

ARTÍCULO DE INVESTIGACIÓN

**Between Legality and Legitimacy, a proposal for
Judicial Review of Security Council Collective
Security Actions in Light of Responsibility to
Protect and Just War Theory**

Entre la legalidad y la legitimidad, una propuesta para la Revisión Judicial de las Acciones de Seguridad implementadas por el Consejo de Seguridad de Naciones Unidas, considerando la doctrina de la Responsabilidad de Proteger y la teoría de la Guerra Justa

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ABSTRACT The purpose of this article is to question whether the powers of the United Nations Security Council (SC) are subject to any limitation under international law, especially in the context of the Responsibility to Protect (RtoP) doctrine. And consequently, which organism will be entitled to hold the SC accountable for its actions, and how that organism should do it.

The first chapter of this article deals with the possible limitations of the SC, it considers both legal and legitimacy restraints to the broad powers of the SC. Additionally, we will explain how RtoP presents itself as a new challenge to the legitimacy of the SC.

Chapter 2 discusses which organisms within the UN system, may be appropriate to hold the SC responsible for its actions. Finally, in Chapter 3, we will review the legal status of RtoP, and explain how the ICJ could use Just War criteria as a valuable tool for a judicial review process of SC decisions based on RtoP.

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KEYWORDS United Nations Security Council; International Court of Justice; Right to Protect; Humanitarian Intervention; Just War Theory.

RESUMEN El propósito de este artículo, es cuestionarse acerca de si los poderes del Consejo de Seguridad de Naciones Unidas, se encuentran sujetos a alguna limitación prevista por el Derecho Internacional, en especial en el contexto de la doctrina de la Responsabilidad de Proteger (RtoP)³. Y, en consecuencia, que organismo se encontraría capacitado para obligar al Consejo de Seguridad a rendir cuentas y de qué manera podría hacerlo.

El primer capítulo de este artículo trata acerca de las posibles limitaciones del Consejo de Seguridad. En esta sección se consideran restricciones de tipo legal y de legitimación a los amplios poderes del Consejo de Seguridad. De igual manera, se explicará como la noción de la RtoP, se presenta a sí misma como un nuevo desafío para la legitimidad del Consejo de Seguridad.

En el segundo capítulo, se discutirá acerca de que organismos, dentro del sistema de Naciones Unidas, serían los más adecuados para determinar responsabilidades del Consejo de Seguridad por sus acciones. Finalmente, en el capítulo tercero de este artículo, analizaremos la validez legal de la RtoP y explicaremos, como la Corte Internacional de Justicia podría utilizar los criterios de la doctrina de la Guerra Justa, como una importante herramienta para procesos de revisión judicial de las decisiones del Consejo de Seguridad enmarcadas en la RtoP.

PALABRAS CLAVE Consejo de Seguridad de las Naciones Unidas; Corte Internacional de Justicia; Derecho a proteger; Intervención humanitaria; Just War Theory.

Introduction

The SC is ‘*a structure devoted to maintaining order*’⁴. This idea is envisaged in the Security Council’s fundamental task, ‘*the maintenance of international peace and security*’⁵. For that purpose, this organism is allowed to establish the existence of threats to the order and stability of the international community, and make recommendations

3. We use RtoP as an acronym of Responsabilidad de Proteger in the spanish abstract, in order to avoid confusing the reader with other terms.

4. KOSKENNIEMI (1995) p. 335.

5. CHARTER OF THE UNITED NATIONS (1945) 1 UNTS XVI (UN Charter/Charter) art 2.

or take any measure it deems necessary⁶, including the use force⁷, to preserve or re-instate international peace and security.

In that sense, The SC managed to hold a State legally responsible under international law⁸. Moreover, the SC managed to create two international tribunals⁹, a matter believed to be outside its powers¹⁰. Yet possible due to the expansive interpretation capacities the UN Charter grants to the SC, in matters of international peace and security¹¹.

Additionally, the SC was able to legislate for every member of the international community in matters of international terrorism¹², and the risk of proliferation of weapons of mass destruction¹³. Although that possibility was questioned on several occasions due to the danger, it may entail towards the structural balance of the UN and the risk of eroding state consent¹⁴. The SC may be authorized to act as legislator based on an exercise of its implicit powers¹⁵, and the binding capacities of its resolutions¹⁶.

Accordingly, the SC is a compelling actor in the international system of States. A notion that is nowadays reinforced by its capacity to declare, a humanitarian crisis¹⁷ or the necessity to restore a democratically elected government into power¹⁸, as breaches of international peace and security. And because of Responsibility to Protect (RtoP), a doctrine that allows military operations under the authority of the SC, for humanitarian purposes, within the sovereign territory of a State¹⁹.

6. *ibid* art. 39.

7. *ibid* art. 42.

8. UNITED NATIONS SECURITY COUNCIL RESOLUTION 687 (1991) UN Doc S/RES/ 68.

9. UNITED NATIONS SECURITY COUNCIL RESOLUTION 827 (25 May 1993) UN Doc S/RES/ 827 and UNITED NATIONS SECURITY COUNCIL RESOLUTION 955 (8 November 1994) UN Doc S/RES/ 955

10. *Tadic Case* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) para 27.

11. *ibid* paras 31-36.

12. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1373 (2001) UN Doc S/RES/ 1373.

13. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1540 (28 April 2004) UN Doc S/RES/ 1540.

14. See, ROSAND (2005) P. 544

15. *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ. Rep 174 p.182-183.

16. CHARTER OF THE UNITED NATIONS (1945) art 25. See also, *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 16 para 117.

17. UNITED NATIONS SECURITY COUNCIL RESOLUTION 688 (1991) UN Doc S/RES/ 688 art. 2.

18. UNITED NATIONS SECURITY COUNCIL RESOLUTION 841 (1993) UN Doc S/RES/ 841

19. UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 60/1 (2005) UN Doc A/RES/60/1 para. 13.

As such prominent actor, within the international community, it is important to discuss its limitations, especially as we understand the international community of nations as a democratic system under the legal framework of international law and the UN system.

1. Drawing boundaries to the Security Council

1.1 Legal limitations

As understood by the ICJ, SC resolutions are accorded *prima facie* validity²⁰. Consequently, the SC enjoys a considerable liberty to decide which situation may be characterized as a breach of international peace and security, and in that sense, estimate the proper response to that situation. Additionally, SC resolutions are recognized to enjoy overriding capacities, by both the UN Charter²¹ and the ICJ²². As such SC resolutions enjoy primacy over norms of international law contained in treaties or customary international law.

Nevertheless, the SC is not an almighty organism capable of disavowing every rule of international law. In the first place, the SC is part of the UN, an international organization. The powers and functions of international organizations are determined by their instrument of creation, it could be a treaty or in generic terms an international agreement under international law²³.

Therefore, the SC is '*a creature of limited powers and every action of the organization, or of its organs, must be capable of justification by reference to those powers*²⁴'. Accordingly, the Charter grants significant autonomy to the SC, but only as it conducts itself within its framework²⁵. Article 25, for instance, gives binding powers to SC Resolutions inasmuch they are created and exercised following the Charter²⁶. This allows us to believe that, when SC decisions are indeed *ultra vires*, there seems to be no legal obligation to comply with them²⁷.

20. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States of America) (Provisional Measures) [1992] ICJ Rep 114 para 42 (Lockerbie Case).

21. CHARTER OF THE UNITED NATIONS (1945) art 103.

22. LOCKERBIE CASE paras 39-42.

23. INTERNATIONAL LAW COMMISSION (2011) art. 2.

24. LAUTERPACHT, (1999) p. 93.

25. TADIC CASE para 28.

26. CHARTER OF THE UNITED NATIONS (1945) art. 25.

27. BOYLE and CHINKIN (2007) p. 230.

Moreover, Article 24 compels the SC to act in harmony with the purposes and principles of the UN²⁸. Consequently, the SC should be able to enact resolutions yet, only as described in, inter alia, article 1 (1) of the UN Charter. That is, following '*the principles of justice and international law*²⁹'. Furthermore, article 1(3) commands the SC to respect '*human rights and [...] fundamental freedoms*³⁰'. In that sense, the SC should be bound to respect norms of International Human Rights Law (IHRL) and International Humanitarian Law (IHL).

IHRL and IHL norms are not clearly expressed in the Charter, instead they are developed through treaties and conventions³¹. Therefore, it would be logical to assume them as subordinate to the hierarchical supremacy of SC resolutions³². Nonetheless, several norms of IHRL and IHL are also endowed with the status of *jus cogens*.

