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CONTENTS

ARTICLES

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*Maurizio Arcari**

LIMITS TO SECURITY COUNCIL POWERS UNDER THE UN CHARTER AND ISSUES OF CHARTER INTERPRETATION**

Abstract

This article deals with the interpretation of Security Council powers under the UN Charter, and analyses available interpretive options. The various approaches, inspired by the textual, teleological, "subsequent practice", and "systemic" methods of interpretation, as well as the complementary means of interpretation supplied by the preparatory works of San Francisco Conference, are successively considered and their relative advantages and shortcomings comparatively assessed. The article argues that recourse to one or the other from among the available interpretive methods can be influenced in individual cases by political and judicial contingencies, and that as a whole the interpretation of Security Council powers under the Charter is an evolving process, the variations of which may depend on the changing needs of collective security and of the international legal order at large.

INTRODUCTION

It can comfortably be said that the topic of the limits to the competence and powers of UN Security Council (SC) has attained the status of *locus classicus* in international law and in the international legal literature. The reasons are conveniently summed up in the observation made by an author, who referred to "the worrisome tendency of the Security Council since the end of the cold war to over-stretch its activities and powers beyond their foreseeable, and arguably permissible, legal limits."[1] Hence, an overview of the last two decades of collective security practice permits one

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[1] G. Abi-Saab, *The Security Council Legibus Solutus? On the Legislative Forays of the Council*, in: L. Boisson de Chazournes, M. Cohen (eds.), *International Law and the Quest for Its Implementation. Liber Amicorum Vera Gowland-Debbas*, Brill, Leiden/Boston: 2010, p. 23.

to ascertain different instances of questionable use by the SC of its powers under the UN Charter.

Very cursorily, one may recall the assumption by the SC of quasi-judicial powers carried out through resolutions 731 (1992) and 748 (1992) in the well-known *Lockerbie* case; the controversial interventions in the field of international criminal justice brought about in resolutions 827 (1993) and 955 (1994) establishing the international criminal tribunals for Former Yugoslavia and Rwanda – later replicated with resolution 1757 (2007) on the establishment of the Special Tribunal for Lebanon; the exercise of "legislative-type" competences in the field of the fight against terrorism and the proliferation of weapons of mass destruction, carried out through resolutions 1373 (2001) and 1540 (2004) respectively; and, finally, the practice of the so-called "targeted" or "smart" sanctions affecting the rights of individuals inscribed on SC blacklists, mainly enacted through resolutions 1267 (1999), 1333 (2000) and 1390 (2002) concerning Taliban and Al-Qaida.[2]

It must be noted that most of such questionable cases also raised complicated legal disputes before international, regional or domestic courts. Besides the well-known proceedings initiated in 1992 before the International Court of Justice (ICJ) in the *Lockerbie* cases (later discontinued),[3] and the 1995 decision in the *Tadic* case rendered by the Chamber of Appeals of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) on the legality of the establishment of the same tribunal,[4] the new century has already seen a handful of judicial decisions, coming from both regional and domestic courts, dealing with the scope of SC powers. For the sake of brevity, one may quote the prominent judgment rendered on 3 September 2008 by the Court of Justice of the European Union in the *Kadi* case,[5] or the judgments pronounced in 2011 and 2012 by the European Court of Human Rights in the *Al-Jedda* and *Nada* cases,[6] all concerned with the effects of SC decisions on fundamental rights of individuals. Turning to domestic courts, one may add the landmark decisions issued by the United Kingdom Supreme (House of Lords) Court in 2007 and 2010, in the *Al-Jedda* and *Ahmed* cases

[2] For a recent overview of these and other cases of questionable use by the SC of its Chapter VII powers, and of the legal issues involved, *see* N. Krisch, *Introduction to Chapter VII: The General Framework*, in B. Simma, D.-E. Khan, G. Nolte, A. Paulus (eds.), *The Charter of the United Nations. A Commentary* (3rd ed.), Oxford University Press, Oxford: 2012, pp. 1241-1243 and 1248-1255.

[3] Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v UK; Libyan Arab Jamahiriya v US*), (Request for the Indication of Provisional Measures, Orders 14 April 1002), [1992] ICJ Rep, respectively pp. 3 and 114.

[4] *Prosecutor v. Dusko Tadic* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 [hereinafter "Tadic Decision"], available at http://www.icty.org.

[5] Case C-402/05/P Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, Judgment 3 September 2008, [2008] ECR I-06351.

[6] *Al-Jedda v. the United Kingdom* (27021/08) Grand Chamber, ECHR Judgment 7 July 2011; *Nada v. Switzerland* (10593/08) Grand Chamber, ECHR Judgment 12 September 2012 [hereinafter "Nada Judgment"], both available at http://www.echr.coe.int.

respectively.[7] And, to complete the picture, one should mention the recent decision rendered on 24 October 2012 by the Appeals Chamber of the Special Tribunal for Lebanon (STL), dealing with the question of the proper use by the SC of its Chapter VII powers in the establishment of the same tribunal.[8]

Even though twenty years have passed since the issue became prominent, the question of the limits to SC powers is far from being settled, as the above decisions demonstrate. To this purpose, it is interesting to compare the reasoning developed by the ICTFY Appeals Chamber in 1993 and by the STL Appeals Chamber in 2012, when both were confronted with the same substantive issue; namely, the legality of the establishment of the two criminal tribunals by the SC.

After having affirmed its competence to deal with the matter, the ITCFY Appeals Chamber set forth an important statement of principle. While recognizing that the SC enjoys a very wide discretion under Art. 39 of the Charter to determine the existence of a threat of the peace and to decide the measures necessary for maintaining and/or restoring peace, the Appeals Chamber pointed out:

> [T]his does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the international division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives the Security Council as *legibus solutus* (unbound by law).[9]

Starting from these premises, the Appeals Chamber developed a stringent analysis of SC powers under Chapter VII of the Charter, and concluded that the establishment of the ICTFY fell squarely within such powers.[10]

Twenty years later, the conclusions reached by the STL Appeals Chamber on the same legal issues sound very different. First of all, this Chamber endorsed a divergent interpretation of the basic "jurisdictional issue", and affirmed lack of authority to review the legality of resolution 1757 (2007), whereby the SC gave binding force to the terms of the treaty on the establishment of the STL, concluded between the United Nations

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[7] *R (on application of Al-Jedda) v. Secretary of State for Defence*, Opinions of the Lords of Appeal 12 December 2007, [2007] UKHL 58; *Her Majesty's Treasury v. Mohammad Jabar Ahmed and others*, United Kingdom Supreme Court Judgment 27 January 2010, [2010] UKSC 2, both available at http://www.bailii.org.

