the urgency of this dire challenge and the amount of time for a negotiating process involving all Member States, it is fitting and timely for the Security Council to address important loopholes in the existing proliferation regimes.' Also Representative of United States of America, S/PV.4956, at 5; Representative of Chile, ibid., at 6; Representative of Romania, ibid., at 9.

and across borders. Also, prior to the adoption of SC Resolution 1373, there have been more than a dozen conventions dealing with different aspects of terrorism.[77] Some of these conventions have been adopted under the auspices of the General Assembly, such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), the International Convention against the Taking of Hostages (1979), the International Convention for the Suppression of Terrorist Bombings,[78] and the International Convention for the Suppression of Financing of Terrorism.[79] Other conventions and protocols were adopted by specialist organizations such as the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO), and the International Atomic Energy Agency (IAEA) to deal with the threat that terrorism presents in their specific areas. The problem, though, with these conventions was that state membership was low, ratifications even lower, reservations abundant, and monitoring mechanisms weak. The same is true with regard to the legal regime applying to the development, acquisition, manufacture, possession, transport, transfer, or usage of nuclear, chemical, or biological weapons and their delivery systems by non-state actors. Treaties such as the 1968 Nuclear Non-Proliferation Treaty, the 1972 Biological Weapons Convention, or the 1993 Chemical Weapons Convention may have been widely ratified but their domestic implementation has not been always satisfactory and, in any case, they are not concerned with non-state actors.[80]

Thus, the Security Council intervened in areas that required but lacked a global and uniform regulatory framework. This was noted in SC Resolution 1540, which states that the Security Council proceeded with the adoption of that Resolution, '[r]ecognizing the need to enhance co-ordination of efforts on national, sub-regional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security' and in order 'to facilitate henceforth an effective response to global threats in the area of non-proliferation'.[81] In the same vein and in view of the threat that piracy and armed robbery pose to international peace and security, the Security Council contemplated the creation of regional, international, or mixed tribunals in order to prosecute and try those suspected of piracy and armed robbery, because the existing regime has proven inadequate. This is due to the fact that 'the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates'.[82] The Security Council has not created any tribunal yet but, if states fail to adopt a common criminal code as that Resolution urges them to do, the creation of such tribunals by the Security Council will fill that void. This will not be the first time that the Security Council will create criminal tribunals. The

77 E.g., there are 13 International Conventions or protocols addressing terrorism (www.un.org/terrorism/index.shtml).
78 GA Res. A/52/653 (1997).
79 GA Res. 54/109 (1999).
80 M. Asada, 'Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation', (2009) 13 JCSL 303.
81 SC Res. 1540 (Preamble).
82 SC Res. 1918 (2010) (Preamble).

Security Council has created in the past the criminal tribunals for Rwanda and the former Yugoslavia[83] because, at the time, no international criminal-law code and process existed to bring to justice those responsible for the widespread violations of international humanitarian and human-rights law committed during the conflict in these countries. By creating these two tribunals as a means of restoring peace and by adopting their statutes, which contain general and abstract criminal-law provisions,[84] the Security Council filled that void.

The third set of subsidiarity enquiries invokes the notion of proportionality and gives rise to questions about the form and content of SC legislative action, so as to avoid unnecessary interference with state orders. Although the principle of proportionality is well known in international law, it is particularly important in the case of SC legislation. This is because, in contrast to other forms of international law-making in which proportionality is implicitly accounted for in the principle of state consent, SC legislation is unilateral and *erga omnes* mandatory. It is for this reason that questions of proportionality need to be integrated into subsidiarity enquiries. It is submitted that the criterion of proportionality will be satisfied by framework legislation, whereby the Security Council outlines the aims to be achieved but allows member states to decide how to implement them. In this way, states retain a meaningful degree of jurisdictional authority because they enjoy flexibility in the way they implement the SC legislation and participate thus in the law-making process together with the Security Council, without, however, deviating from the common goal. In this sense, the centralizing and decentralizing effects of subsidiarity referred to above become evident: whereas SC legislation represents a move towards centralization, the promulgation of framework legislation that is implemented by member states represents a move away from centralization.