As acknowledged by the ILC the prohibitions against '*genocide, slavery, racial discrimination, crimes against humanity and torture*³³', and the '*basic rules of international humanitarian law applicable in armed conflict*³⁴', are to be regarded as peremptory norms that would create binding obligations upon the SC.

This position was criticized by Martenczuk, who believes that the SC is not limited by peremptory norms, as '*it is essentially a concept from the law of international treaties that cannot easily be transplanted into the law of the United Nations*³⁵'. By that account, *jus cogens* would also be bound to the superseding capacities granted to UN provisions by article 103 of the UN Charter.

28. CHARTER OF THE UNITED NATIONS art. 24.

29. *ibid* art 1(1).

30. *ibid* art 1(3).

31. See for instance, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 2 August 1949, entered into force 21 October 1950) 75 UNTS 287;; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609.

32. Some authors believe that the SC is bound to respect IHRL and IHL despite their characterization as *jus cogens*, for an insight on their opinions see GARDAM (1996) pp. 312-320. See also, REINISCH (2001) pp. 854-859.

33. INTERNATIONAL LAW COMMISSION (2001) art. 26 para 5.

34. *ibid* art 40 para 5.

35. MARTENCZUK (1999) p. 546.

However, even if peremptory norms can be limited, this should only be available to the *'legal subject whose protection is the purpose of the rule, but not the legal subject which aims to widen its powers'*³⁶. Moreover, some peremptory norms *'cannot be waived because even the legal subjects, protected by them, have no right to dispose of them. Such rules are meant to protect not only the individual but also the interests of all States and human beings'*³⁷. Consequently the SC is unable to disavow peremptory norms because, as understood by Judge Lauterpacht:

*'The concept of jus cogens operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot as a matter of simple hierarchy of norms extend to a conflict between a Security Council resolution and jus cogens'*³⁸.

1.2. The legitimacy of the Security Council as a limit to its powers

Another aspect that contributes to limit the powers of the SC, is the perceived legitimacy of its actions by the international community. However, to talk about the importance of legitimacy, we must first understand that the relationship between international law and the international community of States, is far more intricate today than it used to be when the UN Charter was adopted. The rise of new actors such as mass media, NGO's and the development of new technologies, are currently challenging the traditional methods on which international law is created, as well as the role of international institutions like the SC³⁹.

As inter-state relations have become a multifaceted process of decision making, that relies on several factors, State consent and the rule of law are infused with the intricacies of a globalized world. Consequently, legitimacy has acquired a preponderant position, as a tool for supporting our current international legal order and institutions. In terms of Boyle and Chinkin:

*'legitimacy is used to enhance the moral persuasiveness of international law by importing other values such as those of justice or equity, and conversely, the centrality of international law is undermined by assertions of its illegitimacy, either of the system as a whole or, more frequently, of particular rules'*⁴⁰.

36. DOEHRING (1997) p. 102.

37. *ibid* p. 103.

38. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) (Order of 13 September 1993, Separate Opinion of Judge Ad Hoc Lauterpacht) [1993] ICJ Rep 325 para 100.

39. REISMAN (2000) pp. 99-106.

40. BOYLE and CHINKIN (2007) p. 25.

Moreover, legitimacy '*is a subjective quality, relational between actor and institution, and defined by the actor's perception of the institution. The actor's perception may come from the substance of the rule or from the procedure or source by which it was constituted*⁴¹'. In that sense, obedience to SC resolutions, and its capacity to enact them are also measured in terms of their legitimacy.

1.3. Responsibility to Protect and the legitimacy of the Security Council

Doubts about the legitimacy of the SC, rely on two broad conceptions, '*(1) that the Council is dominated by a few states, and (2) that the veto held by the permanent members is unfair*⁴²'. For this work, our attention will be focused on the perceptions of a hegemonic dominance of the SC by powerful States. In that sense, the emerging concept of RtoP, would help us to understand and explain this critique against the SC legitimacy.

RtoP was developed after the 1999 events in Kosovo, where NATO decided to act through force without the consent of the SC, against the Federal Republic of Yugoslavia (FRY)⁴³. NATO based its actions on the idea that a unilateral use of force '*can be justified as an exceptional measure in support of purposes laid down by the UN Secretary, but without the Council's express authorisation, where that is the only means to avert an immediate and overwhelming humanitarian catastrophe*⁴⁴'.

Nevertheless, the legitimacy behind NATO's humanitarian desires may be questioned. For instance, Chomsky has highlighted the double standard used by powerful States to back up military interventions, especially those that seem to rely on humanitarian aims⁴⁵. As portrayed by Roberts:

*'Humanitarian intervention seems for the most part to be confined to cases in which there has been extensive television coverage, where there is some particular interest in intervention, and in which there is not likely to be dissent among powers or massive military opposition*⁴⁶'.

41. HURD (1999) p. 381.

42. CARON (1993) p. 562.

43. SIMMA (1999) p. 7. For examples of SC Resolutions enacted against the FRY see, UNITED NATIONS SECURITY COUNCIL RESOLUTION 1199 (1998) UN Doc S/RES/1199 arts 1-4; UNITED NATIONS SECURITY COUNCIL RESOLUTION 1160 (1998) UN Doc S/RES/1160 art. 8.

44. House of Commons (2000) Vol.1 para 134 available at the UK Parliament Website <<https://www.publications.parliament.uk/pa/cm199900/cmselect/cmaff/28/2813.htm#a38> > accessed 16 August 2017.

45. CHOMSKY (2008) pp. 35-37.

46. ROBERTS (1993) p. 12.

However, this doesn't mean that the SC is only dominated by the US or its allies. On the contrary, our argument is based on an idea of collective hegemony dominance of the SC by its more powerful actors. For instance, NATO States are not the only hegemons within the SC, Russia violations of human rights during its armed activities in Chechnya have been criticized by the United Nations Commission on Human Rights (UNCHR)⁴⁷, and have even been judicially challenged by the European Court of Human Rights (ECHR)⁴⁸. Yet no indication of a humanitarian intervention was advanced in the SC or by any regional organization like NATO.

Nevertheless, despite NATO's disregard for the authority of the SC, and the Charter's prohibition against a unilateral use of force, both the SC and the UNGA seemed to endorse NATO's actions. In first place by authorizing member '*States and relevant international organizations to establish the international security presence in Kosovo*⁴⁹'; while on second hand establishing their costs as UN expenses⁵⁰.

This ex-post approval of NATO's illegal actions, weighed heavily on the legitimacy of the SC, as an impartial forum to deal with matters of international peace and security. For instance, for a substantial number of international legal scholars⁵¹, NATO's intervention was regarded as a clear violation of article 2(4), due to the legal uncertainty of a right to humanitarian intervention⁵².

Moreover, NATO's actions appear to be in flagrant contradiction of UNGA Resolution 2131 (XX) of 1965, that sustained the idea that, '*No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State*⁵³'. This principle of no-intervention, was further developed by the UNGA in Resolution 2625 (XXV) of 1970⁵⁴, where it was recognized as a norm of international customary law⁵⁵. Additionally, NATO's intervention contradicts ICJ jurisprudence on the Nicaragua Case, where it found out that:

47. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (2001) UN Doc A/56/36 pp. 4-7 paras 26–38.

48. *Chitayev and Chitayev v. Russia* (Judgement) [2007] ECtHR App No. 59334/00 paras 148-160.

49. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1244 (1999) UN Doc S/RES/ 1244 art 7.

50. UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 54/245 (2000) UN Doc A/RES/54/245 Preamble.

51. BROWNLIE and APPERLEY (2000) 49(4) pp. 886-891.

52. *ibid* pp. 891-894.

53. UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 2131 (1965) UN Doc A/RES/20/2131 art. 1.

54. UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 2625 (1970) UN Doc A/RES/25/2625 art 1.

55. *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (Judgement on the Merits) [1986] ICJ Rep 392 para 188.

*'In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect'*⁵⁶.

Another Example, may be found in the 2003 invasion of Iraq. Operation Iraqi freedom remains a contested issue to this day, not only because US claims about weapons of mass destruction have been recently proved to be based on false or flawed intelligence, but because of a widespread perception of its illegality⁵⁷. Several States represented in the Non-Aligned Movement, believed that the *'war against Iraq has been carried out without the authorization of the Security Council. This war is being carried out in violation of the principles of international law and the Charter'*⁵⁸.