[8] *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra* (STL-11-01/PT/AC/AR90.1), Decision on the Defence Appeals against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012 [hereinafter "Ayyash Decision"], available at http://www.stl-tsl.org.

[9] *Tadic* Decision, *supra* note 4, para. 28.

[10] *Ibidem*, paras. 29-36.

and the Government of Lebanon, but not ratified by the Lebanese parliament. This was so because:

> Once the Security Council has established the existence of a threat to international peace and security under Article 39 of the United Nations Charter, it retains the sole and exclusive prerogative to determine which measures under Articles 41 and 42 of the Charter are required to maintain or to restore international peace and security (…). What is important is that this decision is essentially political in nature, and as such not amenable to judicial review.[11]

However, what appears to be more striking is the argument elaborated by the STL Appeals Chamber on the underlying (and substantive) question of the standard of review applicable to SC decisions. According to this vision,

> Our finding that we lack the authority to review Security Council resolution 1757 is also supported by the difficulty in establishing a meaningful standard of such review. (…) the United Nations Charter does not specify any legal criteria that the Security Council had to take into account when making this determination [of the existence of a threat to international peace and security under Art. 39 of the Charter]. (…) It would be impossible to verify the facts on which the Security Council based its decision, how it weighed those facts, and whether it did so properly.[12]

The comparison between such diverse conclusions reached in different times by two different jurisdictions on similar or comparable legal questions may serve to convey the idea that the question of the limits to SC powers is ultimately a matter of Charter interpretation. The purpose of the present contribution is to develop this basic suggestion, and to consider the alternatives that are available for the interpretation of the pertinent provisions of the UN Charter concerning the powers and competences of the SC.[13] Having in mind that the UN Charter remains an international treaty – albeit one "having certain special characteristics", as rightly pointed out by the ICJ[14] – the following analysis will be developed by referring to the main (and most pertinent) principles of treaty interpretation codified in Art. 31 of the 1969 Vienna Convention on the Law of Treaties. In the following pages, the approaches inspired by the textual, teleological, "subsequent practice" and "systemic" methods of interpretation, as well as the supplementary means of interpretation supplied by the preparatory works of the San Francisco Conference, will be successively considered, and their main implications for a proper interpretation of SC powers under the Charter will be tentatively assessed.

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[11] *Ayyash* Decision, *supra* note 8, para. 52.

[12] *Ibidem*, para. 51.

[13] It must be underlined that the present survey will be limited to some of the provisions of Chapter V of UN Charter dealing in general with the functions and competences of the SC, and to the more specific provisions of Chapter VII, dealing with the binding powers reserved to this organ in the field of peace maintenance. Therefore, the provisions of Chapters VI, VIII and XII of the Charter will not be considered.

[14] *Certain Expenses of the United Nations* (Article 17, Paragraph 2, of the Charter) (Advisory Opinion 20 July 1962) [1962] ICJ Rep, p. 157.

1. THE TEXTUAL APPROACH TO THE INTERPRETATION OF SC POWERS UNDER THE CHARTER

The first key provision that comes to the forefront in a textual analysis of SC powers under the Charter is Art. 24. This Article, after having indicated the SC as the organ charged with the primary responsibility for the maintenance of international peace and security, provides in the second paragraph that

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

In fact, the first phrase of the cited provision represents the most punctual and explicit textual reference set forth in the Charter on the limits of SC powers, insofar as it recalls that this organ is bound to respect the "Purposes and Principles of the United Nations", as they are defined in Art. 1 and 2 of the Charter. Even if this may at first glance appear as a powerful statement, one cannot overlook the fact that the broad language of Art. 1 and 2 of the Charter, and the sweeping and abstract character of the purposes and principles enshrined therein, can hardly provide meaningful and precise limitations to the powers of SC.[15] Besides that, the Purposes and Principles of the UN Charter seem also to liberate this organ from additional legal constraints.[16] In this regard, it is worth mentioning that Art. 1, para.1 of the Charter, which sets forth the basic purpose of maintaining peace and security, specifies that the United Nations are bound

> to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

It is easy to note that the reference to justice and international law is confined to the second part of the provision, relating to the adjustment or settlement of international disputes that might lead to a breach of the peace, and does not concern the first phrase of the paragraph, dealing with the collective measures for maintenance of the peace. The most plausible implication of this formulation would be that only action deployed by the UN and its organs in the field of the settlement of disputes has to be subjected to the principles of justice and international law, while the same cannot apply to the coercive action carried out by the SC for the maintenance or restoration of peace.[17] As it is well

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[15] *See* A. Peters, *Article 25*, in: Simma et al., *supra* note 2, pp. 812-814; see also the punctual analysis provided by M. Wood, *The UN Security Council and International Law*, Hersch Lauterpacht Memorial Lectures, Second Lecture: The Security Council's Powers and their Limits (as delivered on 8th November 2006), pp. 7-12, available at http://www.lcil.cam.ac.uk/lectures/2006_sir_michael_wood.php.

[16] *See* Krisch, *supra* note 2, pp. 1256-1257.