The Security Council resolutions under discussion satisfied this criterion. SC Resolutions 1373 and 1540[85] set out a number of mandatory legislative targets but allow states to implement them in conformity with the relevant provisions of national or international law. As the Representative of Spain said, 'the Resolution [1540] is not intrusive because it enables States to translate the obligations conferred by it into domestic law as they wish'.[86] The Security Council's practice of setting general standards and allowing their implementation by states is evident in other resolutions of a general character, even if they are not binding as such. For example, in SC Resolution 1456 (2003), the Council called upon states to ensure that any measures taken to combat terrorism comply with all their obligations under international law and should adopt such measures in accordance with international law, particularly international human-rights, refugee, and humanitarian law.[87] Also, in Resolution

83 SC Res. 827 (1993); SC Res. 955 (1994).

84 Some of the provisions included in their respective statutes, such as those on individual criminal responsibility arising out of Common Art. 3 (Art. 3 Common to the Four Geneva Conventions of 1949) (Arts. 2, 3, 5 ICTY Statute and Art. 4 ICTR Statute) may not have represented at the time of their adoption customary law. *Tadić*, *supra* note 2, paras. 71–137; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 1998, paras. 604–606.

85 SC Res. 1373, para. 3(f) and SC Res. 1540, paras. 3 and 10.

86 S/PV.4956 (2004), at 8.

87 See also SC Res. 1624 (2005); SC Res. 1805 (2008).

1918 (2010), the Security Council called upon states to 'criminalize piracy under their domestic law and favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law'.[88]

This aspect of subsidiarity is also reflected in the establishment of committees to assist states in the implementation of their obligations under the aforementioned legislative resolutions. The mandate of the Counter-Terrorism Committee (CTC), which was established by Resolution 1373, is to monitor states' implementation of the obligations imposed by that resolution but also to provide technical assistance, engage states in dialogue, compile country reports, and encourage states to apply known best practices.[89] According to the guidelines adopted by the CTC in October 2001, the Committee would be guided in its work by the principles of co-operation, transparency, and even-handedness.[90] In the same vein, the 1540 Committee established pursuant to SC Resolution 1540 also provides assistance to states to implement their obligations under that resolution. More specifically, the role of the Committee is to:

> promote the full implementation by all States of Resolution 1540 (2004) through its programme of work, which includes the compilation of information on the status of States' implementation of all aspects of Resolution 1540 (2004), outreach, dialogue, assistance and co-operation, and which addresses in particular all aspects of paragraphs 1 and 2 of that Resolution, as well as of paragraph 3, which encompasses (a) accountability, (b) physical protection, (c) border controls and law enforcement efforts and (d) national export and trans-shipment controls, including controls on providing funds and services such as financing to such export and trans-shipment.[91]

States have, in general, co-operated with the relevant committees, which shows that their initial fears were to some extent allayed by the co-operative nature of the implementation process of these resolutions. States have submitted reports and provided data to the committees, allowed visits, but also enacted specific legislation as requested by the resolutions.[92] As was noted with regard to the implementation of SC Resolution 1540:

> in qualitative terms, a number of Member States have forged new working relationships across government bureaucracies; enhanced regulatory frameworks; and expanded their efforts to address the nexus between non-State actors and weapons of mass destruction. In quantitative terms, since 2006, Member States have made demonstrable and significant progress in addressing the threat of proliferation of weapons of mass destruction. Nearly 160 Member States have reported on their capabilities and gaps in stopping the proliferation of weapons of mass destruction, and the number of States reporting to have implemented legislative measures to penalize the involvement of

88 SC Res. 1918 (2010), para. 2.
89 SC Res. 1377 (2001).
90 Guidelines of the Committee for the Conduct of Its Work: Note by the Chairman, Doc. S/AC.40/2001/CRP.1 (2001).
91 Programme of work of the Security Council Committee established pursuant to Resolution 1540 (2004) from 1 February 2010 to 31 January 2011, S/2010/112 (2 March 2010). See also SC Res. 1810 (2008).
92 Survey of the implementation of Security Council Resolution 1373 (2001) by Member States, UN Doc. S/2009/620; Letter Dated 8 July 2008 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1540 (2004) Addressed to the President of the Security Council, UN Doc. S/2008/493.

non-State actors in prohibited weapons of mass destruction proliferation activities has grown considerably since the adoption of Resolution 1540 (2004).[93]