This was also the position of the Council of the League of Arab States⁵⁹. Additionally, the illegality of the war in Iraq was also perceived by several international lawyers⁶⁰. Even the UN Secretary General believed that, the coalition actions against Iraq, amounted to a breach of international law⁶¹.

Nevertheless, through resolution 1483, the SC seemed to once again acquiesce with the illegal behavior of powerful States, by recognizing the occupation of Iraq by US and UK forces⁶². Although, it is important to also notice that, SC resolution 1483 may be also seen as an attempt to constrain and impose the rule of law over rogue actions by the US and its coalition in Iraq, mainly by defining that the occupying powers must comply with their *'responsibilities, and obligations under applicable international law'*⁶³.

56. *ibid* para 268.

57. UNITED STATES SENATE SELECT COMMITTEE ON INTELLIGENCE (2008) p.17-2 available at the U.S. Senate webpage <<https://www.intelligence.senate.gov/sites/default/files/publications/110345.pdf>> accessed 16 August 2017.

58. UNITED NATIONS SECURITY COUNCIL RESOLUTION MEETING 4726 (2003) UN Doc S/PV.4726 p. 7.

59. *ibid* pp. 8-9.

60. See, KRAMER and MICHALOWSKI (2005) pp. 448-453.

61. BBC NEWS, (2004) <http://news.bbc.co.uk/1/hi/world/middle_east/3661134.stm> accessed 20 June 2017.

62. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1483 (2003) UN Doc S/RES/ 1483 p. 1 preamble.

63. *ibid*.

For authors like Alvarez, it is an example of *'deliberate ambiguity'*⁶⁴, that fails to show how the US and its allies would be held accountable for their responsibilities under international law, and *'leaves the UN role in post-war Iraq extremely vague and uncertain, refusing even to concede to the United Nations those tasks within its established expertise, such as verifying and supervising a free and fair election'*⁶⁵.

Both Situations, Kosovo and Iraq, created questions on the SC ability to withstand pressure by hegemonic powers. In that context, RtoP can be understood as a proposal to restore international legitimacy to the SC, and to legally deny the possibility of unilateral humanitarian interventions⁶⁶, *'[i]n a bid to reconcile intervention and sovereignty, and sovereignty and obligation'*⁶⁷.

According to this notion, each State is responsible for the protection of its citizens *'from genocide, war crimes, ethnic cleansing and crimes against humanity'*⁶⁸. However, when a State fails to comply with its obligations in accordance to RtoP, the international community may intervene, yet only through a *'collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate'*⁶⁹.

The most recent example of RtoP is perhaps the 2011 SC authorized intervention in Libya. On the contrary, to what happened in Kosovo, this time NATO actions seemed to be both legal and legitimate. Human rights NGO's, such as Amnesty International⁷⁰ and international institutions like the UN Human Rights Council⁷¹, gave an account of the excessive force used by the Gadhafi regime against protestors and violations of IHRL and IHL.

64. ALVAREZ (2003) p. 883.

65. *ibid.*

66. LUCK (2009) p.2. Available at the UN webpage <<http://www.un.org/en/preventgenocide/adviser/pdf/EL%20GA%20remarks%202009.pdf> > accessed 16 August 2017.

67. ROSSI (2014) p. 357.

68. UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 60/1 (2005) UN Doc A/RES/60/1 para 138.

69. *ibid* para 139.

70. AMNESTY INTERNATIONAL (2011) p.35-54. Available at Amnesty International webpage <<https://www.amnesty.org/en/documents/MDE19/025/2011/en/> > accessed 16 August 2017.

71. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (2011) UN Doc A/HRC/17/44 p. 3-8.

Moreover, NATO was acting under express permission of the SC, through resolution 1973 (2011)⁷². As such, SC resolution 1973 could be an example of the legitimization of RtoP under the SC and the UN Charter⁷³. However, though the acknowledgment of the SC authority and the primacy of its consent, as the only legal guarantee to conduct a military operation for humanitarian purposes, is an achievement in itself. Questions upon the institutional legitimacy of the SC are far from being resolved.

For instance, in Libya, NATO began to attack retreating forces loyal to Colonel Gadhafi, and military objectives in government-controlled areas, where they didn't present a threat to civilian populations⁷⁴. They also began to aid rebel forces with weapons, military instructors, intelligence operators and even, by deploying armed forces in Libyan territory⁷⁵.

In that sense, NATO's objectives appear to overpass those of SC resolution 1973, which authorized military actions, yet only '*to protect civilians and civilian populated areas under threat of attack*⁷⁶'. Moreover, the distribution of weapons, and technical support of anti-Gadhafi movements, looks like a clear violation of SC resolution 1970 (2011). Which imposed an arms embargo, that also included a prohibition on all members of the UN to give aid, in the form of military assistance or training, to both parties in the Libyan conflict⁷⁷.

Likewise, NATO bombings seem to violate other norms of international law. As portrayed by Human Rights Watch, several air raids by NATO airplanes targeted civilian objectives without any valuable indication about their relation to lawful military targets⁷⁸. This would imply a violation of IHL norms, which state the necessity to distinguish civilian and military objectives⁷⁹, and the prohibition to attack civilian ob-

72. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1973 (2011) UN Doc S/RES/ 1973 p. 3.

73. LANDINGHAM (2012) p. 860.

74. KUPERMAN (2013) p. 116.

75. *ibid* pp. 113-116.

76. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1973 (2011) UN Doc S/RES/ 1973 p. 3.

77. *ibid* art 9.

78. HUMAN RIGHTS WATCH (2012) <<https://www.hrw.org/report/2012/05/13/unacknowledged-deaths/civilian-casualties-natos-air-campaign-libya#290612>> accessed 16 August 2017.

79. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 2 December 1977, entered into force 7 December 1979) 1125 UNTS 3 art 48.

jects⁸⁰. Additionally, the fact that various NATO members had a considerable amount of economic interest in Libya⁸¹, also cast some doubts about the disinterested aims behind their military operations.

Moreover, several States had objections to the legality of NATO actions in Libya⁸². Nonetheless, once again, the SC appeared to allow a hegemonic political agenda to overrule the express limitations of a SC resolution, and more importantly over international law⁸³.

So even in times of RtoP, the perception of illegitimacy seems to remain over the SC. Furthermore, the SC use of RtoP instead of diminishing its perception of illegitimacy, appears to increase it. This perception of illegitimacy is problematic to the SC because, if SC decisions seem to be unfairly directed to support hegemonic interests, their compelling capabilities would be diminished⁸⁴, leaving us with a SC that would still be able to enforce State compliance yet only on account of its capacity to use force⁸⁵.

Additionally, it will also weaken the SC capacity to deal effectively with breaches of international peace and security, because suspicions of illegitimate motives and processes behind a SC resolution, may weigh against the possibilities of its approval, and may push States to adopt weaker decisions⁸⁶.

Moreover, the notion of an imperial security council, that works according to the interests of hegemonic powers, is not resolved by the reappraisal of a SC monopoly over the use of force in international relations, in any case, it may be reinforced. As expressed by Caron, when speaking of the SC at the end of the cold war:

'[A]s the international community finally achieved what quite a few of its members at least officially had sought-a functioning UN Security Council-many of them began to have second thoughts about the legitimacy of that body's use of its collective authority'⁸⁷.

80. *ibid* arts 51-52.

81. ELHARATHI (2016).

82. BOOTH (2011) <<https://www.theguardian.com/world/2011/mar/28/libya-bombing-un-resolution-law>> accessed 29 June 2017. See also, JACOBS (2011) <<http://www.nytimes.com/2011/03/23/world/asia/23beijing.html>> accessed 29 June 2017.

83. UNITED NATIONS (2011) <<https://www.un.org/sg/en/content/sg/statement/2011-03-29/secretary-generals-statement-situation-libya-and-implementation>> accessed 16 July 2017.

84. FRANCK, (1988) pp. 741-751.

85. CARON (1993) p. 560.

86. *ibid* p. 558.

87. *ibid* p. 553.

Consequently, if legitimacy claims against the SC are allowed to be expressed without a proper organism to conduct the reactions of the international community, and solve them through an ordained and impartial process, we may face a continuous process of erosion of our collective system of international security.

Because, even if a low perception of the legitimacy of SC decisions may operate as a counterweight to an overly authoritative SC, it may also undermine its effectiveness to deal with matters of international peace and security by restricting the same authority it pursues to contest⁸⁸.