[17] *See* R. Wolfrum, *Article 1*, in Simma et al., *supra* note 2, pp. 113-114.

known, this conclusion is further reinforced by the *travaux préparatoires* of the UN Charter. At the San Francisco Conference, a proposal was submitted by the Egyptian delegation to move into the *chapeau* of Art. 1, para. 1 the reference to conformity with justice and international law, so as to subject to such principles the whole range of activity of the UN, including *both* the peaceful adjustment or settlement of disputes *and* the coercive action for the maintenance and restoration of peace.[18] This proposal – sustained at San Francisco by some small States worried about the extensive powers conferred on SC under the draft established at Dumbarton Oaks by the four sponsoring powers – was however defeated, having failed to reach the required two-thirds majority: a strong argument for this outcome was that submitting Security Council actions to justice and international law would carry the risk of undermining the efficacy of the initiatives undertaken by that organ in the field of peace maintenance.[19]

Going back to Art. 24 of the Charter, the final phrase of its second paragraph also seems to provide some other possible textual limitations for SC action, as it envisages the "specific powers" granted to SC for the discharge of its responsibilities, which are specifically laid down in Chapters VI, VII, VIII and XII of the Charter. Referring to this phrase of Art. 24, the ICTFY Chamber of Appeals observed that "the Charter thus speaks the language of specific powers, not of absolute fiat".[20] This conclusion can be further corroborated if one looks at the subsequent provision in the UN Charter devoted to the functions and powers of the SC. Art. 25 states that "The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." According to one possible interpretation of the final proviso "in accordance with the present Charter", only SC decisions vested by other specific Charter provisions with binding force must be carried out by UN members, as opposed to those decisions in a broad sense which are merely recommendatory.[21] In establishing that UN members are bound to carry out SC deliberations only when and where the Charter expressly enables the SC to decide, Art. 25 would confirm that, as a general principle, the powers of this organ are specific and definite in scope.

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[18] The text of the proposed Egyptian amendment to Art. 1, para. 1, read as follows: "To maintain international peace and security, *in conformity with the principles of justice and international law*; and to that end to take effective corrective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, adjustment or settlement of international disputes or situations which may lead to a breach of the peace" (emphasis added): see *United Nations Conference on International Organization* [hereinafter UNCIO], doc. 1006 I/6, 15 June 1945, vol. VI, p. 21. The rationale of this proposal is efficaciously summed up in the following excerpt taken from the original French text of the Egyptian delegate's speech at Commission I of the San Francisco Conference (not reproduced in the abridged English version) : "il ne peut y avoir paix sans justice. La paix certes oui, mais dans la justice" (*ibidem*, p. 50).

[19] *See ibidem*, pp. 34 and 25-31, especially the explanations provided by the representatives of the United Kingdom and the United States. See further on this *infra*, section 5.

[20] *Tadic* Decision, *supra* note 4, para. 28.

[21] *See* Peters, *supra* note 15, p. 808; but for another possible, and opposite, interpretation of Art. 25 see *infra*, note 37 and the accompanying text.

However, even assuming that the UN Charter speaks the "language of specific powers", if one looks at the articles specifically envisaging a binding effect for SC decisions – such as Chapter VII provisions dealing with measures to maintain or restore international peace and security – it is hard to escape the impression that very few clues are provided for identifying the legal limits to SC powers. A key provision in this sense is Art. 39, which lays down the preconditions for SC actions in the field of maintenance of peace and security:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

As the ICTFY Chamber of Appeals recognized in the *Tadic* decision, of the three situations justifying the resort to Chapter VII, the "act of aggression" might appear as the more amenable to legal definition, while the "threat to the peace" is more of a political concept.[22] In any case, the decision not to provide a definition in the Charter of those expressions was a deliberate choice of the drafters at the San Francisco Conference, pursued in order to ensure to the SC a great measure of freedom and flexibility in the qualification of any relevant situation.[23] The result of this approach is, not only that the flexible concept of 'threat to the peace' has proved to be the most frequently used tool in the practice of the SC,[24] but also that its interpretation has become one of the thorniest issues in the legal debates.[25] This is exemplified by the opposite conclusions reached by the Appeals Chambers of ICTFY and of the STL on the question of assessing the legality of the determinations of a threat to the peace made by the SC in the Former Yugoslavia and Lebanon cases. While the ITCFY Appeal Chamber was ready to move away from the literal interpretation of the Charter, and attempted to justify the soundness of the concrete qualification of a 'threat to the peace' under other principles of legal interpretation (an argument that will be reconsidered later),[26] the STL Appeal Chamber seemed to confine itself to a strict evaluation of the textual elements of the Charter, reaching the extreme conclusion that the notion of 'threat to the peace' cannot be subjected to any standard of legal review.[27]

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[22] *Tadic* Decision, *supra* note 4, para. 29.

[23] See the report of Paul-Boncour, chairman of the Committee III/3, charged with the re-drafting of Chapter VIII, Section B, of the Dumbarton Oaks proposals (later Chapter VII in the UN Charter), UNCIO, doc. 881 III/3/46, 10 June 1945, vol. XII, p. 505: "The Committee therefore decided to adhere to the text drawn up at Dumbarton Oaks and to leave to the Council the entire decision as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression". The report was adopted unanimously by Committee III of the Conference (UNCIO, doc. 943 III/5, 13 June 1945, vol. XI, pp. 12-27).

[24] *See* N. Krisch, *Article 39*, in Simma et al., *supra* note 2, p. 1278.

[25] For an overview of this classical question, *see* I. Osterdhal, *Threat to the Peace. The Interpretation by the Security Council of Article 39 of the UN Charter*, Iustus Forlag, Uppsala: 1998; and, more recently, A. Orakhelashvili, *Collective Security*, Oxford University Press, Oxford: 2011, pp. 149-175.

[26] *See infra*, note 46 and accompanying text.

[27] *Cf.*, *supra* notes 11-12 and accompanying text.

However, the conclusion that the text of the UN Charter does not provide meaningful parameters for a legal assessment of SC powers does not seem to be inescapable. On the one hand, it must not be forgotten that, especially in the early days of collective security, it was far from unusual for the members of the SC to examine the legal foundation of a proposed action in the light of the pertinent provisions of the Charter and to consider the most plausible textual interpretation thereof. One may quote the debates on the specific or general powers accruing to the SC under the text of Art. 24 of the Charter, that characterized the question of Trieste in 1947;[28] or the decision adopted by the SC in 1946 to establish a special sub-committee charged with the task of ascertaining whether the situation created in Spain by the government of Franco endangered international peace and security and fell under the scope of Art. 39 of the Charter.[29]

On the other hand, the observation that "SC members regularly debate the limits of the scope of action under Art. 39, thus indicating their conviction that the concepts carry some meaning and are not completely indeterminate"[30] seems to hold true also in current times. In this respect, suffice it to consider the thematic debates periodically devoted by the SC to certain selected issues, such as the impact of infectious diseases or of climate changes on the maintenance of peace and security: it is during such occasions that UN members States often call into question the boundaries of the notion of threat to the peace appearing in Art. 39, its proper interpretation, and its applicability to the above-mentioned phenomena.[31]

Be that as it may, other more flexible or more liberal methods of interpretation may be available to overcome the interpretative difficulties arising from the indeterminacies of the relevant provisions of UN Charter, and as a matter of fact they are often exploited for appraising the scope of SC powers.