Be that as it may, a critical question to ask is whether the Security Council is the appropriate body to decide on subsidiarity. To the extent that subsidiarity is primarily a political principle, the Security Council is better positioned to make the relevant inquiries because it is a political organ that brings together the relevant stakeholders who can then assess whether legislation by the Security Council is more appropriate than law-making by states. Although the Security Council is not the sum of its members, but an independent organ representing the United Nations, it is not totally removed from states that bring to the deliberations their interests. This is reflected in Article 24 UN Charter, according to which the Security Council acts in peace and security on behalf of the UN member states, intimating thus a degree of representativeness between member states and the Security Council. Furthermore, since states are quite sensitive when it comes to issues of jurisdictional authority and will be most affected by SC legislation, it is expected that, notwithstanding any other factors that may influence their behaviour, they will give careful consideration to the question of whether legislation by the Security Council is required and, if it is, what the limits of such legislation should be. To this, it should be added that the Security Council cannot, by itself, initiate legislation or practically enforce it worldwide because it does not have its own administration or links with domestic stakeholders, but relies on the co-operation of states, which means that state interests will be taken on board in its legislative initiatives. That said, the more specific question is whether the Security Council is indeed the right forum for making such decisions in view of its composition and decision-making process. It is well known that the Security Council has limited membership, that it privileges its permanent members in the decision-making process, and that its proceedings are closed and secretive.[94] The Security Council is aware of such criticisms and it tried to address them during the discussions preceding the adoption of the aforementioned legislative resolutions. For example, the drafting of SC Resolution 1540 was preceded by five months of consultations with non-Security Council members and open meetings.[95] As the representative of New Zealand said with regard to SC Resolution 1540, 'it will not succeed in its aim without the support and acceptance of Member States. Such

93 Annex to the Letter Dated 29 January 2010 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1540 (2004) Addressed to the President of the Security Council. Final Document on the 2009 Comprehensive Review of the Status of Implementation of SC Resolution 1540 (2004): Key Findings and Recommendations, UN Doc. S/2010/52.

94 As the Representative of Nepal said, 'the opaque and exclusive decision-making process in the Council does not inspire much confidence among the wider membership of the United Nations Member States of the opportunity to participate in negotiations leading to agreements and decisions that would have profound and wide ramification for Member States', S/PV.4950 (2004) (Resumption 1), at 14.

95 Thirty-four states participated in these meetings. As the Representative of Liechtenstein said, 'open debates of the Security Council are an important means of enabling the Council to hear the view of other Member States and thus to truly act on their behalf, as foreseen in the Charter of the United Nations', S/PV.4950 (2004) (Resumption 1), at 11–12. The US representative said, 'because this threat and the actions we are taking today concern the entire United Nations membership, the United States and the co-sponsors have made major efforts to consult, listen and take into account the many views expressed. We share a common goal: to implement the Resolution', S/PV.4956 (2004), at 5.

acceptance requires ... the opportunity for all Member States to express their views'.[96] These resolutions were also adopted by consensus. As the representative of Spain stated, 'since the Council is legislating for the entire international community, this draft Resolution (1540) should preferably, although not necessarily, be adopted by consensus'.[97]

If subsidiarity is, however, to be formalized, what is needed is a radical overhauling of the Security Council's working methods[98] that go beyond ad-hoc-ism and experimentation. What are also needed are accountability mechanisms. These issues go to the heart of the debates on UN reform, but lie outside the scope of an article aiming at developing a theoretical case for the application of subsidiarity to SC legislation by identifying its conceptual parameters. What is undoubtedly the case, however, as the preceding discussion has demonstrated, is that the Security Council — even in its current form and with its present working methods — has been guided by considerations identified here as being salient to the principle of subsidiarity.

5. Conclusion

The international legal system has often been criticized for lacking a body that can produce uniform and binding norms. The Security Council can play such a role but, in doing so, it inexorably changes the character of the international law-making process, antagonizes states, and creates tensions in their relationship with the United Nations. The main argument of this paper is that, when it comes to law-making for peace and security, the relationship between the United Nations and its member states should be viewed not in conflictual terms, but in symbiotic and synergetic terms. In this respect, this paper has put forward the principle of subsidiarity as the principle that can filter the manifestations of legislative power by the Security Council and member states with regard to the common goal of peace and security, and maximize the gains to be achieved from a more efficient law-making process. Although the aim of the paper was to make the case for the application of the principle of subsidiarity to SC legislation and set out its conceptual parameters, it is recognized that its formalization will demand important structural and normative changes to the UN system. However, the argument put forward here is not without practical consequences. Its currency and salience are confirmed by the fact that the issues identified here as belonging to the principle of subsidiarity problematized the Security Council, which then went on to address them, albeit informally. Its currency is also confirmed by the fact that, at both national and international levels, the process of aggregating power in order to attain common goals and maximize benefits has nowadays given rise to demands for the diffusion of power between and among different levels of authority without, however, downgrading the expectations

96 S/PV.4950, at 21.
97 S/PV.4950, at 7.
98 See GA Draft Resolution on Reforming the Working Methods of the Security Council (17 March 2006), Annex, paras. 4–6, A/60/L.49. SC Presidential Note S/2006/507 of 19 July 2006.

about the end to be achieved or the benefits to be accrued – an event that requires new conceptual understanding as to how power can be organized and exercised among different authorities. Subsidiarity provides such a tool by organizing the relationship between different power holders – the United Nations and its member states in our case – in symbiotic rather than antagonistic terms, with a view to achieving the common goals.

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