Conclusively, if the SC is allowed to remain unchecked, its broad powers, in consonance with the perceived dominance that powerful States seem to have over it, may very well create a world where the SC could be *'the Judge, the Jury, and the Lord-High Executioner of International law'*⁸⁹. Or in the opposite take us back to the stage of the world after WWI, where States lost all credibility in a system of collective security and preferred to settle international disputes by their own means.

2. Judging the Security Council

2.1. *Evaluating the Security Council through the United Nations General Assembly*

In the previous chapter, we mentioned that the Charter granted the SC primary responsibility in matters of international peace and security⁹⁰. However, as understood by the ICJ, although the SC is the only organism that, *'can require enforcement by coercive action against an aggressor'*⁹¹, international peace and security is not its exclusive responsibility⁹².

The UNGA, for instance, can *'recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations'*⁹³. Moreover, is entitled to deliberate over any matter related to the scope of the Charter or the organisms of the UN⁹⁴. Additionally, it could make recommendations to the SC or member states based on *'general principles of cooperation in the maintenance of international peace and security'*⁹⁵.

88. *ibid* p. 560-561.

89. MCWHINNEY (2004) p. 58.

90. CHARTER OF THE UNITED NATIONS (1945) art 24.

91. Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter) (Advisory Opinion) [1962] ICJ Rep 151 p.163.

92. *ibid*.

93. CHARTER OF THE UNITED NATIONS (1945) art 14.

94. *ibid* art 10.

95. *ibid* art 11 (1).

Nevertheless, this doesn't mean that the UNGA is the appropriate organism to hold the SC accountable. In the first place, the UNGA power to make recommendations on matters of international peace and security, is constrained to those situations that are not currently being discussed by the SC⁹⁶.

On second hand, even if a general set of guidelines to assess the legitimacy of SC resorts to force, may be understood to be within the UNGA competencies under article 10 of the Charter, and in harmony with the ICJ statement, that a UN organism could not be assumed to act *ultra vires*, when its actions are directed to achieve the purposes of the UN Charter⁹⁷, this position would be wrong because it would fail to take into account that the Charter grants the SC the capacity to '*adopt its own rules of procedure*'⁹⁸.

Notwithstanding that, authors like Alvarez, have argued that the UNGA may be a useful forum to hold the SC responsible, due to its pre-eminence over budgetary measures of the UN⁹⁹. Indeed, article 17 of the Charter, grants the UNGA control over the expenses of the organization, including of course those of SC enforcement operations¹⁰⁰. This has also been reaffirmed through UNGA resolutions¹⁰¹.

Nevertheless, a UNGA resolution that lessens or withdraws funds from a military operation endorsed by the SC, seems to lose its coercive capacities because of the SC dependence on powerful States to act as enforcers. An exercise that is not expressly mentioned in the Charter and that may become a further threat to the SC legitimacy¹⁰², but that has become a standard practice of the SC on a multitude of occasions such as Iraq (1990)¹⁰³, Haiti (1994)¹⁰⁴, the Central African Republic (1997)¹⁰⁵, East Timor (1999)¹⁰⁶ and the case of Libya, that allowed us to infer how an implementation of RtoP may be strongly linked to particular geopolitical interests of hegemonic powers.

99. ALVAREZ (1996) p. 10.

100. CHARTER OF THE UNITED NATIONS (1945) art 17.

101. UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 55/235 (2001) UN Doc A/RES/55/235 art 1 (a).

102. See, QUIGLEY (1996) pp. 276-277.

103. UNITED NATIONS SECURITY COUNCIL RESOLUTION 678 (1990) UN Doc S/RES/678 art 2.

104. UNITED NATIONS SECURITY COUNCIL RESOLUTION 940 (1994) UN Doc S/RES/940 art 4.

105. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1125 (1997) UN Doc S/RES/1125 arts 1-2.

106. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1264 (1999) UN Doc S/RES/1264 art 3.

In that sense, those States interested in a regime change or control over a particular territory or recourses may use their own funds, some of which may be even larger than those of the UN. We must only compare the 16.8 million budget of the United Nations Supervision Mission in Syria (UNSMIS)¹⁰⁷, with those of the estimated US (\$896m)¹⁰⁸ and UK (£950m) expenses in Libya¹⁰⁹, to see the disparity between them.

Following Alvarez ideas, UNGA '*powers to create potentially troublesome subsidiary organs and its ability to refer issues to other UN organs*'¹¹⁰, may also be an important element to exert more control over SC initiatives. Furthermore, he contends that if a more jurisdictional review of SC acts may be required, ad-hoc arbitration, as well as other types of arbitration, may be perceived as impartial and therefore more suitable options than UN organisms like the ICJ¹¹¹.

However, the capacities of subsidiary organisms to review SC decisions, are linked to their ability to request advisory opinions to the ICJ¹¹². As such, it would be up to the ICJ and not to the organisms themselves, to resolve any doubts upon SC undertakings that may be understood to be illegitimate or illegal. Likewise, to take such questions to ad-hoc tribunals outside the UN framework could be regarded as discounting the ICJ role within the UN system.

As recognized by the Court, its nature as the principal judicial organism of the UN, is that of '*an organ which, in that capacity, acts only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way*'¹¹³.

107. UNITED NATIONS (2012) <<http://www.un.org/en/peacekeeping/missions/past/unsmis/facts.shtml>> accessed 16 August 2017.

108. UKMAN (2011) <https://www.washingtonpost.com/blogs/checkpoint-washington/post/libya-war-costs-for-us-896-million-so-far/2011/08/23/gIQA5KpIYJ_blog.html?utm_term=.7b62acbb71c4> accessed 16 August 2017.

109. HOPKINS (2011) <<https://www.theguardian.com/news/datablog/2011/sep/26/uk-operations-libya-costs>> accessed 16 August 2017.

110. ALVAREZ (1996) p. 10.

111. *ibid* p. 12.

112. United Nations, Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) (ICJ Statute/ Statute) art 66.

113. Namibia Advisory Opinion para 29.

2.2. *Judicial Review and the International Court of Justice*

However, could the ICJ be the appropriate organism to held the SC accountable for its acts? Nowadays, judicial review of SC decisions remains a controversial issue; although such possibility has been denied by the ICJ, who acknowledged that *'the Court does not possess powers of judicial review or appeal in respect of the decisions taken by [...] United Nations organs'*,¹¹⁴ it has also been subtly endorsed by other courts, like the Special Tribunal for Lebanon, who denied its own capacity to engage in a process of judicial review, but also mentioned that:

*'[O]nly the International Court of Justice, in adjudicating an advisory opinion referred to it by the United Nations, could potentially judicially review the actions of an organ of the United Nations [...] No other judicial body possesses such a power of potential judicial review of the Security Council'*¹¹⁵.

Another example is the ICTY who concluded that, although the ICJ assertion about its lack of powers of judicial review was right, it was only referred to *'a matter of "primary" jurisdiction. They do not address at all the hypothesis of examination of the legality of the decisions of other organs as a matter of "incidental" jurisdiction, in order to ascertain and be able to exercise its "primary" jurisdiction over the matter before it'*¹¹⁶.

Consequently, the actual practice of the Court, shows that it has accepted the possibility of judicial review in both its cases and advisory opinions¹¹⁷. For instance, as portrayed by the ICTY¹¹⁸, the ICJ proceeded to exercise a limited process of judicial review, over SC and UNGA resolutions, in its advisory opinion about Namibia to sustain its jurisdiction¹¹⁹.

Another question is that of a possible conflict of hierarchies between the Court and the SC. Neither the UN Charter nor the Statute of the ICJ, contain an express provision that authorizes the Court to exercise judicial control over other organs of the UN, that may resemble those of constitutional courts in national systems¹²⁰. Moreover, that possibility was denied by the drafters of the Charter¹²¹.

114. *ibid* para 89.

115. Al-Ayyash et al. (Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal) STL-11-O1/PT/TC (27 July 2012) para 55.

116. Tadic Case para 21.

117. Lockerbie Case pp. 669-670.

118. Tadic case para 21.

119. Namibia Advisory Opinion para 89.

120. Certain expenses advisory opinion p.168.

121. HIGGINS (1963) p. 66.

Nevertheless, this shouldn't be understood as an outright prohibition of judicial review. Rather than that, it is clear that in a horizontal system of administration like the UN, where no hierarchical divisions exist, '*each organ must, in the first place at least, determine its own jurisdiction*'¹²². And on the contrary to the UNGA, no prohibition impedes the ICJ from addressing at the same time an issue that is already being considered within the SC¹²³, as '[b]oth organs can therefore perform their separate but complementary functions with respect to the same events'¹²⁴.