2. THE PRINCIPLE OF EFFECTIVENESS AND THE TELEOLOGICAL APPROACH TO THE INTERPRETATION OF SC POWERS UNDER THE CHARTER

Insofar as it is intended to enhance a purpose-oriented reading of the provisions of an international treaty and is aimed at maximizing the goals thereof, the so-called teleological method is often considered in the legal literature as the most appropriate

[28] *See* SC Official Records, 2nd year, 91st Mtg., 10 January 1947, pp. 43-61.

[29] *See* Resolution 4 (1946) of 29 April 1946, SC Official Records, 1st year, 39 Mtg., pp. 241-245, and *Report of the Sub-Committee on the Spanish Question*, UN doc. S/75, 1 June 1946.

[30] *See* Krisch, *Article 39*, *supra* note 24, p. 808.

[31] *See e.g.* the summary records of the SC debate devoted to "New Challenges to international peace and security and conflict prevention", UN doc S/PV.6668, 23 November 2011, esp. pp. 11-12, 18-19 and 23-24 for the interventions of the representatives of Colombia, South Africa and India, questioning the problematic qualification of climate change and of the HIV/AIDS disease as threats to the peace.

for the constitutive instruments of international organizations.[32] At the same time, the principle of effectiveness or "*effet utile*" is an important conceptual underpinning of teleological interpretation, and there are many elements in the Charter that encourage its adoption.[33] First of all, the previously quoted Art. 1, para. 1 of the Charter pledges the Organization to take "*effective* collective measures" for the prevention and removal of threats to the peace, while Art. 24, para. 1 provides that "in order to ensure prompt and *effective* action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security". Secondly, it must be emphasized that attempts made at the San Francisco Conference to envisage express legal limits or forms of legal control over SC actions were defeated precisely on the account that any legal straightjacket imposed on that organ would compromise the effectiveness of the UN system of collective security. This held true not only for the above-mentioned Egyptian amendment concerning the place of justice and international law in the very first article of the Charter,[34] but also for a Belgian proposal aimed at subjecting the decisions of the SC infringing on the legal rights of States to the judicial review of the International Court of Justice.[35]

The paradigm of effectiveness of UN action in the field of the maintenance of international peace and security has played an important role, not only during the drafting of the Charter but also in the following practical application and judicial interpretation of this instrument. Leaving aside some well-known cases brought before the ICJ, where the principle of effectiveness made its appearance under the cover of the implied powers doctrine,[36] one may here recall as a pertinent example – and one more directly concerned with the topic of collective security – the 1971 Namibia Advisory

[32] *See generally*, E.P. 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*, University of Tennessee Press, Knoxville: 1964, pp. 119-138.

[33] S. Kadelbach, *Interpretation of the Charter*, in Simma et al., *supra* note 2, pp. 79-80 and 84-86.

[34] *See supra* note 19.

[35] The text of the Belgian proposal submitted to Committee III/2 of the San Francisco Conference read as follows: "Any State, party to a dispute brought before the Security Council, shall have the right to ask the Permanent Court of International Justice whether a recommendation or a decision made by the Council infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision": UNCIO, doc. 461 III/2/16, 21 May 1945, vol. XII, p. 63. The Belgian amendment referred to Chapter VIII, Section A of the Dumbarton Oaks proposals (concerning the peaceful settlement of disputes, later Chapter VI of the UN Charter) and was motivated by the fear that a State may be obliged by a recommendation adopted by the SC under that Chapter to abandon a right granted by positive international law (*ibidem*, doc. 433 III/2/15, 19 May 1945, vol. XII, pp. 48-50). Belgium withdrew its proposals after having received assurances from the inviting powers that a recommendation made by the Council under Section A of Chapter VIII did not possess obligatory effects (*Ibidem*, doc. 498 III/2/19, 22 May 1945, pp. 65-66).

[36] *See Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion, 11 April 1949) [1949] ICJ Rep, p. 174; *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal* (Advisory Opinion, 13 July 1954) [1954] ICJ Rep, p. 47.

Opinion. In this case, the World Court suggested an extensive reading of Art. 25 of the Charter premised on the *effet utile* of this provision, and derived from it a general power of decision of the SC, going well beyond the "specific powers language" laid down in Art. 24 and Chapter VII of the Charter.[37] More recently, the same reasoning reappeared, albeit mixed with a constitutional-flavoured argument, in the 2003 decision of the Trial Chamber of the ICTFY in the *Milutinovic* case, whereby the principle of effectiveness of the UN system of collective security was evoked to assert the universal reach of SC decisions adopted under Chapter VII and their applicability to non-member States.[38]

However, the most far-reaching and recent expression of the teleological interpretation of SC powers has been enacted with reference to Art. 103 of the Charter. As is well known, Art. 103 establishes the priority of UN Charter obligations over conflicting treaty obligations of Member States,[39] and the ICJ in its orders on provisional measures in the *Lockerbie* cases unequivocally affirmed that this rule also applies to SC decisions adopted under Chapter VII.[40] It is therefore not surprising that, in the recent case law concerning the impact of UN targeted sanctions on individual rights, Art. 103 of the Charter has been extensively evoked to guarantee the effectiveness of the anti-terrorist actions carried out by the SC under Chapter VII, and to affirm the primacy of SC decisions over conflicting conventional human rights obligations binding on States called on to implement UN sanctions.[41] In this vein, it has also been suggested that the

[37] *See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council 276* (1970) (Advisory Opinion, 21 June 1971) [1971] ICJ Rep, pp. 52-53, para. 113: "It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. (…) If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter". But cf. the interpretation of Art. 25 made by the ICJ with that expounded above, *supra* note 21 and accompanying text.

[38] *See The Prosecutor v. Milan Milutinovic, Dragoljub Ojdanic, Nikola Sainovic* (IT-99-37-PT), Decision on Motion Challenging Jurisdiction, 6 May 2003, available at http://www.icty.org, paras. 45-63 and especially para. 48: "The principle of *institutional effectiveness* (…) also lends support to an interpretation of Chapter VII of the Charter as empowering the Security Council to adopt measures for the maintenance of international peace and security in the circumstances of this case (…). Chapter VII of the Charter *may be interpreted purposively* as empowering the Security Council to continue to deal with a situation which it has determined to be a threat to international peace and security even if the country concerned ceases to be a member of the United Nations" (emphasis added).