The idea of distinctive functions of the SC and the ICJ, allows us to believe that, '*there are certain categories of international disputes that by their very nature are not appropriate for judicial settlement*'¹²⁵. This creates some doubts about the ICJ capacity to deal with political issues. However, The Court has sustained that the existence of political questions, which in matters of disputes concerning States or international governance organisms like the UN are constantly happening, does not preclude the Court from addressing the legal issues that are generated by them¹²⁶.

Accordingly, the Court would be able to exercise its jurisdiction in situations related to international peace and security, because the political frame of those matters does not automatically disavow the legal setting in which policy decisions of UN organs must be grounded. As mentioned by the Court, '*[t]he political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment*'¹²⁷.

Nonetheless, it's important to avoid confusing, the complementary functions of the ICJ and the SC, in order to prevent an intromission within the spheres of jurisdiction of both organisms. A process of judicial review, doesn't mean that the ICJ is allowed to overpass a SC determination of a threat to international peace and security and replace it with its own judgement.

122. Certain expenses advisory opinion p. 168.

123. *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (Jurisdiction and Admissibility Judgment) [1984] ICJ Rep 392 para 95.

124. *ibid.* See also, *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran) (Judgement) [1980] ICJ Rep 3 para 40.

125. MARTENCZUK (1999) p. 649.

126. Tehran Case para 37. See also Nicaragua Case Jurisdiction para 93; MARTENCZUK (1999) p. 651; and FRANCK (1995) pp. 329-332.

127. *Admission of a State to the United Nations (Charter, Art. 4)* (Advisory Opinion) [1948] ICJ Rep 57 p. 64.

As portrayed by Akande, there is general support behind the idea that a determination on the existence of a breach of international peace and security, or an act of aggression, is a discretionary competence of the SC; and that the legal standards that the Court would require to pass such verdict are not clear or recognized¹²⁸.

Consequently, the Court is not apt to judge the accuracy of a SC resolution that determines the existence of a breach of international peace and security, which is a political issue entrusted to the SC as a political organism. What is available to the Court is to exercise a restricted process of judicial review, that takes into consideration the legal limitations that the SC must consider, when acting under Chapter VII of the UN Charter¹²⁹.

Another problem that needs to be solved are the consequences of a judicial review process by the Court. The court competence is limited to two situations, a legal dispute between States¹³⁰, and an advisory opinion request formulated by an authorized organism¹³¹. Both situations, as we saw before, may give rise to a process of judicial review of SC decisions by the Court; however, the authoritative weight of an ICJ judgement in both instances is debatable.

In the event of a dispute between States, ICJ judgements are considered binding, yet only '*between the parties and in respect of that particular case*'¹³². While in the circumstance of advisory opinions, an ICJ decision do not necessarily purport binding capabilities, and may be considered as guidance rather than a mandatory judgement¹³³. As such they could be disregarded by the SC.

Nevertheless, an extreme position that takes those ideas to the letter, would fail to contemplate that even if ICJ judgements are binding only on the parties to the dispute, they are also considered as part of the sources of international law that the Court may use as basis for its legal reasoning and adjudication¹³⁴. In that sense, they may be understood as creating a form of international jurisprudence, that will force the Court to judge on similar grounds for further cases in which a judicial review of SC decisions may proceed. A practice not uncommon to the ICJ¹³⁵.

128. AKANDE (1997) pp. 337-338.

129. *ibid* pp. 339-341.

130. ICJ Statute art 34.

131. *ibid* art 65.

132. *ibid* art 59.

133. Reservations to the Convention on Genocide (Advisory Opinion) [1951] ICJ Rep 15 p.19. See also, Certain Expense Advisory Opinion p. 168.

134. ICJ Statute art 38 (d).

135. Oil Platforms (Islamic Republic of Iran v. United States of America) (Judgment) [2003] ICJ Rep 161 para 34. See also, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment) [2005] ICJ Rep 168 para 59.

Additionally, advisory opinions may also have binding aptitudes, like in the Convention on the Privileges and Immunities of the United Nations, that qualifies advisory opinions of the Court as decisive in a dispute between a State member of the UN and the organization¹³⁶. Moreover, advisory opinions may acquire compulsory characteristics in the sense that, as with contentious cases before the ICJ both of them lay down the law, and therefore might determine the legality of acts performed by a UN organ¹³⁷. As portrayed by Gray, *'there is little distinction in substance and effects between Advisory Opinions and judgments; the major differences are merely procedural'*¹³⁸.

Consequently, if the Court is able to deduce a violation of the principles and purposes of the UN Charter or *jus cogens*, by a SC resolution in a contentious case or an advisory opinion, then the validity of that resolution could be questioned¹³⁹. Likewise, if the Court is able to show that the SC has overstepped its procedural functions in rendering a resolution, and consequently acted *ultra vires*, then such decision, may not be complied as it would lack legal force¹⁴⁰.

As such, even if provocative, judicial review remains as a valid, yet more importantly, a legitimate possibility to hold the SC legally responsible. Furthermore, as understood by Franck, *'any UN organ must be judged by reference to the Charter as a "constitution" of delegated powers. In extreme cases, the Court may have to be the last-resort defender of the system's legitimacy if the United Nations is to continue to enjoy the adherence of its members'*¹⁴¹.

Nevertheless, the previous discussion about RtoP, brings us further to a new question: would it be possible for the ICJ to conduct a process of judicial review of SC decisions based on the principle of RtoP, inasmuch it is considered as an ethical norm rather than a legal one?

136. Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 327 UNTS 90 art 30.

137. GRAY (1987) p. 100.

138. *ibid* p. 101.

139. Certain expenses advisory opinion p. 167.

140. LAUTERPACHT (1965) p. 111.

141. FRANCK (1992) p. 523.

3. A process of Judicial review in Light of RtoP and Just War Theory

3.1. *The normative status of RtoP*

RtoP appears to be crafted in mandatory terms, the use of the word responsibility seems to highlight a positive duty of States to comply with the doctrine¹⁴². However, RtoP is commonly regarded as an emerging norm, not as an actual rule of international law¹⁴³. A definition that is not without importance, as it may allow the recognition of RtoP as International Customary Law (ICL).

RtoP has been acknowledged on several occasions through UN reports¹⁴⁴, and UNGA resolutions¹⁴⁵; these instruments '*may be evidence of existing law, or formative of the opinio juris or State practice that generates new customary law*'¹⁴⁶. Although several States seem to remain sceptic on the contents and application of RtoP¹⁴⁷, a unanimous position of the whole of the international community is not a prerequisite to constitute a norm of ICL.

As explained by Dupuy, evidence of a customary norm, is conditioned to the participation of the most representative States of the field in which the rule would be applied¹⁴⁸. Regarding RtoP, the participation of representative States should be qualified by those States who, as part of the SC, decide when and how this organism must exercise its powers of collective security.

The fact that the SC, has implemented several collective security operations based on RtoP¹⁴⁹, gives significant evidence of State practice around this principle. Nevertheless, State practice on its own is not enough to indicate the existence of ICL, as understood by the ICJ:

142. EATON (2011) p. 801.

143. UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE (2004) UN Doc A/59/565 para 203. See also, UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE SECRETARY GENERAL (2005) UN Doc A/59/2005 para 135.

144. UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE SECRETARY GENERAL (2009) UN Doc A/63/677 p. 4; UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE SECRETARY GENERAL (2013) UN Doc A/67/929 pp.1-2; UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE SECRETARY GENERAL (2015) UN Doc A/69/981 para 3.

145. UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 60/1 (2005) UN Doc A/RES/60/1 paras 138-140.

146. BOYLE (2014) p. 118.

147. STAHN (2007) p.108. See also, FOCARELLI (2008) pp. 202-203.

148. *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic (Ad Hoc Award)* [1977] 53 ILR 389 paras 87-91.

149. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1706 (2006) UN Doc S/RES/1706 preamble; UNITED NATIONS SECURITY COUNCIL RESOLUTION 1894 (2009) UN Doc S/RES/1894 preamble.

*'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of Law requiring it. [...] The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough'*¹⁵⁰.

As such, RtoP seems to depend on the compulsory capacities of pre-existing norms, that have already been recognised by the international community as part of international law¹⁵¹. As portrayed by Edward C. Luck, RtoP *'is a political, not legal, concept based on well-established international law and the provisions of the UN Charter'*¹⁵².

In that sense, both national States and the international community as a whole would comply with RtoP, yet not because they find themselves committed to the principle as a legal norm, but because they must already perform in accordance with their previous legal commitments under international law, which at the same time are contained in the concept of RtoP.

Although, the existence of a conventional norm does not affect its existence as customary law¹⁵³, RtoP seems to be more a reaffirmation of current rules, than a parallel standard of customary law¹⁵⁴. Moreover, the 2005 World Summit Outcome, mentions that the international community is 'prepared to take collective action [...] on a case-by-case basis'¹⁵⁵. This appears to indicate that a SC intervention is a discretionary measure not a legal obligation¹⁵⁶.

Therefore, a certainty of *opinio juris* regarding RtoP as a customary obligation under international law, remains at least a contested issue for the international community of States. Consequently, due to the uncertain status of RtoP as a legal concept, it would be difficult to claim it has achieved the rank of a norm of ICL. Then, perhaps the best view is to look at RtoP as an ethical norm¹⁵⁷.

150. *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment) [1969] ICJ Rep 3 para 77. See also, *Nicaragua Case* para 184.

151. Those norms would be, inter alia, the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948 entered into force 12 January 1951) 78 UNTS 277; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 6 June 1987) 1465 UNTS 85.

152. LUCK (2009) Available at the UN webpage <<http://www.un.org/en/preventgenocide/adviser/pdf/EL%20GA%20remarks%202009.pdf>> accessed 16 August 2017.

153. *Nicaragua Case* para 174.

154. BELLAMY (2010) p.160.

155. UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 60/1 (2005) UN Doc A/RES/60/1 para 139.

156. HEHIR (2010) pp. 231-232.

157. EVANS (2009) p. 4. Available at the UN webpage <<http://www.un.org/ga/president/63/interactive/protect/evans.pdf>> accessed 16 August 2017.

As proposed by Gözen Ercan, RtoP should be understood as, '*a standard of appropriate behaviour for states to follow in their internal affairs and for the international community in its conduct*'¹⁵⁸. For this author, such understanding is possible because, as '*no original binding mechanism has been established to coerce adherence to the norm, the implementation of R2P is mainly dependent on the ethical understanding and the political will of states*'¹⁵⁹.

3.2. Judicial Review of RtoP and the dangers of *Non liquet*

Nevertheless, if RtoP is not a legal concept, how would the ICJ be able to determine the legal boundaries of that concept? It looks, as if the Court would be compelled to base its judgement on moral principles, a possibility that is forbidden by its Statute, because the ICJ is bound to adjudicate based on the recognized sources of international law; unless it is authorized to decide a case *ex aequo et bono*¹⁶⁰.

In such case, the Court may be in front of a circumstance, where State practice has '*thrown the law into a state of confusion where legal rules are not clear and where no authoritative answer is possible*'¹⁶¹. As understood by Lauterpacht, this type of situation, where a '*defective adaptation of existing law to new developments*'¹⁶² creates a vacuum in the international legal order¹⁶³, may be understood as a possible case of *non liquet*.

The existence of non liquet in international law, has been denied in absence of any evidence of its recognition in the practice of the ICJ¹⁶⁴. However, nowadays, we count with at least one case, in which the Court appeared to acknowledge its presence¹⁶⁵. In this case, the Court, paradoxically decided that '*in view of the current state of international law [...] cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake*'¹⁶⁶

158. ERCAN (2014) p. 45.

159. *ibid*.

160. ICJ Statute art 38.

161. GLENNON (2003) p. 98.

162. LAUTERPACHT (1933) p. 73.

163. *ibid* pp.73-74.

164. STONE (1959) p. 138.

165. Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226.

166. *ibid* para 105.

This ICJ judgement, has been interpreted as a possible recognition that non liquet would be a legal possibility within the Court's advisory jurisdiction:

*'In advisory proceedings, non liquet is an expression of the principles of self-interpretation and polynormativity that are characteristic of the international legal system. Therefore, when in response to a request for an advisory opinion, the I.C.J. concludes "that it cannot conclude," such a response appropriately may reflect the state of the law and the specific role the Court plays in such matters'*¹⁶⁷.

Nonetheless, during the same case, the likelihood of non liquet was denied on several dissenting opinions. As portrayed by Judge Schewebel, the ICJ is banned from exercising non liquet, this prohibition was expressed by the drafters of the Court's Statute, who introduced the concept of general principles of law as part of article 38 to specifically avoid this circumstance¹⁶⁸; this argument was also shared by Judge Higgins¹⁶⁹, and Judge Koroma¹⁷⁰.

There are two points of view that deal with the problem of non liquet. The first one *'arises from the conception of the State as having a sovereignty which cannot be limited except where the State voluntarily agrees'*¹⁷¹. As such everything that is not forbidden by international law, as declared by the will of States, is allowed¹⁷². From this perspective, there is no space for a vacuum of normativity in international law, *'[t]he 'no-law's land' of non liquet would be occupied by permissive legal rules'*¹⁷³.

However, the idea that no such thing as a gap may exist in international law seems to be a bit extreme, for it would give a "get out of jail free card" to States or organizations, in respect to their actions in a space not yet constrained under international normativity. Additionally, it would also deny the practice of the ICJ, which as in, inter alia, its Barcelona Traction case has already acknowledged the existence of gaps in international law¹⁷⁴.

167. WEIL (1997) p. 119.

168. *Legality of the Threat or Use of Nuclear Weapons* (Dissenting Opinion of Vice-President Schewebel) [1996] ICJ Rep 226 p. 323.

169. *Legality of the Threat or Use of Nuclear Weapons* (Dissenting Opinion of Judge Higgins) [1996] ICJ Rep 226 paras 38-39.

170. *Legality of the Threat or Use of Nuclear Weapons* (Dissenting Opinion of Judge Koroma) [1996] ICJ Rep 226 p. 558.

171. AZNAR (1999) p. 8.

172. *The Case of the S.S. "Lotus"* (Judgement) [1927] PCIJ Rep Series A No 10 p. 18.

173. STONE (1959) p. 136.

174. *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) (Judgment) [1970] ICJ Rep 3 para 89. For more examples of gaps in International law found by the ICJ see, AZNAR (1999) pp. 10-13.

The second point of view, was the one developed by Judges Schwebel, Higgins and Koroma¹⁷⁵; which as mentioned earlier, relates to the idea that even if gaps exist in international law, it is the responsibility of the Court to fill them by using the sources of international law. This seem to be the better view, as it solves the problem of *non liquet*, without relying in a theoretical artifice that denies the existence of gaps in international law, but on a practical exercise of the Court 's judicial function.

As described by Judge Higgins, '*[i]t is exactly the judicial function to take principles of general application, to elaborate their meaning and to apply them to specific situations. This is precisely the role of the International Court, whether in contentious proceedings or in its advisory function*'¹⁷⁶.

Conclusively, the experience of the ICJ allows us to draw some ideas about how the Court may conduct a process of judicial review of a SC decision based on RtoP, if faced with a possible situation of non liquet. In the first place, the Court would be able to base its contentions on existing legal norms that even if not expressly addressed to RtoP, are part of the regulatory framework in which RtoP operates.

Additionally, as a collective action under the SC is an exception to the prohibition on the use of force, IHL may be an important tool to assess the legality of a SC action based on RtoP, as '*[t]he rules of the humanitarian law of war have clearly acquired the status of jus cogens, for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect*'¹⁷⁷.

Finally, the Court would also be allowed to use general principles of international law, and if necessary, compare them with principles contained in national law, in conformity with its actions on the Barcelona traction case¹⁷⁸. Or to identify that RtoP has indeed achieved the status of customary international law¹⁷⁹, as in the Nicaragua Case.

175. For an insight of other authors opinions regarding the second point of view regarding non liquet see, LAUTERPACHT (1933) pp. 77-84.

176. *Legality of the Threat or Use of Nuclear Weapons* (Dissenting Opinion of Judge Higgins) [1996] ICJ Rep 226 para 32; see also Tomka (2013) p.5 available at the ICJ webpage <<http://www.icj-cij.org/files/press-releases/4/17684.pdf>> accessed 16 August 2017.

177. *Legality of the Threat or Use of Nuclear Weapons* (Dissenting Opinion of Judge Weeramantry) [1996]. ICJ Rep 226 p. 496.

178. Barcelona Traction Case para 38.

179. Nicaragua Case paras 184-190.

3.3. *Avoidance of Non Liquet Revisited*

Nevertheless, another method may be available to the ICJ, as an appropriate way to deal with a possible situation of *non liquet*, yet it requires the Court to identify RtoP as soft law. Although instruments like for example UNGA resolutions, have no binding capabilities and consequently, should not be regarded as law¹⁸⁰, they may acquire a significant role in the development of international law, especially as an instrument '*for authoritative interpretation or amplification of the terms of a treaty*'¹⁸¹.