[39] For a recent assessment of this provision, see A. Paulus, J.R. Leiss, *Article 103*, in Simma et al., *supra* note 2, pp. 2110-2136.

[40] *See* Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v UK; Libyan Arab Jamahiriya v US*), *supra* note 3, p. 15, para. 39, and p. 126, para. 42.

[41] For a judicial application in domestic case law *see Tribunal Fédéral Suisse, A. c.* Département Fédéral de l'Economie (2A.783/2006), Judgment 23 January 2008, available at http://www.bger.ch. For more details see M. Arcari, *Les exigences de la sécurité collective*, in J. Rideau, C. Grewe, L. Balmond, M. Arcari (dir.), *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l'Union Européenne*, Bruylant, Bruxelles: 2010, pp. 29-31.

scope of Art. 103 of the Charter cannot be limited to conflicting treaty obligations of UN member States, but must be also extended to any conflict with obligations arising under customary international law, because otherwise the priority effect associated with SC decisions could be easily circumvented.[42] Finally, it is worth recalling that the English courts, in the *Al-Jedda* case, have suggested that "authorizations" to use all necessary means delivered by the SC to member States must be considered on the same footing as Chapter VII binding "decisions" for the purposes of application of Art. 103 of the Charter.[43]

It is evident, however, that the teleological interpretation of Charter provisions, aimed at maximizing the effectiveness of SC action in the field of collective security, cannot be forced beyond some basic textual limits that are present in the Charter itself. In this respect, the following observation – made by an author criticizing the tendency to overstretch the priority rule sanctioned in Art. 103 of the Charter – may be generalized and applied to the various instances of teleological interpretation of SC powers reviewed above: "[b]ut that interpretation rests on shaky ground. Logic is a tool of interpretation, not a means for creating new obligations. And the wording of Art. 103 is just the way it is."[44]

In order to provide more solid foundations for the powers of the SC and for their limits (if any), recourse to other criteria of interpretation may be desirable. The reference to elements of interpretation "external" to the text of the Charter, such as the practice of member States in the application of Charter provisions concerning collective security, may in this regard be of help.

3. THE 'SUBSEQUENT PRACTICE' APPROACH TO THE INTERPRETATION OF SC POWERS UNDER THE CHARTER

According to Art. 31, para. 3, letter (b), of the 1969 Vienna Convention, in the process of treaty interpretation account must be taken of "any subsequent practice in

[42] *See* Krisch, *supra* note 2, p. 1262; in the same direction, R. Kolb, *Interprétation et création du droit international*, Bruylant, Bruxelles: 2006, p. 580. The argument that the priority rule of Art. 103 of the Charter applies to both conventional and customary obligations of UN member States was also advanced by the EU Council and Commission in the first phase of the Kadi case: Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Judgment 21 September 2005, II-3706, para. 156.

[43] *See R (on application of Al-Jedda) v. Secretary of State for Defence*, *supra* note 7, paras. 30-34 (Lord Bingham of Cornhill), para. 117 (Lord Rodger of Earlsferry) and paras. 131-135 (Lord Carswell). For a review of the underlying legal arguments, see R. Kolb, *Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?*, 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 21 (2004).

[44] K. Zemanek, *The Legal Foundations of the International System. General Course of Public International Law*, Recueil des Cours de l'Académie de Droit International de La Haye, vol. 266, Martinus Nijhoff Publishers, The Hague, Boston, London: 1997, p. 232.

the application of the treaty which establishes the agreement of the parties regarding its interpretation." In fact, the reference to "subsequent practice" can be regarded as a convenient method for the interpretation of constitutive treaties of international organizations. The inference here is that acceptance or acquiescence by the member States of an international organization of an institutional practice developed by organs of the organization in the application of the constitutive treaty may reveal an agreed-upon or "authentic" interpretation of the instrument at hand.[45] This was the path followed by the ICTFY Appeal Chamber in the *Tadic* case of 1995, when deciding on the challenge to the qualification of "threat to the peace" made by the SC to justify the invocation of Chapter VII as a legal basis for the establishment of the Tribunal. According to the Appeals Chamber, the internal conflict existing at that time in Former Yugoslavia might have amounted to a threat to the peace in accordance with the settled practice of the Security Council and in the light of "the common understanding of the United Nations membership in general." On this point, the following passage of the *Tadic* decision is particularly telling:

> Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which is classified as a 'threat to the peace' and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly (…). It can thus be said that there is a common understanding, manifested by the 'subsequent practice' of the membership of the United Nations at large, that the 'threat to the peace' of Article 39 may include, as one of its species, internal armed conflicts.[46]

It is not surprising that "subsequent practice" or "acquiescence" are often invoked as another line of legal justification to explain actions based on a generous interpretation, if not on plain overstretching, of the SC competencies under the Charter. This has happened, for example, in the case of the so-called "legislative powers" exercised by the SC in resolutions 1373 (2001) and 1540 (2004), setting forth measures of general scope and application for the fight against terrorism and against the diffusion of weapons of mass destruction to non-State actors. According to many authors, the fact that those "legislative" resolutions were not substantially contested by UN member States, and particularly the fact that most States accepted the obligation to report on the national implementation of such measures, would reveal the general acceptance of SC practice, and eventually validate the exercise by the SC of "new" legislative powers that would otherwise be outside the reach of the coercive powers provided for in Chapter VII of the Charter.[47]

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[45] *See generally*, J. Alvarez, *International Organizations as Law-makers*, Oxford University Press, Oxford: 2005, pp. 87-92; *see also* N. Blokker, *Beyond 'Dili': On the Powers and Practice of International Organizations*, in G. Kreijen, M. Brus, J. Duursma, E. de Vos, J. Dugard (eds.), *State, Sovereignty, and International Governance*, Oxford University Press, Oxford: 2002, pp. 299-322.

[46] *Tadic* Decision, *supra* note 4, para. 30.