As understood by Eaton and Focarelli, RtoP may be interpreted as a new understanding of the concept of sovereignty that is portrayed in the UN Charter¹⁸². In terms of the UN Secretary General, RtoP is '*a conceptually distinct approach centered on the notion of "sovereignty as responsibility" [...] sovereignty entailed enduring obligations towards one's people, as well as certain international privileges*'¹⁸³.

Therefore, as developed by the UNGA in resolution 60/1 and the reports of the Secretary General, RtoP can be understood as a subsequent agreement between the parties that interprets the provisions of the Charter¹⁸⁴. However, the problem with this approach lies in the indeterminacy of RtoP concepts and implementation. As portrayed by the Non-Aligned Movement, it is commonly recognized that '*each individual State has the responsibility to protect its populations*'¹⁸⁵. But, in order '*to legitimize unilateral coercive measures or intervention in the internal affairs of States. There are also pertinent questions about the role to be played by each of the principal organs within their respective institutional mandates and responsibilities in this regard*'¹⁸⁶.

This situation seems to continue unresolved, as exposed by the UN Secretary General in 2015, RtoP has acquired a prominent position in UN practice accounting to, inter alia, 30 SC resolutions and 13 resolutions of the Human Rights Council based on RtoP¹⁸⁷. However, when dealing with matters of collective security measures under

180. KLABBERS (1996) p. 171.

181. BOYLE (1999) p. 905. See also, BOYLE (2005) pp. 572-574.

182. EATON (2011) p. 773-776; FOCARELLI (2008) pp. 191-193.

183. UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE SECRETARY GENERAL (2009) UN Doc A/63/677 para 7.

184. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(3).

185. ABDELAZIZ (2009) p. 1 available at the International Coalition for the Responsibility to protect webpage <http://www.responsibilitytoprotect.org/NAM_Egypt_ENG.pdf> accessed 16 August 2017.

186. *ibid.*

187. UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE SECRETARY GENERAL (2015) UN Doc A/69/981 para 5.

Chapter VII of the Charter, *'the record also shows a lack in both the political will and cohesion of the international community, which has compromised the pursuit of a consistent and timely response to protecting populations'*¹⁸⁸.

In that sense, as understood by Stahn, maybe the notion of RtoP *'is so indeterminate that it does not yet meet the requirements of a legal norm'*¹⁸⁹. This means that in the context of judicial review, the Court would be required to interpret this concept before it is able to verify the limits and scope that the Charter and International law impose, over a SC resolution that aims to implement a collective enforcement operation based on RtoP. As such, we argue that the Just War Theory (JWT) may provide the Court with a valuable tool to solve the puzzle of RtoP.

3.4. *Just War criteria as a tool for legal reasoning and adjudication*

JWT has been traditionally used as an instrument for the interpretation of ethical and legal constraints that a State needs to consider before engaging in a military operation¹⁹⁰. As war, is now considered as an illegal activity within the international community of States¹⁹¹, that only knows two exceptions: Self-defence¹⁹², and a collective security action by the SC¹⁹³, it is only logical that JWT reasoning may be transplanted from the sphere of national decision making, to that of collective decision making by the SC.

Moreover, if our aim is to be able to evaluate the actions of the SC, and consequently hold it accountable for possible breaches of its limitations within the Charter and those imposed by *jus cogens*, JWT may be a valuable criterion to consider by the Court.

However, it is also important to notice that JWT has also been criticized for being a possible way to disavow the legal framework construed by the UN Charter to deal with matters of a use force, and replace it with a moral process of justification¹⁹⁴. Our contemporary appreciation of war appears to be more concerned with legality than morality, as portrayed by Kelsen, war *'is permitted only as a reaction against an illegal act, a delict, and only when directed against the State responsible for this delict'*¹⁹⁵.

188. *ibid* para 36.

189. STAHN (2007) p. 102.

19. FOTION (2007) p. 2.

191. UN Charter art. 1(4).

192. *ibid* art. 51.

193. *ibid* art. 42.

194. DINSTEIN (2004) p. 880.

195. KELSEN (1990) p. 331.

Authors like Walzer, also support the idea that war within the UN system of States is subject to a legal paradigm¹⁹⁶. In that sense, a revival of just war ethics and principles would not only be a dangerous erosion of the Charter values, but would also be unconnected to the legality of a use of force. As portrayed by Dinstein, *'it is totally irrelevant today whether or not a war is just. The sole question is: is war legal, in accordance with the Charter?'*¹⁹⁷.

Nonetheless, it should be noted that our argument is not aimed to replace the existent legal structure of the Charter, it is only addressed, to highlight the usefulness of JWT for a legal interpretation of RtoP by the ICJ in a context of judicial review.

JWT has been widely discussed by several scholars of international law¹⁹⁸, consequently, the court may be able to use JWT as a subsidiary tool for its process of legal reasoning based on article 38 (1)(d) of its Statute¹⁹⁹. As such, the Court would not substitute the legal norms that rule over a collective enforcement operation by the SC as depicted in the Charter or international law, it would only appreciate them in light of RtoP, as new understanding of the Charter's principles and provisions.

This approach seems possible, because both archetypes, the UN Charter, and JWT, share a number of common features that allow a possible interaction of their concepts. Collective security operations are the clearer example of JWT principles in contemporary international law, for instance, Neff has pointed out that enforcement actions through the SC may be understood as a proper action of just war, while self-defence may be characterized as a quasi-just war²⁰⁰.

Collective security measures resemble the idea of just war as they encompass both defensive and offensive actions²⁰¹. SC resolutions for Iraq²⁰², and Sierra Leone²⁰³ give an account of the punitive and law enforcement character that collective security measures may acquire. This is also a core feature of JWT, that understands war as an enforcement operation, justified in order to correct a wrong inflicted by an enemy²⁰⁴.

196. WALZER (2015) pp. 58-63.

197. DINSTEIN (2004) p. 880.

198. See for instance, STONEBRAKER and IRVING (2014) p. 373-392; BRUNNÉE and TOOPE (2004) p.63-92; WHETHAM (2016) p.55-69; LAUTERPACHT (1946) p. 2-53; JOHNSON (2006) pp. 114-127.

199. ICJ Statute article 38 (1)(d).

200. NEFF (2005) p. 327.

201. *ibid* pp. 324-325.

202. UNITED NATIONS SECURITY COUNCIL RESOLUTION 678 (1990) UN Doc S/RES/678.

203. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1133 (1997) UN Doc S/RES/1132.

204. NEFF (2014) p. 3.

Furthermore, collective security operates on the premise that any unilateral resort to force that is not grounded on self-defence, is an illegal conduct under the eyes of international law²⁰⁵, as such it leaves no room for a stance of neutrality towards the transgressor²⁰⁶. Rights of neutrality, would only be available, as a duty over '*[m]embers of the United Nations to accept some qualification of their legal position of impartiality in relation to the State which is not the wrongdoer*'²⁰⁷.

This resembles the separation that JWT in the middle ages imposed over the belligerents in a conflict, where no support was available to the unjust side, in the very sense that criminal acts find no support because those who aid a criminal are considered as accomplices to the wrongful act²⁰⁸.

The possibility to integrate a JWT analysis into SC enforcement operations based on RtoP has been noticed by the international community, for instance, the International Commission on Intervention and State Sovereignty (ICISS), recognized the necessity to adopt a set of criteria for decision making on RtoP implementation. For that purpose, the ICISS proposed six criteria of legitimacy, 'right authority, just cause, right intention, last resort, proportional means, and reasonable prospects'²⁰⁹.

Following that, in 2004 the High-level Panel on Threats Challenges and Change (Panel), also proposed a set of criteria that should be addressed when dealing with RtoP, not only by the SC, but by '*anyone else involved in these decisions*'²¹⁰. Those criteria were: seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences²¹¹.

205. DISTEFANO (2014) pp. 545-549.

206. SEGER (2014) p. 251.

207. LAUTERPACHT (1968) p. 65.

208. NEFF (2005) p. 75.

209. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001) para 4.16 available at the International Coalition for the Responsibility to protect webpage <<http://responsibilitytoprotect.org/implementing%20the%20rtop.pdf> > accessed 16 August 2017.

210. UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE (2004) UN Doc A/59/565 p.61

211. *ibid* p. 67 para 207.