[47] For this conclusion see *e.g.* A. Marschik, *Legislative Powers of the Security Council*, in R. St John Macdonald, D.M. Johnston (eds.), *Towards World Constitutionalism*, Brill, The Hague: 2005, pp. 457-492, esp. 473 ff. For a more nuanced evaluation of SC "legislative" measures concerning terrorism, see however

However appealing the above arguments may appear, some caution is due in applying the "subsequent practice" method of interpretation to the powers of the SC. Indeed, as an author has cogently pointed out, "[t]he fact the Council has acted does not guarantee that its action is lawful or that this action will constitute legally significant 'practice' that contributes to the evolution of the law",[48] and care must be taken to distinguish between an "action" (of the SC) and "practice" (of UN member States). What really matters is a consistent pattern of general reception of SC initiatives by the UN membership at large, which would reveal the "common understanding" needed to establish the agreement of the parties to a certain interpretation of the UN constitutive instrument. If the threshold for this agreement is "taken seriously", the possibility to validate, under the cover of "subsequent practice", the most controversial cases of the liberal use by the SC of its Chapter VII powers may become very problematic.[49] In this respect, the general measures set forth in resolutions 1373 (2001) and 1540 (2004) have remained as occasional examples and have not been replicated, and further attempts by the SC to "legislate" in the matter of international terrorism – i.e. by providing a general definition of the latter notion or by generalizing the application of blacklists and targeted sanctions to terrorists different from those associated with Taliban and Al-Qaida – have encountered a cool reception by UN member States.[50] These developments suggest that the interpretative method of "subsequent practice" needs to be handled very carefully.

One may ask whether other interpretative methods based on the consideration of factors "external" to the UN Charter may be available for addressing the issue of the scope of SC powers. In this respect, attention must be paid to Art. 31, para. 3, letter (c), of the Vienna Convention, establishing that in the interpretation of a treaty account shall be taken of "any relevant rules of international law applicable in the relations between the parties".

A. Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, 17(5) European Journal of International Law 881 (2006).

[48] *See* Abi-Saab, *supra* note 1, p. 33.

[49] *See* Krisch, *supra* note 2, p. 1254.

[50] *See e.g.*, resolution 1566 (2004), adopted unanimously on 8 October 2004 under Chapter VII of the Charter, especially para. 3, whereby the SC outlines a general definition of criminal acts "committed (…) with the purpose to provoke a state of terror in the general public (…) intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism" and calls upon States to prevent and punish such acts; and para. 9, where the SC decides to establish a working group to consider and submit recommendations "on practical measures to be imposed upon individuals, groups or entities involved or associated in terrorist activities, other than those designated by the Al Qaida/Taliban Sanctions Committee". Some members of the Council, while participating in the consensus on the adoption of the resolution, have however underlined the compromise language of the text and have expressed dissatisfaction for the fact that their operative paragraphs have been placed under Chapter VII of the Charter: see UN doc. S/PV.5053, 8 October 2004, especially the intervention of the representative of Brazil, pp. 7-8. As far as it is possible to know, Resolution 1566 (2004) remained a dead letter and no significant traces of its implementation can be found in the subsequent practice of the SC.

4. THE 'SYSTEMIC APPROACH' TO THE INTERPRETATION OF SC POWERS UNDER THE CHARTER (AND INTERNATIONAL LAW)

It is obvious that the SC, through its decisions based on Chapter VII of the Charter, can impinge on the substantive rights of States. This of course may happen not only vis-à-vis those States that are directly targeted by the enforcement measures adopted under Arts. 41 or 42, but also with respect to other UN member States called upon to implement those measures. It is therefore frequent that the SC, in its Chapter VII resolutions providing for the imposition of economic measures, takes pains to remind States *expressis verbis* of their obligation to implement sanctions "notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into (…) before the date of the [relevant] resolution";[51] and we have already alluded to the critical role that Art. 103 of the Charter may play in such instances.[52]

On the other hand, it is a fact that especially SC non-armed measures have considerably evolved in recent times. Once again, the paradigm of effectiveness of UN action in the field of maintenance of the peace appears to have played a considerable role in this evolution.[53] It is precisely with the aim to improve the impact and efficacy of its Chapter VII measures that the SC has progressively changed the targets of its non-military sanctions, shifting from States to individuals deemed directly or indirectly responsible for threatening international peace and security.[54] The transformation of traditional economic embargoes into "smart", or "targeted" sanctions against named individuals has inevitably posed new challenges for the protection of fundamental human rights. In fact, the obligation of States to implement in their internal order the freezing measures imposed against individuals inscribed in the SC blacklists may very easily clash with obligations that States owe to those same individuals as a consequence of participation in treaties for the protection of human rights (*i.e.*, the obligation to guarantee a fair and equitable process to the individuals concerned, or the obligation not to deprive them of private property).[55] In order to resolve such conflicts, the rule of priority enshrined in Art. 103 of the Charter seems to be of little avail. This is so, first, because States may be deemed to have some – albeit weak and unarticulated

[51] *See* for instance, resolution 670 (1990), para. 3, providing for the partial interruption of air communications with Iraq and Kuwait.

[52] *See supra* notes 40-43 and accompanying text.

[53] *See e.g.*, General Assembly Resolution 51/242 of 15 September 1997, Annex II (Question of Sanctions Imposed by the United Nations), UN doc. A/RES/51/242, 26 September 1997, pp. 6-10.

[54] For an overview of the evolution of SC non-armed measures, *see generally*, N. Krisch, *Article 41*, in Simma et al., *supra* note 2, pp. 1308-1319.

[55] *See generally*, A. Ciampi, *Security Council Targeted Sanctions and Human Rights*, in B. Fassbender, *Securing Human Rights? Achievements and Challenges of UN Security Council*, Oxford University Press, Oxford: 2011, pp. 98-140.

– obligations in the field of the protection of human rights also arising under the UN Charter and general international law, which fall beyond the proper scope of Art. 103; and second, because the promotion of human rights is spelled out in Art.1, para. 3 of the Charter as one of main purposes of the UN Organization, so that UN organs must coordinate the protection of human rights with the other legitimate purpose of maintenance of the peace.[56]

Significantly, domestic or regional courts called on to review the legality of SC targeted sanctions, after having initially indulged in the logic of Art. 103 of the Charter and acceded to the principle of the pre-eminence of SC decisions over conflicting human rights obligations,[57] in their most recent decisions have attempted to strike a new balance between the different values at stake.[58] The recent case law of the European Court of Human Rights (ECtHR) concerning the impact of SC resolutions on human rights may be cited as the most telling example of this judicial trend. For instance, in the *Nada* judgment of 12 September 2012, the ECtHR held Switzerland responsible for the violation of the right to private and family life of the applicant, because that State had not adequately explored and exploited "the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order". Such an option, according to the Court, "should have allowed some alleviation of the sanction regime applicable to the applicant" and should have "avoid[ed] interference with his private and family life", without however "circumventing the binding nature of the relevant [SC] resolutions or compliance with the sanctions provided for herein".[59]

What the above reasoning of the ECtHR suggests is that integrating human rights into the implementation of SC enforcement measures may be the best way to ensure the effectiveness of UN action in the field of peace maintenance. The fact that this perspective as suggested by the Court is limited to the domestic implementation of Chapter VII measures is due to the contingencies of the case, and is without prejudice to the possibility that the SC itself may be bound to integrate human rights requirements in its decisions aimed at the maintenance of international peace and security. In this respect, it is of significance, first of all, that the SC has in most recent years subjected the regime of targeted measures to a thoughtful revision, with the aim to render this regime more transparent, more equitable, and consistent with the principles of the rule of law;[60] and secondly, that in all recent resolutions concerning targeted sanctions

[56] *See* G. Thallinger, *Sense and Sensibility of the Human Rights Obligations of the United Nations Security Council*, 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1015 (2007), pp. 1027-1029.

[57] *See* references *supra* note 41.

[58] *See* P. De Sena, C. Vitucci, *The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values*, 20(1) European Journal of International Law 193 (2009).

[59] *Nada* Judgment, *supra* note 6, para. 195.

[60] *See inter alia*, Resolution 1904 (2009), concerning the establishment of an Office of the Ombudsperson charged to receive and process the requests of de-listing submitted by persons inscribed on the SC Consolidated list concerning the Taliban and Al-Qaida, as well as Resolutions 1989 (2011) and 2082 (2012), carrying out further improvement to the procedures of listing and de-listing.

against individuals and entities associated with Al-Qaida, the SC has constantly taken pains to remind that the need to combat terrorism must be pursued "in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law (…)".[61]

The developments summarily reviewed confirm that a new and promising approach to the question of the limits to SC power is underway. This approach demands that the UN Charter provisions on collective security not be read in their "splendid isolation", but are integrated into the overall framework of international law norms, both of conventional and customary origin, that may be pertinent and applicable to UN member States and to the UN Organization itself. Such an approach is not only consistent with the prescriptions of the above cited Art. 31, para 3, letter (c), of the Vienna Convention, but also corresponds to the notion of "systemic interpretation" recently expounded by the International Law Commission as one of the most appropriate tools to coordinate the different normative layers of international law, to avoid fragmentation of the international legal system, and to guarantee its overall consistency.[62]

All things considered, the most appealing feature of the above described "systemic approach" of interpretation is that it paves the way for the integration into the Charter law of "external" normative values – such as human rights obligations of both a conventional and customary nature – that may eventually play the role of additional legal limits to SC powers.[63] But even admitting that this perspective is intriguing, one cannot underestimate the legal hurdles created by the text of the Charter to such integration, at least insofar as Art. 1, para. 1, liberates the actions carried out by the UN in the field of the maintenance of international peace and security from the observance of international law.[64]

5. A COMPLEMENTARY APPROACH TO THE INTERPRETATION OF SC POWERS UNDER THE *TRAVAUX PRÉPARATOIRES* OF THE CHARTER

After a survey of the main interpretative approaches to the question of the limits to SC powers, one can hardly avoid the impression that the bulk of the issue remain rather unpredictable. This may induce a last attempt to clarify the meaning and the scope of SC powers under the Charter by having recourse to the preparatory works of the latter instrument. Such an attempt may also be consistent with the prescription of Art. 32 of the Vienna Convention, providing that recourse to supplementary means of

[61] *See e.g.*, Resolution 1989 (2009), fifth preambular paragraph.

[62] *See generally*, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, UN doc. A/CN.4/L.682, 13 April 2006.

[63] *See* Peters, *supra* note 15, pp. 822-825 and 833-834.

[64] *See supra* notes 17-19 and accompanying text.

interpretation may be authorized when the interpretation according to the general rule of Art. 31 "leaves the meaning ambiguous or obscure".

The reasons which recommend downgrading the role of preparatory works in the process of treaty interpretation are well known,[65] and are particularly applicable when the interpretation of UN Charter – and especially of its provisions concerning collective security – is at stake.[66] Occasional references have been made above to the proceedings of the San Francisco Conference, in order to show that the absence of legal constraints on SC action in the text of the Charter was a deliberate choice made by the drafters.[67] It may however be of interest to point out that, while the various proposals advanced by small States at San Francisco to envisage some form of legal control over the SC were frustrated by the opposition of the great (inviting) powers, the abandonment of such proposals was not completely unconditional. On the one hand, it is true that proposals aimed at introducing some substantive legal standards (i.e., the conformity to justice and international law) or some form of judicial control (i.e., review by ICJ over SC decisions infringing on the rights of States) in the framework of the collective security system were defeated based on the reasoning that the submission of the SC to legal straightjackets would undermine the efficacy of UN action in the field of peace maintenance. But on the other hand, it must not be forgotten – and the *travaux préparatoires* of San Francisco are crystal clear on this point – that the renunciation by small States of their proposals was obtained on the basis of the strongest assurances, provided by the inviting powers, that the UN Security Council was in any case "bound to act in accordance with the principles of justice and international law",[68] and that "no compulsion or enforcement was envisaged" in SC actions concerning the peaceful settlement of disputes,[69] and that as a whole the SC organ has to act, in the field of peace maintenance, "as a policeman" and not as a 'jury'.[70]

The question may thus be posed whether the above assurances are to be considered as mere lip service paid to appease some recalcitrant countries at the San Francisco Conference, and have lost any relevance many years after the entry into force of the Charter; or whether those same assurances conveyed some envisioned legal boundaries on the powers of the SC, which cannot be trespassed without calling into question

[65] *See generally*, U. Linderfalk, *Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation*, 54 Netherlands International Law Review (2007), pp., 133-154; for an alternative view on the relevance of preparatory works for treaty interpretation see J. Klabbers, *International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?*, 50 Netherlands International Law Review 267 (2003).