The resemblance of the aforementioned sets of criteria with the seven principles of JWT: (1) a just cause; (2) lawful authority; (3) right intention; (4) a reasonable probability of success; (5) proportionality in the use of force; (6) war as a last resort; and (7) the goal of war must be peace²¹², is remarkable and shows the influence of JWT in the international community. Consequently, when engaged in a judicial review of SC decisions based on RtoP, the Court, may be able to tackle the vagueness of RtoP by delineating its limits and scope in accordance with JWT principles. Some examples will allow us to illustrate this proposal.

For instance, following the set of criteria developed by the Panel, “Seriousness of threat” could be equated to the idea of just cause, which is understood as a threshold that provides legal viability to a claim that intends to match a specific use of force to a just war²¹³. In the particular case of RtoP, only four justifications may allow the SC to engage in a collective enforcement operation, ‘*genocide, war crimes, ethnic cleansing and crimes against humanity*’²¹⁴. Moreover, the possible harm that these situations may impose over a State or to human safety, must be ‘*sufficiently clear and serious, to justify prima facie the use of military force*’²¹⁵.

If the SC is unable to ground a resolution on any of the parameters mentioned above, it would have failed the just cause, or “Seriousness of threat” test, and consequently misused RtoP. Accordingly, this would mean that the SC has acted against the principles and purposes of the Charter, as are now interpreted under RtoP, and such resolution could be considered both illegal and illegitimate.

This can also be said about “Balance of consequences”, which seems particularly related to the JWT principle of proportionality. As understood by Johnson, proportionality means that the ‘*overall good achieved by the use of force must be greater than the harm done*’²¹⁶. The same premise was followed by the Panel²¹⁷, and could allow the Court to judge the effectivity of a SC resolution based on RtoP, and perhaps recommend additional measures, or plainly reject a resolution that would deepen the problem rather than resolve it.

212. JOHNSON (2014) p. 27.

213. NEFF (2005) pp. 50-51.

214. UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 60/1 (2005) UN Doc A/RES/60/1 para 139.

215. UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE (2004) UN Doc A/59/565 para 207 (a).

216. JOHNSON (2014) p. 28.

217. UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE (2004) UN Doc A/59/565 para 207 (e).

“Proper purpose” means that the main objective ‘*of the proposed military action is to halt or avert the threat in question*’²¹⁸. As such it could be equated to the idea of right intention, a concept that echoes the Cristian principle of loving your enemy, and implies that the purpose of conducting a war is not greed or self-interest, neither it is hate, but a righteous action for the sake of the community²¹⁹. This would allow the Court, to identify if a SC resolution goes beyond the required threshold of avoiding a humanitarian crisis and became, for example, a military intervention for the purpose of regime change. A useful tool if the 2011 events of Libya would repeat themselves in another country.

The idea of “Last resort”, as the necessity to assess if no other means than a resort to force would be successful in resolving the problem, is present in both JWT criteria²²⁰, and those developed by the Panel²²¹. This principle would allow the Court to analyze if preventive actions²²², as well as aid building capacities²²³, where previously considered to a military intervention and consequently, rebuff a SC decision that has failed to take into account those measures.

“Proportional means” and “reasonable hope of success”²²⁴ are also considered in both JWT and the Panel criteria. The former is addressed to identify if, ‘*the levels and means of using force must be appropriate to the just ends sought*’²²⁵; while the latter, implies the necessity to consider the chances of success of a military action²²⁶. In such case, both principles could be used to measure the amount of compromise by the international community, and avoid possible failures.

218. *ibid* 207 (b).

219. NEFF (2005) pp. 51-53.

220. JOHNSON (1999) p. 28.

221. UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE (2004) UN Doc A/59/565 para 207 (b).

222. UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 60/1 (2005) UN Doc A/RES/60/1 para 139.

223. UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE SECRETARY GENERAL (2009) UN Doc A/63/677 para 28.

224. JOHNSON (1999) p. 29. See also, UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE (2004) UN Doc A/59/565 para 207 (e).

225. *ibid* p.28. See also, UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE (2004) UN Doc A/59/565 para 207 (d).

226. *ibid* p. 29. See also UNITED NATIONS GENERAL ASSEMBLY REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE (2004) UN Doc A/59/565 para 207 (e).

If a SC resolution is bound to fail, then the Court would be able to review it and prevent a further loss of legitimacy by the SC. At the same time if the success of an enforcement action can be measured by the Court, then the SC would take every effort to design an appropriate resolution and gather enough support from the international community, so the resolution may pass this test and could be implemented.

Additionally, even if not considered by the panel, an example can be drawn from the JWT criteria of lawful authority, a principle that is based on the idea that a just war is only possible under authorization of a sovereign, or a proper authority. This means that war is allowed only when it is waged in defense of community interests, and not over particular benefits²²⁷. As such, no unilateral use of force based on RtoP could be legitimized, not even through an *ex post* endorsement by the SC. Any resolution crafted with such intent would also fail to pass the right authority check, and could be subsequently invalidated in a process of judicial review.

Although any unilateral resort to force is already considered illegal according to Article 1(4) of the Charter²²⁸, lawful authority, could be a useful way to highlight the role of the SC, as the appropriate organism to conduct an enforcement operation linked to RtoP, and finally absolve any doubt about the illegality of a unilateral humanitarian intervention. Hopefully allowing the international community to avoid a reprisal of the events of Kosovo and Iraq.

The exercise of construing this kind of tests, to aid the Court's process of legal reasoning, is not a strange practice to the ICJ. For example, the Court has been able to establish, that a State's responsibility to prevent acts of genocide, was an obligation of conduct and not one of result²²⁹.

Subsequently, the ICJ '*set out a flexible test for deciding whether a state has duly discharged the obligation to prevent*²³⁰ acts of genocide, based on the principle of due diligence, that included, *inter alia*, a measure of the State capacity to effectively influence an action that prevents a situation of genocide²³¹.

Consequently, following its practice, the Court may create a test based on JWT criteria that settles an appropriate process to implement and interpret RtoP, and thus evaluate SC decisions based on that principle.

227. NEFF (2005) p. 50.

228. UN Charter art .1(4).

229. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgement) [2007] ICJ Rep 43 para 430.

230. HIGGINS (2010) pp.286-287.

231. Genocide Case para 430.

4. Conclusion

In our previous discussion, we found out that the UN Charter and *jus cogens* are the main legal constraints to the SC broad powers in matters of international peace and security. Additionally, the perceptions that the international community has about the legitimacy of SC actions, weighs over its effectiveness to pass and implement resolutions.

In this context, RtoP as was implemented during the civil conflict that ravaged Libya in 2011, seems to remain as an additional challenge to the legitimacy of the SC. Specially, as it appears to be connected to the idea of a hegemonic dominance of the SC by powerful States, that use this concept, as a justification to intervene within the domestic sphere of another State, engaging even in activities that violate SC resolutions and international law.

Consequently, it is essential to allow a review process of SC decisions that admits some kind of accountability of its actions. The ICJ, seems to be the appropriate organism, to conduct a process of judicial review of such decisions; the UN Charter and the Court's own practice, as well as that of other international tribunals, seem to support this contention.

Even if faced with SC resolutions based on an ethical principle like RtoP, the Court will be able to avoid a situation of *non liquet* by using the complete framework of the sources of international law, as described within article 38 of its Statute. Furthermore, another way to deal with a possible situation of *non liquet*, would be to regard RtoP as soft law and consequently, use it to interpret the Charter in accordance to the new understanding of its provisions that appears to be reflected in RtoP.

Moreover, If the vagueness of RtoP presents itself as an issue to the Court in a process of judicial review of SC resolutions, then it seems possible that the ICJ could rely on JWT as a subsidiary tool for the Court's process of legal reasoning. Based on the significant resemblances that the UN Charter and JWT paradigms seem to share on the matter of SC collective enforcement operations. And the possibility that the Court has to use '*the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*'²³².

Nevertheless, as judicial review remains a contested issue in international law, it would be important to consider the possibility of a general set of guidelines, perhaps through a UNGA resolution or even better through a reform of the ICJ Statute, that would bring clarity on how this process should be conducted. Additionally, in case that more authoritative weight is needed for the application of JWT criteria, it would

232. ICJ Statute art 38(d).

be important to reconsider the suggestion of the High-level Panel on Threats Challenges and Change and adopt its proposal of six criteria of legitimacy ‘as declaratory resolutions of the Security Council and General Assembly’²³³.

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