[66] *See* Kadelbach, *supra* note 33, pp. 88-89.

[67] *See supra* notes 18-19, 23, 35, and accompanying text.

[68] See the statement of the delegate of the United States, UNCIO, doc. 433 III/2/15, 19 May 1945, vol. XII, p. 49.

[69] See the statement of the delegate of the United States, UNCIO, doc. 498 III/2/19, 22 May 1945, vol. XII, p. 66.

[70] See the statements of United Kingdom and United States delegates at Commission I of San Francisco, UNCIO, doc. 1006 I/6, 15 June 1945, vol. VI, pp. 25 and 29-30.

the very fundamental (and still actual) compromise lying at the heart of the system of collective security. The second alternative may perhaps help to explain why questionable instances of the exercise by the SC of functions of a quasi-judicial or quasi-legislative nature have raised in the recent past – and will prospectively continue to raise – stronger objections and protests by some relevant sectors of UN membership.[71] By contrast, this can also explain the recent initiatives within the UN aimed at enhancing the legitimacy of the SC through its submission to the principles of the rule of law.[72] In the same vein, it is not superfluous to note the somewhat sporadic but authoritative attempts made in the legal literature to reconsider the question of the legal limits to SC powers in light of the "Spirit of San Francisco".[73] This seems to confirm the conclusion that, especially for the issues discussed in this article, the preparatory works may provide a complementary, rather than a merely supplementary, means for the interpretation of UN Charter.

CONCLUSION

Different alternatives are available for the interpretation of UN Charter provisions concerning the powers and the competences of the SC, each presenting both its relative shortcomings and advantages. Even if the utilization of one or other among the available methods can be influenced in individual cases by political or judicial contingencies, it is in fact possible to detect a rather consistent pattern of chronological development in the recourse to the various interpretative solutions, which follows the different historical phases of UN collective security.[74] While a textual interpretation of Charter provisions was the natural option in the early days of collective security, when the first-time application of specific articles relating to SC competence was at stake,[75] the stalemate of the UN system of collective security – and especially of Chapter VII mechanisms – that characterized the Cold War enhanced the elaboration of purpose-oriented approaches to Charter interpretation, aimed at revitalizing the role of UN

[71] For a more detailed account of these contested cases, see M. Arcari, *De l'action parajudiciare du Conseil de sécurité*, in M. Arcari, L. Balmond (s.l.d.), *La sécurité collective entre légalité et défis à la légalité*, Giuffré, Milan: 2008, pp. 83-113.

[72] *See e.g.*, the statement by the President of the SC on the item "The promotion and strengthening of the rule of law in the maintenance of international peace and security", UN doc. S/PRST/2010/11, 29 June 2010; as well as the report "The UN Security Council and the Rule of Law" produced by the Austrian initiative 2004-2008 holding the same name, UN doc. S/2008/270, 7 May 2008.

[73] *See* G. Arangio-Ruiz, *On the Security Council's "Law Making"*, 83(3) Rivista di diritto internazionale 609 (2000), esp. pp. 660-682. *See also* K. Mansson, *Reviving the 'Spirit of San Francisco': The Lost Proposal on Human Rights, Justice and International Law to the UN Charter*, 76 Nordic Journal of International Law 217 (2007).

[74] For an analysis based on the different historical phases in the evolution of the UN system of collective security and SC actions, see generally D.L. Bosco, *Five to Rule Them All. The UN Security Council and the Making of the Modern World* (Oxford University Press, Oxford: 2009).

[75] See the examples referred to *supra* notes 28-29.

organs in the field of maintenance of international peace and security.[76] By contrast, the "subsequent practice" approach appeared to be the most adequate solution to appraise the SC's ultra-activism following the end of the Cold War and the innovative character of many SC actions in this period.[77] More recently, the growing complexities of the international system and the multiplication of impacts and interferences that SC decisions may have on the international legal order have imposed a "systemic-oriented" approach to the interpretation of the Charter provisions, aimed at reconciling, rather than opposing, the different values involved in SC actions.[78] Finally, it cannot be excluded that even recourse to the basic compromises underlying the role of the SC in the system of collective security, as reflected in the *travaux préparatoires* of the UN Charter, may contribute to setting the threshold for permissible or impermissible interpretations of the powers of that organ.

Of course, the distinctions outlined above are not water-tight, but correspond to a wide and schematic generalization, so that intermediate or overlapping situations can also be found.[79] However, it seems useful to convey the idea that the interpretation of SC powers under the Charter is an evolving process, the variations of which can be associated with, and may to a large extent depend on, the changing needs of collective security and of the international legal order at large. This being so, the preferable way to approach the problem of the limits to SC powers would be to have recourse to a contextual and coordinated consideration of all available interpretative options, instead of picking and privileging one of them.[80]

Over and above the methodological issue concerning the interpretative tool that may be most desirable or advisable for dealing with the issue at hand, the review carried out above has shown that the question of the limits to SC powers is in itself a legal question, which may be framed and answered according to legal standards. Even admitting that in the field of collective security the Charter privileges the political over the juridical approach and posits very few express limitations to SC action, there is no gainsaying the fact that the question of the real scope of SC powers remains, in the first instance, a matter of proper Charter interpretation.

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[76] Besides the Namibia case mentioned *supra* note 37, another prominent example in this sense is the ICJ advisory opinion relating to *Certain Expenses of the United Nations*, *supra*, note 14.

[77] *See supra* notes 47-50 and accompanying text for further references.

[78] See the relevant examples *supra* notes 55-59 and accompanying text.

[79] Relevant examples are the instances of teleological interpretation of Art. 103 of the Charter that have been advanced in recent times: see *supra* notes 42-43.

[80] It may incidentally be noted that such an approach is also in line with the suggestions provided by the International Law Commission during its work on codification of the law of treaties. The Commission, referring to the various methods of treaty interpretation mentioned in the draft article on the general rule of interpretation, pointed out that "the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation (see the commentary to draft Art. 27 adopted on second reading in 1966, later to become Art. 31 of the Vienna Convention)." 2 Yearbook of the International Law Commission (1966), pp. 219-220.